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INTERNATIONAL ECONOMIC LAW IN THE 21ST CENTURY: NEED FOR STRONGER “DEMOCRATIC OWNERSHIP” AND COSMOPOLITAN REFORMS

Abstract

Most worldwide monetary, financial, trade and environmental agreements fail to protect international public goods (like prevention of climate change, transnational rule of law for the benefit of citizens) effectively and do not even mention human rights and consumer welfare. This contribution argues that the prevailing “Westphalian conceptions” of international economic law (IEL) as “international law among states”, “global administrative law”, multilevel economic regulation and international “conflicts law” must be “civilized” and “constitutionalized” by limiting multilevel governance through legal and judicial protection of cosmopolitan rights empowering citizens – as “democratic owners of IEL” – to hold their government agents more accountable for their obvious “governance failures”. Sections 1 to 10 discuss ten areas of IEL where the need for stronger protection of human rights is increasingly recognized. Sections 11 and 12 infer from the citizen-driven transformations of international investment law and European common market law that “market failures”, “governance failures” and related abuses of public and private power in international economic relations can be limited by empowering citizens and “courts of justice” to protect transnational rule of law for the benefit of citizens. The article criticizes the EU institutions for their non-democratic

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assertion of “freedoms to violate international law” to the detriment of EU citizens, and discusses the links between the current financial and economic growth crises in the European Monetary Union and the persistent violations by most EU countries of their agreed fiscal and debt legal disciplines. If the main objective of law is to “institutionalize public reason” protecting citizens and their human rights, IEL requires far-reaching cosmopolitan reforms in the 21st century.

INTRODUCTION

Law and governance need justification. Modern theories of justice (e.g. by J. Rawls) proceed from the economic insight that the social welfare of a community depends on its democratic responsibility and political capability of institutionalizing reasonable rules and just institutions enabling citizens to increase their individual welfare through rules-based social cooperation and division of labour. As the potential economic benefits of division of labour depend on the scope of the market and on “human capital” rather than on natural resources, even poor countries with few natural resources (like Switzerland in the 19th century) have succeeded in becoming rich by integrating into the worldwide division of labour, liberalizing welfare-reducing border discrimination, and protecting constitutional rights and rule of law at home and in transnational cooperation across frontiers. International agreements constituting, limiting, regulating and justifying international institutions for mutually beneficial governance of interrelated, national and international public goods (like efficient monetary, trading, financial and related rule-of-law systems) can serve “constitutional functions” for protecting producers, investors, traders, consumers and other citizens engaged in mutually beneficial cooperation across frontiers against welfare-reducing border discrimination and other harmful abuses of discretionary foreign policy powers.¹ But the increasing transformation of *national* into *international public goods* with “horizontal” as well as “vertical interdependencies” (e.g. among national and international markets for goods, services, persons and capital movements) also entails new private and public powers (e.g. of private actors in global financial markets, international organizations) that risk being abused in the absence of adequate constitutional and democratic restraints, as illustrated by the under-regulation of international financial markets, the financial crises since 2008, the lack of effective parliamentary, judicial and democratic control over intergovernmental rule-making in worldwide organizations, as well

¹ E.U. Petersmann, *Constitutional Functions and Constitutional Problems of International Economic Law*, Fribourg University Press and Boulder Press, Fribourg: 1991.

as by domestic non-compliance with many internationally agreed disciplines (e.g. the Lisbon Treaty's budget and debt disciplines and their persistent violation in most of the 17 Eurozone member countries).²

Ten years ago, I published a series of articles calling for “mainstreaming human rights into the law of worldwide organizations” in order to strengthen the “constitutional functions” of international economic law (IEL) to contribute to reducing the unnecessary poverty of more than 1 billion people living on \$1 or less per day and to protecting, respecting and fulfilling human rights of citizens.³ Law – in contrast to the natural sciences – is not about discovering “scientific truth out there”, but rather about “institutionalizing public reason” (J. Rawls) enabling individuals to peacefully cooperate in order to realize their individual and democratic self-development. Hence, my articles argued that – from a human rights perspective recognizing human dignity, reasonableness, autonomy (including “human capacities”) and human rights of citizens to justification of all governance restrictions – both IEL and human rights law (HRL) can be seen as *instruments* to realize the human rights to self-development. Without stronger “democratic ownership” and cosmopolitan rights empowering citizens to rely on transnational rule of law, IEL cannot effectively fulfil its “constitutional functions” to empower and protect domestic citizens benefitting from the worldwide division of labour. Yet, as human rights say little about the optimal constitutional, legislative, administrative, international and judicial design of economic regulation and constitutional traditions legitimately differ among states, comparative analyses of national and international economic regulation are of crucial importance – albeit often neglected outside Europe – for evaluating the relative efficiency and legitimacy of IEL.

The two constitutional principles underlying my proposition – i.e. (1) the customary law requirement of interpreting international treaties “in conformity with principles of justice” and the human rights obligations of all UN member states, as codified in the 1969 Vienna Convention on the Law of Treaties (Preamble and Article 31 VCLT); and (2) the need for a “5-stage-sequence” of constitutional, legislative, executive, judicial and international “institutionalization of

² On the “collective action problems” of interdependent public goods see: E.U. Petersmann (ed.), *Multilevel Governance of Interdependent Public Goods. Theories, Rules and Institutions for the Central Policy Challenge in the 21st Century*, EUI Global Governance Program Working Paper 2012.

³ Cf., E.U. Petersmann, *Time for a United Nations “Global Compact” for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration*, 13 *European Journal of International Law* 621 (2002).

public reason”⁴ in order to protect human rights effectively – had been presented by myself in numerous conferences in Europe since the 1980s without causing much controversy in view of the successful “merger” of human rights law, economic law and constitutional law in European international law.⁵ Hence, the violent rejection of my proposal in 2002 by a few Anglo-Saxon lawyers (like P. Alston and R. Howse) – arguing for keeping HRL and IEL separate in view of the lack of human rights expertise of economic organizations, and rejecting “judicial balancing” of human, economic and social rights as practised by courts throughout Europe – took me by surprise.⁶ Till today, proposals from Anglo-Saxon countries for responding to the increasing crises in IEL (e.g. for “fighting the private and public debt crises” by additional “monetary financing” from the European Central Bank) are often based on value-premises (like majoritarian conceptions of democracy in terms of “parliamentary freedom”, laissez-faire conceptions of private self-regulation and “common law freedoms”) that differ fundamentally from those of constitutional democracies prioritizing the constitutional rights of citizens and the constitutional limits of majority politics also in economic regulation. Understanding this impact of diverse national conceptions of constitutional democracy, majoritarian democracy, non-liberal democracy and authoritarian governance systems on intergovernmental rule-making and adjudication is often crucial for understanding the “collective action problems” impeding effective protection of international public goods. The purpose of this article is two-fold:

- Sections 1 to 10 identify and discuss 10 areas of IEL where the “trade and human rights linkages” have become increasingly recognized over the past ten years.

⁴ On the “four-stage sequence” of legitimate rulemaking inside constitutional democracies like the USA see: J. Rawls, *A Theory of Justice*, Oxford University Press, Oxford: 1971, p. 195 ff. As collective supply of most “international public goods” depends on international law and institutions, the increasing transformation of *national* public goods into *international* public goods requires a “five-stage sequence” of multilevel constitutional, legislative, administrative, judicial and international rulemaking protecting national and international, increasingly interdependent public goods.

⁵ Cf., E.U. Petersmann, *Constitutional Functions of Public International Economic Law*, in: P. Van Dijk, V. Van Themaat (eds.), *Restructuring the International Economic Order. The Role of Law and Lawyers* (Colloquium on the occasion of the 350th anniversary of the University of Utrecht), Kluwer, The Hague: 1987, pp. 49-75; E.U. Petersmann, *Trade Policy as a Constitutional Problem. On the “Domestic Policy Functions” of International Trade Rules*, 41 *Aussenwirtschaft* 405 (1986); E.U. Petersmann, *National Constitutions and International Economic Law*, in: M. Hilf, E.U. Petersmann (eds.), *National Constitutions and International Economic Law*, Kluwer, The Hague: 1993, pp. 3-52.

⁶ E.U. Petersmann, *Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston*, 13 *European Journal of International Law* 845 (2002).

- Sections 11 and 12 ask whether the dynamic evolution of international investment law (11) and of the European monetary union (12) over the past years offer lessons for constitutional and cosmopolitan reforms of IEL. The article concludes that “cosmopolitan international public goods” – like citizen-driven trading, financial, development, environmental and related rule-of-law systems aimed at protecting consumer welfare – require stronger legal and judicial protection of cosmopolitan and democratic rights in order to limit the ubiquity of “market failures”, “governance failures” and related abuses of public and private power.

1. RESPECT FOR THE CUSTOMARY METHODS OF INTERNATIONAL TREATY INTERPRETATION PROMOTING SYNERGIES OF HRL AND IEL

Article 1 of the UN Charter, the customary methods of treaty interpretation as codified in the VCLT, and the statutes and procedures of “courts of justice” require that – as stated in the Preamble of the VCLT – “disputes concerning treaties, like other international disputes, should be settled by peaceful means and in conformity with the principles of justice and international law.” The Preamble of the VCLT refers, *inter alia*, to

principles of international law embodied in the Charter of the United Nations, such as the principles of the equal rights and self-determination of peoples, of the sovereign equality and independence of States, of non-interference in the domestic affairs of States, of the prohibition of the threat or use of force and of universal respect for, and observance of, human rights and fundamental freedoms for all.⁷

Arguably, the same principle of “constitutional interpretation” of international treaties also follows from the customary rule codified in Article 31:3 VCLT, which requires taking into account – in the interpretation of treaties – “any relevant rules of international law applicable in the relations between the parties.” All UN member states have obligations under the UN Charter, UN human rights conven-

⁷ Arguably, this Preamble text refers not only to the preceding sub-paragraph on “conditions under which justice and respect for the obligations arising from treaties can be maintained”; it also refers to “principles of justice and international law”, in conformity with the recognition in numerous legal systems that human rights constitute not only individual rights, but also corresponding obligations of governments and “principles of law” to be taken into account in legislation, administration, adjudication and international treaty interpretation pursuant to Article 31 VCLT.

tions and under general international law to respect and protect human rights with due regard to “sovereign equality of states”; many UN and regional conventions also explicitly require compliance with “principles of justice.” Yet, there are hardly any legal analyses so far of the role of “principles of justice” for dispute prevention and dispute settlement in IEL and in multilevel economic adjudication.⁸ As the positive law requirements of “constitutional interpretation” and dispute settlement “in conformity with principles of justice” tend to be neglected in many bilateral, regional and worldwide procedures for the settlement of economic disputes, exploring the legal and contextual relevance of HRL for interpreting IEL remains of constitutional importance for protecting human rights and consumer welfare.

Over the past ten years, the need for promoting synergies between human rights and trade by interpreting IEL in conformity with human rights has been recognized by a growing number of international economic organizations (e.g. in speeches by WTO Director-General P. Lamy) and courts as well as increasingly by non-governmental organizations, including also the International Law Association at its 2008 Conference at Toronto.⁹ The “judicial balancing” of human and economic rights in all European courts is now also cited and emulated in regional economic courts outside Europe.¹⁰ And even investor-state arbitral tribunals acknowledge the need for interpreting IEL in conformity with human rights.¹¹ UN human rights bodies admit ever more the need for strengthening human rights in IEL, as illustrated by the UN Human Rights Council’s endorsement on 16 June 2011 of the “Guiding Principles on Business and Human Rights: Implementing the UN “Protect, Respect and Remedy” Framework” proposed by the UN Special Representative J. Ruggie,¹² or by the “Human Rights Impact Assessments for Trade and Investment Agreements” elaborated by the UN Special

⁸ Cf., E.U. Petersmann, *Administration of Justice in the WTO: Did the WTO Appellate Body Commit “Grave Injustice”?*, 8 *The Law and Practice of International Courts and Tribunals* 329 (2009).

⁹ Cf., E.U. Petersmann, *International Trade Law, Human Rights and the Customary International Law Rules on Treaty Interpretation*, in: S. Joseph, D. Kinley, J. Waincymer (eds.), *The WTO and Human Rights*, Edward Elgar, Cheltenham: 2009, pp. 69-90.

¹⁰ See, e.g., the MERCOSUR arbitral award of 6 September 2006 in the “Bridges case” between Argentina and Uruguay (cf., L. Lixinski, *Human Rights in MERCOSUR*, in: M.T.F. Filho, L. Lixinski, M.B.O. Giupponi (eds.), *The Law of MERCOSUR*, Hart Publishing, Oxford: 2010, pp. 351 ff.

¹¹ See, e.g., the UNCITRAL Arbitral Decision on Liability of 30 July 2010 in *AWG v Argentina* (i.e. one of the more than 40 arbitration proceedings against Argentina’s restrictions in response to its financial crisis in 2001), at para. 262: “In the circumstances of these cases, Argentina’s human rights obligations and its investment treaty obligations are not inconsistent, contradictory, or mutually exclusive.”

¹² Cf., UN document A/HRC/RES/17/4 of 6 July 2011.

Rapporteur for the Right to Food in cooperation with UN bodies and NGOs.¹³ UN human rights bodies increasingly recognize the crucial role of trade and IEL for poverty reduction; they no longer discredit the WTO, as in a report for the UN Commission on Human Rights of 2001, as “a veritable nightmare” for developing countries and women.¹⁴ The acknowledgment – in the practices of numerous UN Specialized Agencies (like the World Bank, the World Health Organization, the Food and Agricultural Organization, the World Intellectual Property Organization) and more recently also of the WTO – of connections between human rights (e.g. of access to food and essential medicines, rights to private property, human rights of access to justice and to rule of law) and development is likely to enhance the legitimacy not only of promoting international public goods through international institutions. Human rights law may also benefit from the discourse among economic institutions, if, for instance, UN human rights rapporteurs request international organizations to “respect, protect and fulfil” human rights and adjust economic rules (e.g. WTO rules on liberalization of agricultural trade).¹⁵ “Westphalian interpretations” of UN HRL and IEL, i.e. the traditionally one-sided focus on rights and obligations of states without acknowledgment of citizens as “primary subjects” and sources of legitimacy also in international law, are increasingly challenged (e.g. by civil society, human rights courts and economic courts) by invoking human rights and other “principles of justice” as justifications and “relevant context” for “cosmopolitan interpretations” of certain international law rules for the benefit of citizens.

¹³ O. de Schutter, *Draft Guiding Principles on Human Rights Impact Assessments of Trade and Investment Agreements* (version July 1, 2011), available at: http://www2.ohchr.org/english/issues/food/docs/20110701Draft_Guiding_Principles_on_HRIA.pdf (accessed March 28, 2012).

¹⁴ *Globalization and its impact on the full enjoyment of human rights*, ECOSOC document E/CN.4/Sub.2/2000/12 of June 15, 2000, para. 15. Apart from a reference to patents and their possibly adverse effects on pharmaceutical prices (depending on the competition, patent and social laws of the countries concerned), the report nowhere identifies conflicts between WTO rules and human rights.

¹⁵ Cf., the 2011 report by O. de Schutter, UN Human Rights Council’s Special Rapporteur on the Right to Food, on *The WTO and the Post-Global Food Crisis Agenda: Putting Food Security First in the International Food System* (published on the website of the UN Office for the High Commissioner for Human Rights) and the criticism of its protectionist recommendations in an open letter by WTO Director-General P. Lamy posted on the WTO website on 14 December 2011 (referring also to written comments by the WTO Secretariat on an earlier draft of the report).

2. INCREASING RECOGNITION OF “COSMOPOLITAN RIGHTS” MAKING “DUTIES TO PROTECT” MORE EFFECTIVE IN HRL AND IEL

The customary law requirement of interpreting international treaties “in conformity with principles of justice” and with the human rights obligations of states reflects a broader constitutional insight as emphasized by J. Rawls’ “Theory of Justice” and modern economics: the welfare of citizens and their adequate access to essential goods and services depend on “reasonable rules and institutions” rather than on domestic economic resources; countries rich in economic resources (like Nigeria) often fail to protect the welfare of their citizens. Hence, the World Development Report 2011 rightly identifies the “absence of legitimate institutions that provide citizens security, justice and jobs” as the main cause of mass violence and unnecessary poverty in so many countries. If protection and fulfilment of human rights depends on “responsible sovereignty”, then cosmopolitan rights are a precondition for empowering citizens to govern themselves (e.g. by engaging in mutually beneficial trade) and ensure the accountability of all delegated governance powers. Constitutional democracies and European international law recognize that the legal task of “institutionalizing public reason” depends – also in IEL – on a “five-stage sequence” of constitutional, legislative, administrative, judicial and international legal safeguards of human rights with due respect for “reasonable disagreement” about particular conceptions for a good life.¹⁶ Civil society increasingly challenges the obvious failures of both UN HRL and worldwide IEL – which are confronted with ever more crises in international monetary, trade, financial, environmental relations and poverty reduction – to institutionalize “public reason” in international relations. “Westphalian intergovernmentalism” reflects “discourse failures” due to authoritarian treatment of citizens as mere objects of international law and neglect of human rights to reasonable justification of all governance restrictions. My publications have long argued that the common “constitutional problem” of the crises in HRL and IEL is that regulatory discretion and “rent-seeking” by powerful interest groups are inadequately “constitutionally constrained” by constitutional rights, institutional “checks and balances” (e.g. judicial remedies) and democratic “public reason”.

¹⁶ See note 4 above and on the need for “cosmopolitan constitutionalism” justifying multilevel governance and IEL in terms of human rights, constitutional democracy and transnational rule of law for the benefit of citizens rather than only in terms of state consent: E.U. Petersmann, *International Economic Law in the 21st Century. Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods*, Hart Publishing, Oxford: 2012, chapters III and VI.

IEL and international HRL evolved as separate regimes until their successful “merger” in European international law. In contrast to the hierarchical nature of domestic constitutional systems, UN HRL remains essentially a horizontal legal system respecting sovereign rights to apply *higher* standards of national and regional HRL compared with UN HRL. This respect for legitimate “constitutional pluralism” entails that the content, legal protection and “balancing” of civil, political, economic, social and cultural human rights, and their contextual relevance for IEL, often remain contested. The unnecessary poverty and inadequate access to water, food, health protection, education and rule of law of 1-2 billion people illustrate that neither UN HRL nor worldwide IEL treaties have succeeded in realizing the declared objective of states “that human rights should be protected by the rule of law” so as to promote “universal respect for and observance of human rights and fundamental freedoms for all” (Preamble of the 1948 UDHR). Human rights do not enforce themselves; as the lack of any references to human rights in the IMF, World Bank, GATT and WTO agreements impedes protection of human rights in IEL, “mainstreaming human rights” into IEL remains the central challenge of HRL and IEL in the 21st century. Arguably, the increasing legal and judicial protection of cosmopolitan rights empowering citizens to challenge welfare-reducing abuses of public and private power by invoking “access to justice” and other human rights, trading rights, investor rights, intellectual property rights, environmental, labour and social rights and corresponding obligations of governments is among the most important changes in IEL over the past years.

3. ACKNOWLEDGMENT OF THE “DUAL” AND “INCOMPLETE NATURE” OF HRL AND OF THE “COSMOPOLITAN FUNCTIONS” ALSO OF IEL

Many national constitutions, regional human rights conventions and all UN human rights instruments derive human rights from respect for the human dignity of all human beings who – as stated in the Universal Declaration of Human Right – “are endowed with reason and conscience and should act towards one another in a spirit of brotherhood” (Article 1 UDHR). Since 1945, all UN member states have regularly reaffirmed their “commitment towards the full realization of all human rights for all, which are universal, indivisible, interrelated, interdependent and mutually reinforcing.”¹⁷ The statement in the Preamble of the

¹⁷ See, UN Resolution 63/116 on the 60th Anniversary of the UDHR adopted on 10 December 2008.

UDHR – “it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law” – confirms the moral justification of the entitlement of every individual to “inalienable human rights” and to “struggles for rights”, as illustrated by the Arab human rights revolutions in North Africa in 2011 and by increasing civil society calls for better protection of human rights (like access to essential food, medicines and health services) in IEL so as to fulfil everyone’s rights to “a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized” (Article 28 UDHR). Today, the “dual nature” of human rights as *moral rights* and integral parts of *positive national and international law* is universally recognized by all 193 UN member states and prompts citizens, some governments and courts to increasingly insist on stronger protection of human rights.¹⁸

The 1966 UN Covenant on Economic, Social and Cultural Rights (ICESCR) focuses on “the right to work” (Article 6), the “right of everyone to the enjoyment of just and favourable conditions of work” (Article 7), labour rights and trade union rights (Article 8), the “right of everybody to social security” (Article 9), protection of the family, mothers and children (Article 10), the “right of everyone to an adequate standard of living” (Article 11), and the human rights to health (Article 12) and to education (Article 13). Yet, apart from a brief reference to “safeguarding fundamental political and economic freedoms to the individual” (Article 6.2), the ICESCR does not refer to the economic freedoms of profession, trade and private property which are recognized as fundamental rights in many European constitutions, the 2009 Lisbon Treaty and in its EU Charter of Fundamental Rights in conformity with the constitutional traditions in EU member states. The disagreement on economic liberties reflects, *inter alia*, the tradition in many common law countries of protecting freedom of contract, freedom of profession and other economic freedoms as common law guarantees rather than as constitutional and human rights, and of conceiving democracy in terms of “parliamentary freedom” rather than equal constitutional rights of citizens. The related disagreement on HRL and on its multilevel implementation in IEL may justify claims for “additional human rights” – like “freedoms of the internet” and the “right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights”, as recognized in

¹⁸ On the moral foundations of HRL and their impact on legal methodology see: E.U. Petersmann, *Human Rights and International Economic Law*, in: J. Linarelli (ed.), *Research Handbook on Global Justice and International Economic Law*, Edward Elgar, Cheltenham: 2012 (forthcoming), chapter 2.

UN General Assembly Resolution A/64/L.63 of 28 July 2010 as well as in Resolution A/HRC/Res/15/9 of 30 September 2010 of the UN Human Rights Council (deriving this right from “the right to an adequate standard of living”).

Protection of human rights by UN bodies and “courts of justice” delegitimizes authoritarian claims that governments (as “agents” with limited powers) have not conceded such rights to their citizens (as the “democratic principals” of national and international law in the 21st century). Human rights advocates increasingly claim that, from a human rights perspective, IEL should be conceived as an instrument for protecting, respecting and fulfilling human rights. Comparative legal and institutional research suggests that – just as the effectiveness of democratic self-government and of regional human rights conventions depends on constitutional and judicial protection of human rights – constitutional and judicial protection of “cosmopolitan conceptions” of IEL (e.g. in transnational commercial and investment law, European economic integration law) empowering citizens to challenge and influence “public reason” has proven to be more effective and more legitimate than state-centred “Westphalian conceptions” of IEL treating citizens as mere objects of intergovernmental regulation.¹⁹

4. “CONSTITUTIONAL JUSTICE” AND THE CHANGING NATURE OF THE “RULES OF RECOGNITION” IN HRL AND IEL

Legal positivists tend to define “law” not only by “primary rules of conduct” but also by legal practices recognizing, developing and enforcing rules in conformity with “secondary rules” of recognition, change and adjudication. The universal recognition of inalienable human rights by all UN member states has contributed also to the universal recognition of “principles of justice” (e.g. in the UN Charter, human rights conventions and national constitutions) as integral parts of national and international legal systems. The ancient symbol of the independent, impartial judge administering justice by “weighing” the arguments of both sides (*justitia* holding the scales) and enforcing the existing law (*justitia* holding the sword), like the common linguistic core of the legal terms *jus*, *judex* and *justitia* (or *justice* and the designation of judges as *Lord Justice*), recall much older traditions of recognizing justice as the main objective of law. Arguably, the legitimacy of law, governance and adjudication derives from “constitutional justice” (e.g. as illustrated by the ancient Virtue of Justice protecting procedural human rights, modern theories of constitutional justice and “public reason”) no less than from “democracy”

¹⁹ Cf., Petersmann, *supra* note 16.

(e.g. as illustrated by the historical transformation of “Renaissance rites of judgment” into democratic and human rights of “access to justice” requiring governments to protect judicial independence and transparency of courts and of their “due process of law”). J. Rawls’ theories of justice and of “public reason” explain why – in constitutional democracies with constitutional adjudication – courts of justice may be more principled “exemplars of public reason” than political institutions based on majority decisions dominated by organized interest groups. Hence, many lawyers and judges define law by “the prophecies of what courts will do in fact” (US Supreme Court justice O.W. Holmes) and by how courts of justice will apply legal rules (e.g. “general principles of law” in terms of Article 38 ICJ Statute). Economic courts in Europe²⁰ as well as in less-developed countries (LDCs),²¹ and also investor-state arbitral awards,²² increasingly recognize that rules (including IEL) violating human rights may not be a valid part of positive law. As human rights law recognizes (e.g. in the UDHR) the need for limiting “rule by law” through “rule of law”, the human right of “access to justice” and judicial protection of “rule of law” are of constitutional importance for both HRL and IEL.

The constitutional guarantees of democratic participation, individual “access to justice” and judicial protection of “rule of law” enable citizens, their democratic representatives and “courts of justice” to increasingly challenge power-oriented, intergovernmental economic regulation, even in case of EU regulations implementing legally binding sanctions approved by the UN Security Council.²³ Arguably, the emerging “multilevel human rights constitution” changes the

²⁰ In Cases C-402/05P and C-415/05P, *Kadi*, ECR 2008 I-6351, the EU Court confirmed its jurisprudence that respect for human rights is a condition of the lawfulness of EU measures: “the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that the Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review.” Even though “the European Community must respect international law in the exercise of its powers”, including “observance of the undertakings given in the context of the United Nations”, it is “not a consequence of the principles governing the international legal order under the United Nations that any judicial review of the internal lawfulness of the contested regulation in the light of fundamental freedoms is excluded.”

²¹ Cf., V. Gauri, D.M. Brinks (eds.), *Courting Social Justice. Judicial Enforcement of Social and Economic Rights in the Developing World*, Cambridge University Press, Cambridge: 2008.

²² Cf., e.g., *Phoenix Action Ltd v Czech Republic*, ICSID Arbitration Award of 15 April 2009 (Case No ARB/06/5), para. 78 (finding that investment protection “should not be granted to investments made in violation of the most fundamental rules of protection of human rights”).

²³ Cf., Cases *Kadi*, *supra* note 20.

“rules of recognition” of international law by constitutionally limiting “Westphalian monopolies” of diplomats to interpret and define the scope of international rules, “general principles of law” and human rights. HRL may justify legal claims that human rights (e.g. of access to water and essential medicines) universally recognized in UN Resolutions may be relevant context for interpreting IEL “in conformity with principles of justice”. Also in less-developed countries (e.g. like India and South Africa), “courts of justice” – as the most independent guardians of the constitutional rights of citizens which, unlike political bodies, have to justify judicial decisions on the basis of constitutional principles – increasingly insist on their “constitutional mandate” of interpreting and applying economic law in conformity with human rights so as to protect citizens against abuses of public and private power.²⁴ The “changing structures” of human rights law, transnational commercial, trade, investment law and European economic integration law are illustrated by the fact that multilevel judicial interpretation and clarification of rules through thousands of dispute settlement findings by national and international courts and other dispute settlement bodies have become no less important for the progressive development of law and protection of individual rights than intergovernmental agreements.

5. LEGAL AND “JUDICIAL BALANCING” AS THE “ULTIMATE RULE OF LAW” (BEATTY)

Law as an instrument of governance needs justification. Economists tend to justify economic rules in terms of promoting economic efficiency, “individual utility”, consumer welfare or “total welfare”. Yet, mere promotion of “market equilibrium” through supply and demand, or “price-setting” by monopolist suppliers (e.g. of tap water and patented medicines), may be inconsistent with human rights and corresponding government obligations to fulfil basic needs of everybody (e.g. in terms of human rights of access to water, food and essential medicines at affordable prices). Utilitarian focus on “output legitimacy” cannot avoid questions of “input legitimacy”, for example regarding the frequent “producer-bias” in IEL resulting from rent-seeking “interest group politics”, inadequate regulation of “market failures” and “private-public partnerships” favouring special producer interests over general consumer welfare. Similarly, positivist legal claims justifying

²⁴ See, Gauri & Brinks, *supra* note 21 and E.U. Petersmann, *Human Rights, International Economic Law and ‘Constitutional Justice’*, 19 *European Journal of International Law* 769 (2008).

“rule of men” and their “rule by law” by their social efficacy (based on authoritative issuance of rules) continue being challenged, since antiquity, by invoking “principles of justice” as legal conditions of the legitimacy and validity of rules and of “rule of law”. “Conservative” conceptions of justice emphasize the need for rule-following (path-dependence) and upholding “legality”; “reformative” conceptions of justice acknowledge the additional function of law and “courts of justice” to ensure “equity” with due regard to the particular circumstances of disputes and the inevitably “incomplete nature” of rule-making. Hence, there are longstanding traditions of complementing universal conceptions of “formal justice” (e.g. as defined by equal human rights and “sovereign equality of states”) by particular conceptions of “substantive justice” (e.g. in terms of “equity” and “difference principles” justifying rectification of formally equal treatment so as to “render to every man his due”). As long as constitutional and legal protection of economic and social rights remains so weak in so many countries (notably outside Europe), effective protection of “freedom from poverty”²⁵ and of transnational rule of law for the benefit of citizens requires overcoming the utilitarian and mercantilist traditions of separating HRL and IEL. Constitutional theory explains why national and intergovernmental power politics in IEL can be “constitutionalized” most effectively by legal and judicial protection of “countervailing rights” protecting general consumer welfare, non-discriminatory conditions of competition, human rights and other reasonable long-term self-interests of all citizens.

Similar to Article 1 of the UN Charter, customary law prescribes that “disputes concerning treaties, like other international disputes, should be settled by peaceful means and in conformity with the principles of justice and international law” (Preamble VCLT). The Agreement establishing the World Trade Organization, like many other international economic treaties, recognizes “basic principles and objectives ... underlying this multilateral trading system” (cf. the Preamble of the WTO Agreement). Some of these principles are specified in WTO provisions, for instance in the General Agreement on Tariffs and Trade (GATT) and other WTO agreements on trade in goods, services and trade-related intellectual property rights. Other principles are incorporated into WTO law by reference to other international law rules, for example in the WTO Dispute Settlement Understanding (DSU) which requires interpreting WTO law “in accordance with customary rules of interpretation of public international law” (Article 3). These customary rules include rules and principles for textual, contextual and teleological interpretation of treaties aimed at mutually coherent interpretations on the

²⁵ Cf., T. Pogge, *Freedom from Poverty as a Human Right: Who Owes What to Whom?*, Oxford University Press, Oxford: 2007.

basis of legal presumptions of lawful conduct of states, of the systemic character of international law, and the mutual coherence of international rules and principles. Arguably, the customary law requirement of interpreting treaties “in conformity with principles of justice”, including “universal respect for, and observance of, human rights and fundamental freedoms for all” (Preamble VCLT), also calls for “constitutional interpretation” clarifying the *procedural* as well as *substantive principles of justice* underlying IEL, like “due process of law” based on equal treatment, freedom, non-discrimination, rule of law, independent third-party adjudication and preferential treatment of LDCs. For, rules and adjudication that are not perceived as just by governments, citizens and “courts of justice”, are unlikely to be effective over time.²⁶

Hence, IEL must not only be justified and evaluated in terms of “justice” and human rights even if human rights are not specifically incorporated into the law of worldwide economic organizations. Legal and judicial interpretation of WTO rules in conformity with human rights, similar to the 1994 Ministerial Decision on the mutual coherence of trade and environmental policies and the 1996 WTO Ministerial Declaration rejecting “the use of labour standards for protectionist purposes” and calling for cooperation with the International Labour Organization as “the competent body to set and deal with [labour] standards”, may also be more appropriate for promoting legal coherence among IEL and HRL in worldwide governance institutions than incorporating UN human rights obligations into WTO law following the model of the incorporation of intellectual property treaty obligations into the WTO Agreement on Trade-Related Intellectual Property Rights (TRIPS).²⁷ The need for reconciling civil, political, economic, social and cultural human rights, like the need for reconciling legal market access commitments (e.g. under GATT and GATS) with sovereign rights to protect non-economic public interests (e.g. pursuant to Articles XIX-XXI GATT, XIV GATS), requires legal and judicial “balancing” so as to “optimize” legal and judicial protection of competing rights and obligations.

Outside Europe, most governments continue to disregard that – due to the “globalization” of ever more public goods like rule of law, protection of human rights and efficient trade, financial and environment protection systems – national constitutions have become “partial constitutions” that can protect interdependent

²⁶ Cf., E.U. Petersmann, *Constitutional Theories of International Economic Adjudication and Investor-State Arbitration*, in: P.M. Dupuy, F. Francioni, E.U. Petersmann (eds.), *Human Rights in International Investment Law and Arbitration*, Oxford University Press, Oxford: 2009, pp. 137-194.

²⁷ Cf., C. Thomas, *The WTO and Labor Rights: Strategies of Linkage*, in: Joseph et al., *supra* note 9, 257 ff.

public goods only in cooperation with international law and institutions. The necessary “de-mystification of the state” and international limitation of welfare-reducing “legal nationalism” require new cosmopolitan and constitutional conceptions of international law as an ever more indispensable instrument for limiting governance failures at home and abroad for the benefit of citizens. As in European economic and legal integration, independent and impartial “courts of justice”, and their multilevel judicial protection of constitutional and human rights across frontiers on the basis of “judicial comity” and “proportionality balancing” as the “ultimate rule of law”,²⁸ must often take the lead in protecting citizens and their human rights in the worldwide division of labour among citizens. While judicial review of whether a restriction is “suitable” and “necessary” for realizing specific public policy interests focuses on the rationality and efficiency between the means and the end, the proportionality *stricto sensu* test reviews the reasonableness of the governmental balancing of competing values. Influenced by the comparatively narrower scope of constitutional protection of liberty rights (notably economic liberties) in Anglo-Saxon democracies, many Anglo-Saxon lawyers (like R. Dworkin) claim that – in “hard cases” involving conflicts between constitutional rights and other public interests – individual rights should “trump” public policies;²⁹ “proportionality balancing” by European courts, by contrast, tends to perceive constitutional rights and public policies as possibly both reflecting constitutional principles subject to weighting in order to promote their mutual coherence case-by-case. By double-checking legislative and administrative “balancing” and clarifying “public reason” and “principles of justice”, judicial proportionality review of restrictions of fundamental rights contributes to “participatory” and “deliberative democracy” across frontiers as a necessary compensation of the deficits of national parliamentary democracy and other forms of majority politics in a globally integrating world. Human rights and their multilevel judicial protection are of crucial importance also in IEL for protecting citizens – as the “democratic

²⁸ According to D.M. Beatty, *The Ultimate Rule of Law*, Oxford University Press, Oxford: 2004, the constitutional ideal of a “government by law and not by men” has become replaced in European constitutional law (e.g. governing the EU, the EEA, the ECHR and the domestic implementation of these treaty regimes) by judicial proportionality review – commonly broken down into three distinct tests of “suitability” (rationality), “necessity” (least restrictive means) and “proportionality *stricto sensu*” (reasonableness) of the legality of legislative and administrative restrictions – securing a more substantial version of the rule of law for the benefit of citizens and their constitutional rights.

²⁹ On the higher levels of constitutional and judicial protection of “negative” and “positive liberties” in European constitutional and economic law compared with Anglo-Saxon common law and constitutional law traditions see Petersmann, *supra* note 16, chapter III.

principals” – against abuses of power by government agents and corporations in multilevel economic regulation undermining, all too often, general consumer welfare and constitutional rights of citizens.

6. RESPECT FOR “MARGINS OF APPRECIATION” AND FOR “REASONABLE DISAGREEMENTS” ON THE OPTIMAL “LEVEL OF REGULATION”

Human rights and democracy also protect individual and democratic diversity and “reasonable disagreement” reflecting legitimately diverse democratic preferences (e.g. on the “politically optimal level of legal regulation”). International human rights conventions recognize that human rights “shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”³⁰ Human rights courts and also economic courts tend to recognize governmental “margins of appreciation” concerning domestic implementation and legitimate “balancing” of human rights obligations and fundamental freedoms. Intergovernmental recognition by UN bodies of “derived human rights”, like the diverse legal methods of protecting the human right to water inside national legal systems by means of constitutional, legislative, administrative and/or judicial rights (often derived from diverse human rights like the rights to life, health and/or an adequate standard of living)³¹, may be protected by such legitimate “margins of appreciation” regarding optimal legal design and protection of human rights. Depending on the respective “constitutional context” (e.g. the constitutional provisions on judicial review), “legislative” and “judicial interpretations” and legal clarifications may lead to “institutionalized public dialogues” progressively developing “public reason” supported by citizens. For instance:

- The adoption by the UN Human Rights Committee in July 2011 of “General Comment No. 34” on Article 19 ICCPR (freedom of opinion and expression) replaces the previous “General Comment No. 10” and considerably extends the “obligation to respect freedoms of opinion and expression (as) binding on every State party as a whole” and on “(a)ll

³⁰ Cf., Article 9 ECHR. For different limitation clauses see, e.g., Articles 8, 10 or 11 ECHR. Some human rights guarantees (like the prohibition of torture in Article 3 ECHR) do not provide for any governmental limitation.

³¹ Cf., P. Thielbörger, *The Right(s) to Water*, EUI doctoral thesis defended in December 2010, European University Institute, Florence: 2011.

branches of the State (executive, legislative and judicial) and other public or governmental authorities, at whatever level”, e.g. by clarifying the scope of freedom of opinion and expression (e.g. by explicitly including commercial advertising and “all forms of audio-visual as well as electronic and internet-based modes of expression”, protecting a “right of access to information held by public bodies”) and by limiting their admissible restrictions (e.g. by permitting only content-specific restrictions of, and prohibiting “generic bans” on, the operation of certain websites and internet-based information dissemination systems).³²

- Economic courts and dispute settlement bodies confronting disputes over market access commitments for the electronic supply of services (e.g. in the WTO disputes over *US-Gambling restrictions* and *China-Restrictions on publications and audiovisual products*) and over sovereign rights to protect “public morals” and “public order” (e.g. pursuant to Articles VI, XIV GATS) may have to decide whether, and to what extent, human rights, and their “dynamic interpretations” by human rights bodies, may be “relevant context” for interpreting economic rules (e.g. on market freedoms and related “commercial freedom of expression”).³³ Yet, they may also have to respect that the state parties to a dispute – as in the *China-Restrictions on audiovisual products* case – may deliberately refrain from invoking human rights and from contesting China’s right to engage in “content control” of internet services.
- WTO dispute settlement bodies have so far hardly ever referred to human rights in view of the usual abstention of WTO complainants and defendants to invoke human rights in WTO dispute settlement proceedings. Yet, the various studies by the UN High Commissioner for Human Rights on the consistency of international trade and investment law with human rights³⁴ – like the ever larger number of academic case-studies on the human rights dimensions of IEL³⁵ – have so far produced no evidence

³² Cf., UN document CCPR/C/GC/34 of 21 July 2011.

³³ On these WTO disputes, and the deliberate abstention by the parties to the dispute as well as by WTO judges from referring to human rights, see: P. Delimatsis, *Protecting Public Morals in a Digital Age: Revisiting the WTO Rulings on US-Gambling and China-Publications and Audiovisual Products*, 14 *Journal of International Economic Law* 257 (2011).

³⁴ Cf., J. Harrison, *The Human Rights Impact of the WTO*, Hart Publishing, Oxford: 2007.

³⁵ Cf., T. Cottier, J. Pauwelyn, E. Bürgi (eds.), *Human Rights and International Trade*, Oxford University Press, Oxford: 2005; F. Abbott, C. Breining-Kaufmann, T. Cottier, *International Trade and Human Rights*, Michigan University Press, Ann Arbor: 2006; Joseph et al., *supra* note 9.

for inherent conflicts between worldwide economic treaties and HRL. As international treaties must be interpreted and applied in conformity with the human rights obligations of states, state practice and dispute settlement practices continue to progressively clarify the often controversial human rights dimensions of IEL, often without specifically referring to human rights. For instance, in the *EC-Tariff Preferences* dispute, the WTO Panel interpreted the non-discrimination requirement in the WTO's Enabling Clause as requiring that identical tariff preferences under Generalized Systems of Preferences (GSP) be provided to all LDCs without differentiation; the Appellate Body reversed this finding and concluded that

the term 'non-discriminatory' ... does not prohibit developed-country Members from granting different tariffs to products originating in different GSP beneficiaries, provided that such differential tariff treatment meets the remaining conditions in the Enabling Clause. In granting such differential treatment, however, preference-granting countries are required, by virtue of the term 'non-discriminatory', to ensure that identical treatment is available to all similarly-situated GSP beneficiaries, that is, to all GSP beneficiaries that have the "development, financial and trade needs" to which the treatment in question is intended to respond.³⁶

In response to the various disputes over compulsory licensing of medicines, WTO Members adopted a "waiver" in August 2003, as well as a subsequent amendment of Article 31*bis* of the TRIPS Agreement, authorizing compulsory licensing of medicines for export to countries with insufficient or no production capacity in the pharmaceutical sector. Yet, the fact that Canada's license for exports to Rwanda has remained the single compulsory license to date and only Zambia among Sub-Saharan African countries ratified the TRIPS Amendment, supports the view that access to essential medicines may be secured also by interpreting the TRIPS Agreement in conformity with the human rights obligations of WTO Members.³⁷

³⁶ Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, adopted 20 April 2004, DSR 2004:III, 925, para. 173. The argument that the EC's "drug preferences" were justifiable in order to help Pakistan to combat drug abuses and their harmful effects on human health, were not reviewed by the WTO dispute settlement bodies in terms of human rights.

³⁷ Cf., H. Hestermeyer, *Human Rights and the WTO. The Case of Patents and Access to Medicines*, Oxford University Press, Oxford: 2007.

7. INCREASING INSISTENCE ON THE “INDIVISIBILITY” OF HUMAN RIGHTS

The indivisibility of human dignity and human liberty is recognized in numerous human rights instruments like the 1993 Vienna Declaration adopted by the UN World Conference on Human Rights: “All human rights are universal, indivisible and interdependent and interrelated.”³⁸ Even though some UN human rights conventions separate civil and political human rights (as protected in the ICCPR) from economic and social human rights (as protected in the separate ICESCR), the holistic conception of the “indivisibility” of human rights continues to be acknowledged in numerous human rights instruments since its first affirmation in the UDHR of 1948.³⁹ The European Court of Justice (ECJ) has acknowledged that respect for human rights – including a “human right to respect of human dignity” – is a condition of the lawfulness of acts of the EU institutions, even if EU acts implement UN Security Council decisions that assert legal primacy (Article 103 UN Charter).⁴⁰ The European Court of Human Rights has likewise recognized in a series of judgments that the human rights guarantees of the ECHR also apply whenever states implement intergovernmental rules adopted in international organizations.⁴¹ Such court judgments confirm the increasing recognition that national and international human rights also limit *foreign policy* powers even if they are being exercised collectively in intergovernmental organizations.

³⁸ Paragraph 5 of the Declaration, reproduced in: *The UN and Human Rights 1945-1995*, UN: New York: 1995, p. 450.

³⁹ See, e.g., note 17 above and the “integrated” protection of civil, political, economic and social rights in the 1989 UN Convention on the Rights of the Child.

⁴⁰ See note 20.

⁴¹ See, Case *Bosphorus v Ireland*, Application no. 45036/98, ECtHR Grand chamber judgment of 30 June 2005: “a Contracting Party is responsible under Article 1 of the Convention for all acts and omissions of its organs regardless of whether the act or omission in question was a consequence of domestic law or of the necessity to comply with international legal obligations” (para. 153). “In ... establishing the extent to which State action can be justified by its compliance with obligations flowing from its membership of an international organisation to which it has transferred part of its sovereignty, the Court has recognised that absolving Contracting States completely from their Convention responsibility in the areas covered by such transfer would be incompatible with the purpose and object of the Convention” (para. 154). “State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides” (para. 155).

Disagreements over the “indivisibility” of human rights often reflect diverse conceptions of human and constitutional rights to liberty. For instance, Anglo-Saxon jurisdictions tend to interpret the human right to liberty (Article 3 UDHR) narrowly in terms of freedom of bodily movement. European constitutional democracies often protect equal freedoms as “first principle of justice” (in terms of Kantian and Rawlsian legal philosophy) not only through specific liberty rights, but also through a general constitutional right to liberty (as recognized in Article 2:1 of the German Basic Law) in order to offer additional constitutional and judicial protection to the legal autonomy of citizens against arbitrary, public and private interference into their liberties. This includes also protection against restriction of individual freedom of action resulting from *multilevel* governance, for instance if *intergovernmental* restrictions adopted in distant international organizations lack a constitutional foundation or sufficient justification in the national legal system.⁴² The multilevel constitutional guarantees of “free movement of persons, services, goods and capital, and freedom of establishment” as “fundamental freedoms” across the 30 member countries of the European Economic Area (EEA) are explicitly based on “the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights” (cf. Article 2 TEU). There is also increasing recognition that constitutional commitment to respect for human dignity and “market freedoms” (e.g. free movement of workers and their families) may require legal protection of “positive liberties” by means of social rights (e.g. to education, health protection, etc.) in order to effectively empower individuals to develop their “human capacities” autonomously.⁴³ The diversity of provisions and institutional safeguards for social rights in national and regional laws, UN and ILO conventions reflect not only diverse legal conceptions for designing social rights as “indivisible parts” of human rights. Constitutional

⁴² On constitutional protection in Germany of a general right to liberty, complemented by specific constitutional liberty rights and other civil, political, economic, social and cultural rights, see R. Alexy, *A Theory of Fundamental Rights*, Oxford University Press, Oxford: 2002, notably chapter 7.

⁴³ On the “capabilities approach” in human rights law and philosophy, see e.g., M.C. Nussbaum, *Frontiers of Justice. Disability, Nationality, Species Membership*, Belknap Press of Harvard University Press, Cambridge MA: 2006), at 69 ff. The German Constitutional Court, for example, recognizes a human right to respect and protection of human dignity based “on an understanding of the human being as an intellectual and moral creature capable of freely determining and developing itself. The Basic Law conceives of this freedom not as that of an isolated and autonomous individual, but as that of an individual related and bound to society” (BVerfGE Vol. 45, 187, p. 227). The Constitutional Court derives from the human right to dignity individual social rights of access to the resources necessary for a life in dignity, cf., D. Merten, H.J. Papier (eds.), *Handbuch der Grundrechte* Vol. II, Müller Verlag, Heidelberg: 2006, para. 40 (“Leistungsrechte”), para. 44 (“Schutzpflichten”).

agreement on how to reconcile and “institutionalize” civil, political, economic and social rights is also inevitably influenced by democratic preferences and the scarcity of resources for effective protection of social rights. Legal and judicial remedies for enforcing civil, political, economic and social rights continue to differ enormously among countries and jurisdictions. Constitutional and judicial protection of a general right to liberty and of “common market freedoms” can strengthen the reasonableness of IEL, for instance, by offering judicial review of the “necessity” (rationality) and “proportionality” (reasonableness) of governmental restrictions on the basis of equal constitutional rights and judicial “administration of justice.”

In common law countries, by contrast, the common law tends to protect specific liberties without constitutional protection of a general right to liberty.⁴⁴ As a major function of constitutional guarantees of maximum equal freedoms is to protect rights to justification and to judicial remedies vis-à-vis governmental restrictions, judicial review of economic regulation tends to be less comprehensive in common law countries than in European economic law. For instance, since the judicial abandonment of “substantive due process” review of economic legislation in the 1930s, US constitutional law protects individual economic freedom and a common market mainly by democratic legislation based on constitutional requirements of a “*rational basis*” for governmental restrictions of economic liberty.⁴⁵ Since US courts do not protect economic and social freedoms (e.g. of workers and trade unions) as constitutionally protected under US federal law and acknowledge deference vis-à-vis economic legislation by the US Congress, most lawyers see no need for US courts to engage in the kind of “strict judicial scrutiny” of governmental restrictions of economic freedom as it is practiced by German courts, European courts, WTO dispute settlement bodies and investor-state arbitral tribunals. Even though national constitutional traditions legitimately differ from country to country, there are additional arguments for basing legal and judicial remedies in multilevel, transnational economic governance against abuses of powers on the cosmopolitan principle that multilevel governance restrictions of individual freedom require constitutional justification and judicial remedies.

⁴⁴ Cf., T.T.S. Allan, *Law, Liberty and Justice*, Oxford University Press, Oxford: 1993, pp. 135-143. D.Z. Cass, *The Constitutionalization of the WTO*, Oxford University Press, Oxford: 2005, claims that in “mature constitutional systems, for example in the United States, Canada and Australia”, neither individual economic freedom nor other individual rights are “a matter considered essential to constitutionalization in the received tradition of constitutionalization” (pp. 168, 176, 191); yet, Cass ignores comparative constitutional law beyond common law countries.

⁴⁵ Cf. e.g., F.L. Morrison, R.E. Hudec, *Judicial Protection of Individual Rights under the Foreign Trade Laws of the United States*, in: Hilf & Petersmann, *supra* note 5, p. 92 f.

8. INCREASING IMPORTANCE OF “THIRD GENERATION” HUMAN RIGHTS AND “DUTIES TO PROTECT” FOR “INTERNATIONAL PUBLIC GOODS”

The under-supply of ever more interdependent *global* “public goods” – like monetary and financial stability, a liberal (i.e. liberty-based) worldwide trading system, transnational rule of law protecting human and cosmopolitan rights, prevention of climate change – reflects economic and political “market failures” as well as “governance failures” at national and international levels. Due to globalization, failures to protect *national public goods* (e.g. an efficient market economy and tax system in Greece) increasingly undermine also protection of related *international public goods* (like financial stability and rule of law in the Eurozone).⁴⁶ The history and theory of constitutionalism suggest that – just as supply of national public goods necessary for protecting human rights depends on protection of constitutional rights limiting abuses of public and private power – supply of transnational public goods likewise depends on multilevel legal and judicial protection of cosmopolitan rights.⁴⁷ Since the UDHR (e.g. its Article 28), individual civil, political, economic, social and cultural human rights are increasingly complemented by collective human rights at national and international levels, such as rights to popular self-determination, the “right to development”, collective labour rights, and rights to democratic governance, transnational rule of law and protection of the environment. Such “third generation human rights”, similar to the recognition of “common concerns” in multilateral environmental agreements”, may justify conceptions of “responsible sovereignty” and “duties to protect” common concerns beyond national jurisdictions, as in the example of the EU’s extension of its carbon-trading regime to the greenhouse gas emissions caused by foreign airlines on their flights to and from Europe.

As explained above in Section 2, multilevel abuses of public and private power (e.g. in the private banking, financial and public “sovereign debt” crises since 2008) undermining the collective supply of public goods may be counteracted most effectively by stronger constitutional “checks and balances” and “countervailing rights” (e.g. under constitutional, competition, social and environmental law) empowering citizens, civil society institutions, courts of justice and independent supervisory bodies to challenge abuses of power, as illustrated by the successful

⁴⁶ Cf., E.U. Petersmann, *International Economic Law, Public Reason and Multilevel Governance of Interdependent Public Goods*, 14 *Journal of International Economic Law* 23 (2011).

⁴⁷ This argument is developed in: E.U. Petersmann, *Cosmopolitan “Aggregate Public Goods” Must be Protected by Cosmopolitan Access Rights and Judicial Remedies*, in: Petersmann, *supra* note 2.

“judicial transformation” of European economic law for the benefit of citizens and their human rights. Promoting such “constitutional reforms” of IEL requires understanding the interrelationships between multilevel governance and multilevel legal protection of interdependent *national, regional* and *global public goods*; for instance, the multilevel GATT/WTO guarantees of economic freedoms and non-discriminatory conditions of competition can serve “constitutional functions” for protecting a mutually beneficial common market among the 27 EU/WTO member states as well as among the four Chinese customs territories of Hong Kong, Macao, the Peoples’ Republic of China and Taiwan. Just as the EU’s customs union (cf. Arts. 30-32 TFEU) continues to be based on GATT/WTO rules and their multilevel constitutional protection inside the EU (e.g. the EU’s constitutional requirement of “strict observance of international law” in Article 3 TEU), so do GATT/WTO rules promote progressive, peaceful “reunification” of the four independent Chinese customs territories. Had China – rather than withdrawing from GATT in 1949 – complied with GATT rules since its GATT membership in 1948, the impoverishment of hundreds of millions of Chinese citizens could have been avoided.

9. HUMAN RIGHTS, “PUBLIC REASON” AND THE COMPETING CONCEPTIONS OF IEL: NEED FOR INSTITUTIONAL INNOVATION

This contribution has argued for additional cosmopolitan and “constitutional reforms” of IEL based on the following five propositions:

- (1) The prevailing conceptions outside Europe of “legal nationalism” and “international law among sovereign states” fail to protect human rights and other international public goods effectively in transnational relations; due to the overlapping nature of many interdependent public goods (like rule of law, an efficient trade and financial system, protection of the environment), they risk undermining the reasonable self-interests of citizens and states. The human rights obligations of all UN member states entail “duties to protect” human rights and rule of law also in multilevel governance of international public goods, thereby limiting “state sovereignty” by principles of “cosmopolitan constitutionalism.”
- (2) The international governance failures are largely due to inadequate regulation of the “collective action problems” in the multilevel governance of international public goods, such as the “jurisdiction gap”, the “governance gap”, the “incentive gap”, the “participation gap” and

the “rule of law gap”.⁴⁸ Just as “institutionalizing public reason” for protecting national public goods inside constitutional democracies requires constitutional, legislative, executive and judicial rule-making, so does multilevel protection of interdependent, international “aggregate public goods” (composed of national public goods) usually require a “five-stage sequence” of constitutional, legislative, executive, judicial and international rule-making, rule-implementation and rule-enforcement.

- (3) The “collective action problems” differ among policy areas and require sector-specific, multilevel regulation avoiding the utopia of unitary “global governance”; for instance, citizen-driven markets and environmental pollution require multilevel regulation and judicial protection of rights and responsibilities not only of states, but also of citizens, with due respect for the legitimate diversity of constitutional conceptions of how human rights must be protected in the worldwide division of labour.
- (4) The competing conceptions of IEL as “international law among sovereign states”, “Global Administrative Law”, multilevel economic regulation (e.g. in NAFTA) and international “conflicts law” must be integrated into a more coherent, multilevel governance based on common constitutional “principles of justice” (e.g. as defined by human rights and national constitutions) and multilevel constitutional restraints of multilevel governance protecting legitimately diverse constitutional rights of citizens.⁴⁹ The needed “institutional innovation” must be based on the “principle of subsidiarity”, e.g. by strengthening the involvement of national parliaments, courts and self-interested citizens in reviewing and enforcing international rules protecting human rights and public goods. The 2009 US Supreme Court finding in *Massachusetts v Environmental Protection Agency* that six key greenhouse gases (such as carbon dioxide) are “air pollutants” endangering public health in terms of the US Clean Air Act, illustrates the potentially systemic, constitutional implications of citizen-oriented interpretations of economic and environmental rules for jurisdictional competences

⁴⁸ These five major collective action problems are explained in: Petersmann, *supra* note 46.

⁴⁹ These five competing conceptions of IEL are discussed by E.U. Petersmann, *The Future of International Economic Law: A Research Agenda*, in: C. Joerges, E.U. Petersmann (eds.), *Constitutionalism, Multilevel Trade Governance and International Economic Law*, Hart Publishing, Oxford: 2011, pp. 533-575.

in collective protection of public goods (like public health and climate change prevention).⁵⁰

- (5) The inevitable “legal fragmentation” among national and functionally limited, transnational legal regimes must be mitigated by multi-level legal and judicial cooperation in protecting transnational rule of law and cosmopolitan rights of citizens, as required also by the human rights obligations of all UN member states and the customary law requirement of interpreting international treaties, and settling international disputes, “in conformity with principles of justice” and the human rights obligations of governments.

National and international courts continue to agree on only a few “core elements” of human dignity,⁵¹ like the requirements that (1) every human being possesses an intrinsic worth and moral entitlement to human rights, merely by being human; (2) this moral worth and entitlement must be recognized and respected by others; (3) also the state must be seen to exist for the sake of the individual human being, and not *vice versa*. Beyond these core elements, the transformation of moral principles of “dignity” and human rights into positive law and cosmopolitan rights may legitimately vary among jurisdictions according to their respective traditions, resources and democratic preferences (e.g. on how to prioritize and protect legal rights under conditions of scarce resources). Arguably, just as European economic law is explicitly “founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights” (Article 2 TEU), so must worldwide IEL be interpreted and further developed in the 21st century in conformity with the legal obligations of all UN member states to respect, protect and fulfil human rights, as explicitly required by the customary methods of treaty interpretation and emphasized by the UN High Commissioner for Human Rights. The needed limitation of the “animal spirits” and rational egoism of economic actors by means of institutionalizing “public reason” in the worldwide division of labour must be based on stronger constitutional, legislative, administrative and judicial protection of cosmopolitan rights empowering self-interested citizens and “public-private partnerships” to defend

⁵⁰ *Massachusetts v Environmental Protection Agency*, 549 U.S. 497. As, following the rejection by the US Senate of the American Clean Energy and Security Act of 2009, the US failed to adopt federal legislation on climate change prevention and the various “Regional Greenhouse Gas Initiatives” adopted at state levels failed to effectively reduce greenhouse gas emissions, the judicial confirmation of EPA’s regulatory competences is of potential constitutional importance for protecting public health and welfare of citizens.

⁵¹ Cf., C. McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 *European Journal of International Law* 655 (2008).

their rights vis-à-vis abuses of public and private power also in transnational economic cooperation. Even though human rights and constitutional principles say little about the optimal design of legal institutions (such as independent regulatory agencies), comparative institutional analysis suggests that rights-based “cosmopolitan regimes” in transnational commercial, trade, investment and regional economic and environmental law have proven to be more effective and more legitimate than state-centred “Westphalian regimes” (cf. Table 1).

Table 1: From “Westphalian IEL” to regionally or functionally limited “cosmopolitan IEL”

Westphalian IEL	focuses on reciprocal rights/obligations among “sovereign states” and separation of international from national legal systems, usually (e.g. in UN law) without compulsory jurisdiction for peaceful settlement of disputes; the treatment of citizens as mere objects, the lack of effective protection of “transnational rule of law” and of human rights, and ineffective parliamentary and democratic control of UN law in many states undermine the moral and democratic legitimacy of “Westphalian international law”.
Cosmopolitan IEL	focuses on rights and obligations of individuals and their multi-level legal and judicial protection across national frontiers (e.g. in transnational investment law); it protects transnational rule of law and strengthens the “constitutional limits” of state sovereignty, popular sovereignty and “constitutional justice”, for instance in regional EU law, EEA law and the ECHR.
EU law	integrates international and national, legal and judicial guarantees of common market freedoms, transnational rule of law, human rights and other cosmopolitan rights on the basis of multilevel constitutional principles (e.g. of legal primacy, direct effect and direct applicability of EU legal rules) and EU institutions.
EEA law	integrates international and national, legal and judicial guarantees of common market freedoms, transnational rule of law, human rights and other cosmopolitan rights on the basis of more deferential constitutional principles (e.g. of quasi-primacy and quasi-“direct applicability” of EEA rules after their incorporation into domestic law) and EEA institutions.
ECHR law	has evolved into a multilevel legal and judicial system protecting human rights and access to justice in the legal and judicial systems of the 47 member states for the benefit of more than 800 million citizens.

Law merchant (<i>lex mercatoria</i>)	continues to evolve into cosmopolitan commercial, investment and arbitration law with multilevel judicial protection of individual freedoms (e.g. of contract), property rights and transnational rule of law empowering citizens.

Yet, as illustrated by the current banking, financial and “sovereign debt” crises in the EU and the USA, limitation of “market failures” as well as of “governance failures” remains a perennial task in IEL. Even though national governance systems will continue to legitimately differ depending on the respective constitutional traditions of people, protecting international public goods requires “bottom-up strengthening” of constitutional and cosmopolitan safeguards of constitutional and cosmopolitan rights of citizens and their democratic representatives against abuses of intergovernmental “Westphalian governance” and against the rational egoism by selfish private economic actors.

10. MULTILEVEL HRL AND IEL MUST BE COORDINATED THROUGH MULTILEVEL “CONSTITUTIONAL BOTTOM-UP PLURALISM”

The failures of the Doha Round negotiations in the WTO since 2001, like the failures of the UN negotiations on a new “Kyoto II Climate Change Agreement” and the inadequate remedies in many UN human rights conventions, illustrate that “waiting for global consensus” on protecting global public goods (like a liberal trading system, prevention of climate change, human rights) is an unreasonable governance strategy; bilateral and regional agreements (e.g. on carbon emission reductions) and unilateral safeguard measures (such as border tax adjustments) are usually necessary “building blocks” for worldwide consensus-building. Proposals for coordinating the hundreds of fragmented, international and national legal regimes by using the formal “conflict rules” codified in the VCLT (such as *lex specialis*, *lex posterior*, *lex superior*) are based on “Westphalian principles” (like “sovereign equality of states”) that may neglect effective protection of human rights, for instance if corrupt rulers abuse their “lending privilege” and “resource privilege” for appropriating and transferring wealth abroad to the detriment of domestic citizens. The diverse forms of European international law in the EU, the EEA and ECHR illustrate how – by interpreting state sovereignty, popular sovereignty and “individual sovereignty” in mutually coherent ways, extending “public goods regimes” (like the EU carbon emission trading system) to “free-riders” (e.g. foreign airlines flying to the EU) based on principles of

“common concerns” to be protected by “responsible sovereignty”, and subjecting multilevel economic governance to multilevel constitutional restraints (e.g. by multilevel judicial protection of transnational rule of law) – IEL can be transformed “bottom-up” into an instrument for promoting consumer welfare, rule of law and human rights across frontiers.⁵² “Constitutional pluralism”, as applied by national and international courts throughout Europe, argues that interdependent national and international legal regimes need to be interpreted in mutually coherent ways on the basis of “universalizable” principles of justice and human rights; the plurality of legitimate, yet potentially conflicting claims based on diverse, national and international constitutional systems must be reconciled by legal and judicial “balancing” of competing constitutional principles, human rights and “deliberative democracy”, especially in mutually beneficial cooperation among citizens across frontiers.

Similar to the private and public, national and international regulation of international economic cooperation, human rights are regulated and protected at local, national and international levels. Like economic and social rights, human rights can be interpreted as fundamental freedoms protecting “human capacities” and legal autonomy. As UN HRL tends to prescribe only *minimum standards* of protection with due respect for national “margins of appreciation” for regulating, prioritizing and mutually “balancing” civil, political, economic, social and cultural rights, human rights require respecting the legitimate “constitutional pluralism” in multilevel protection of human rights and of international economic cooperation among citizens. The UN High Commissioner for Human Rights has argued for a “human rights approach” to multilevel economic regulation so as to limit the often one-sided focus on producer interests by promoting synergies between economic regulation and human rights.⁵³ The UNHCHR differentiates between obligations to respect human rights (e.g. by refraining from interfering in the enjoyment of such rights), to protect human rights (e.g. by preventing violations of such rights by third parties), and to fulfil human rights (e.g. by taking appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights). As recourse to trade sanctions for promoting respect

⁵² Cf., E.U. Petersmann, *State Sovereignty, Popular Sovereignty and Individual Sovereignty: From Constitutional Nationalism to Multilevel Constitutionalism in International Economic Law?*, in: W. Shan, P. Simons, D. Singh (eds.), *Redefining Sovereignty in International Economic Law*, Hart Publishing, Oxford: 2008, pp. 27-60.

⁵³ Cf., E.U. Petersmann, *The Human Rights Approach to International Trade Advocated by the UN High Commissioner for Human Rights and by the ILO: Is It Relevant for WTO Law and Policy?*, in: E.U. Petersmann (ed.), *Reforming the World Trading System: Legitimacy, Efficiency and Democratic Governance*, Oxford University Press, Oxford: 2005, pp. 357-380.

for human rights abroad can aggravate the problems of people adversely affected by trade sanctions, the UNHCHR reports emphasize both potential synergies as well as potential conflicts between human rights and economic rules in the context of trade liberalization, trade restrictions and other economic regulation. Arguably, modern HRL requires going beyond the prevailing “Rawlsian conception of international law among sovereign peoples” and requires respecting, protecting and fulfilling human rights also across frontiers as “the foundation of freedom, justice and peace in the world” (Preamble UDHR).

The Rawlsian argument – that it is “the fact that in a democratic regime political power is regarded as the power of free and equal citizens as a collective body” which requires that the democratic exercise of coercive power over one another can be recognized as being democratically legitimate only when “political power ... is exercised in accordance with a constitution (written or unwritten) the essentials of which all citizens, as reasonable and rational, can endorse in the light of their common human reason”⁵⁴ – applies also to multilevel regulation of mutually beneficial economic cooperation among citizens in the worldwide division of labour. The less national parliaments control intergovernmental rulemaking, the more must the deficit in parliamentary and deliberative democracy be compensated by rights-based constitutionalism and multilevel judicial protection of constitutional rights and “participatory democracy” across frontiers. As explained by Rawls, “in a constitutional regime with judicial review, public reason is the reason of its supreme court”; transparent, rules-based and impartial judicial reasoning, subject to procedural guarantees of due process of law, makes independent courts less politicized “*fora* of principle” that are of constitutional importance for an “overlapping, constitutional consensus” necessary for legally stable and just relations among free, equal and rational citizens who tend to remain deeply divided by conflicting moral, religious and philosophical doctrines. Just as the EU Courts, the European Court of Human Rights, the EFTA Court and national courts have successfully transformed the international EC and EEA treaties and the ECHR into constitutional orders founded on respect for human rights, so can incremental “judicial constitutionalization” of international trade, investment and environmental treaty regimes contribute to making IEL more consistent with HRL for the benefit of citizens. As explained by I. Kant’s theory of multilevel constitutional guarantees of equal freedoms (as “first principle of justice”) in all human interactions at national, transnational and international levels, multilevel constitutionalism is neither based on naïve assumptions about individuals’ moral capacities nor

⁵⁴ J. Rawls, *Justice as Fairness: A Restatement*, Harvard University Press, Cambridge MA: 2001, p. 41.

on utopian calls for a “global Constitution”; it is necessary for institutionalizing “public reason” with due respect for the legitimate reality of “constitutional pluralism” so that – even in a “society of devils” (I. Kant) – human interactions remain constitutionally restrained.⁵⁵ The diverse forms of multilevel constitutionalism in the EU, the EEA and the ECHR, like the multilevel judicial protection of cosmopolitan rights in international commercial, trade, investment, regional integration and human rights law outside Europe, further illustrate that “multilevel constitutionalism” has become a politically feasible and realistic conception of “constitutional justice”; it is no longer only a “cosmopolitan dream”. The legitimacy of “cosmopolitan IEL” and of the necessary, additional “multilevel constitutional restraints” of worldwide economic organizations derives from protecting human rights, other “principles of justice” and national democracies’ promise of self-governance of citizens limited by rule of law.

11. LESSONS FROM INTERNATIONAL INVESTMENT LAW FOR COSMOPOLITAN REFORMS OF IEL?

Sections 1 to 10 have explained why effective protection of human rights calls for multilevel constitutional and judicial protection of cosmopolitan rights so as to protect interdependent “cosmopolitan public goods” – like citizen-driven markets and trading systems aimed at promoting consumer welfare – more effectively in conformity with the “subsidiarity principle”, i.e. “as openly as possible and as closely as possible to the citizens” (cf. Articles 1, 5 TEU). It was further shown that – in areas such as human rights law, EU law, EEA law, the ECHR and the transnational “law merchant” – multilevel legal and judicial protection of cosmopolitan rights has succeeded in limiting discriminatory abuses of foreign policy powers for the benefit of citizens (cf. Table 1). But how can “Westphalian legal regimes” focusing on reciprocal rights and obligations among sovereign states – like UN law, the 1944 Bretton Woods Agreements, GATT 1947, the WTO Agreement and multilateral environmental agreements among states – be transformed into cosmopolitan legal regimes focusing on protection of human rights and other cosmopolitan rights of citizens as “democratic principals” of governments as “agents” with limited, delegated powers? Section 11 asks whether the dynamic transformation of international investment law into a “cosmopolitan legal system” based on

⁵⁵ On Kantian “cosmopolitan multilevel constitutionalism” and its justification of multilevel constitutional safeguards of equal liberty rights limiting national Constitutionalism see: Petersmann, *supra* note 16, chapter III.

multilevel legal protection of investor rights offers lessons for future “cosmopolitan IEL”. Section 12 concludes with a brief look at the emergence of European economic law and its lessons for IEL beyond Europe.

Until the judgment by the International Court of Justice (ICJ) in the *ELSI* dispute,⁵⁶ most international investment disputes were decided either by recourse to domestic courts or by diplomatic protection of the foreign investor by the home state which, occasionally, submitted the dispute to international courts like the ICJ or its predecessor, the Permanent Court of International Justice. Yet, as illustrated by the *ELSI* judgment delivered by the ICJ more than 20 years after the dispute between the US investor and the local authorities in Sicily arose, most foreign investors perceive the prior exhaustion of local remedies in national courts and “politicized”, lengthy procedures of diplomatic protection and disputes among states in international courts as offering inadequate legal and judicial safeguards of investor rights. The transformation of international investment law from a “Westphalian” into a more “cosmopolitan system” evolved since the 1960s in essentially five phases:

- Since the conclusion of the first bilateral investment treaty (BIT) between Germany and Pakistan in 1959, the number of BITs has dynamically increased to now almost 3,000 agreements. Yet, the “first generation BITs” did not yet provide for direct access of the foreign investor to independent international arbitration.
- The 1965 World Bank Convention establishing the International Center for the Settlement of Investment Disputes (ICSID), which entered into force already in 1966 (following 20 ratifications), offered a multilateral legal framework for institutionalized, transnational arbitration of investment disputes based on consent between the states and investors involved. The first ICSID disputes were based on investor-state contracts⁵⁷ or on national legislation providing for direct access of foreign investors to international arbitration.⁵⁸
- Treaty-based investor-state arbitration was provided for only in the “second generation BITs” concluded since about the 1970s; in view of its many advantages for private investors (e.g. in terms of direct access to independent international arbitration usually without prior exhaustion of local remedies, direct control of the procedures without dependence on

⁵⁶ *United States v Italy*, *ELSI* case, ICJ Reports 1989, 15.

⁵⁷ The first ICSID dispute based on an investor-state contract was *Holiday Inns v Morocco*, ICSID Case No. ARB/72/1.

⁵⁸ The first ICSID dispute based on national legislation was *SPP v Egypt*, ICSID Case No. ARB/84/3.

“diplomatic protection”, availability of institutionalized ICSID procedures), most modern BITs provide for treaty-based investor-state arbitration.⁵⁹

- In contrast to the less than 400 BITs concluded prior to 1989, the number of new BITs increased dramatically since the 1990s and approaches now 3,000 BITs or corresponding treaty provisions in free trade agreements (like NAFTA Chapter XI) and other sectorial agreements (like the Energy Charter Treaty which entered into force in 1998), including increasingly also BITs among LDCs.
- Since the 1990s, the number of treaty-based ICSID disputes, or investor-state disputes based on UNCITRAL or other commercial arbitration procedures, and the emergence of case-law referring to nearly 400 known investor-state arbitral awards and related “annulment decisions” or national court decisions as relevant precedents, also increased dramatically.

Does this revolutionary transformation of international investment law – within only a few decades – offer lessons for the normatively desirable, potential transformation of other fields of “IEL among sovereign states” into a rights-based “cosmopolitan IEL” for the benefit of citizens?⁶⁰ Foreign direct investments offer obvious economic advantages (e.g. in terms of transfer of capital and know-how) to the host state justifying legal “investment incentives” compensating for the less secure legal status and potential discrimination of foreigners in the domestic legal system of host states. The “political economy” for the regulation of transnational movements of other natural and legal persons (like foreign workers, traders, portfolio investors, tourists, refugees) offers, unfortunately, less incentives for host states to commit to multilevel guarantees of cosmopolitan and judicial remedies in transnational legal systems. Even most regional human rights courts offer individual access only after prior exhaustion of local judicial remedies. With only few exceptions (like the “domain name dispute settlement system” established in the context of the arbitration centre of the World Intellectual Property Organization), “cosmopolitan dispute settlement institutions” similar to institutionalized ICSID arbitration and its quasi-automatic enforceability in domestic legal systems (e.g. due to the ICSID Convention and, in case of commercial arbitration, the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards) do not (yet) exist in most other fields of IEL. Nor are most UN member states politically willing to submit to compulsory international jurisdiction for the protection of other cosmopolitan rights of citizens. Yet, this

⁵⁹ The first ICSID dispute based on a BIT clause was *AAPL v Sri Lanka*, ICSID Report IV, at 250.

⁶⁰ Cf., J. Griebel, *Lehren aus der Erfolgsgeschichte des Internationalen Investitionsrechts?*, 2 Kölner Schriften zum Internationalen Wirtschaftsrecht 99 (2011).

current reluctance of states to limit their “Westphalian privileges” (e.g. in terms of limited legal and judicial accountability vis-à-vis foreigners) by additional legal and judicial guarantees of cosmopolitan rights may change, for instance, by the gradual recognition of individual legal and judicial remedies in international double taxation agreements and the ever larger number of multilevel legal and judicial safeguards of cosmopolitan rights in regional economic integration agreements and human rights agreements.

12. LESSONS FROM EUROPEAN ECONOMIC LAW FOR COSMOPOLITAN REFORMS OF IEL?

European economic integration law was most successful in those areas (like the common market) where EU citizens could directly invoke and judicially enforce EU rules (such as the common market and competition rules) against discriminatory restrictions by EU member states or EU institutions. The multilevel legal and judicial protection of civil, political, economic, social and cultural rights of the 500 million EU citizens as well as of citizens in other European states was often initiated and developed by multilevel judicial cooperation among national and European courts (like the ECJ, the EFTA Court, the European Court of Human Rights) before national governments and European political institutions accepted and supported the “direct applicability” in domestic courts of international treaty guarantees for the benefit of citizens (e.g. the “market freedoms” protected by the EC, EU and EEA treaties).⁶¹ In those areas where national and European courts did not exercise leadership in multilevel judicial protection of cosmopolitan rights, the political EU institutions often defended their political self-interests in avoiding legal and judicial accountability vis-à-vis EU citizens for non-compliance with the EU law requirements of “the rule of law” (Article 2 TEU) and “strict observance of international law” (Article 3 TEU). For instance:

- Even though many GATT and WTO legal and judicial guarantees of economic freedom, non-discriminatory conditions of competition and rule of law are precise and unconditional enough for being construed as protecting corresponding freedoms and legal security of EU citizens in their transnational economic cooperation, the political EU institutions and governments have asserted “freedom of maneuver”⁶² – in the sense of

⁶¹ Cf., Petersmann, *supra* note 24.

⁶² This term continues to be used by both the political EU institutions and the EU Court of Justice (e.g. in Joined cases C-120 and C-121/06 P, FIAMM [2008] ECR I-6513, para. 119) as the main justification for their disregard of legally binding WTO rules and WTO dispute settlement rulings.

- “freedom to violate WTO law” – without legal and judicial accountability vis-à-vis EU citizens adversely affected by the EU’s numerous violations of its WTO legal and dispute settlement obligations.⁶³
- The *Intertanko* judgment⁶⁴ of the ECJ suggests that – contrary to the constitutional mandate of Article 21 TEU that the “Union’s action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world”, as convincingly defended in the *Kadi* judgments⁶⁵ – the EU Court has decided to grant legal and judicial immunity to violations by the EU also of its obligations under the UN Convention on the Law of the Sea, without offering adversely-affected EU citizens and EU member states effective judicial remedies.
 - In accordance with the EU Commission’s declared strategy for negotiating a “new generation” of free trade agreements focusing on reciprocal trade liberalization,⁶⁶ the 2010 EU Council Decision approving the EU-Korea Free Trade Agreement explicitly states that the “Agreement shall not be construed as conferring rights or imposing obligations which can be directly invoked before Union or Member State courts and tribunals”.⁶⁷ As similar provisions are envisaged for the “new generation” of EU free trade agreements (e.g. with Canada), the EU Court’s case-law excluding legal and judicial remedies of EU citizens against EU violations of WTO law is likely to be extended to all international trade agreements by the EU, thereby further undermining the EU law principles of “strict observance of international law” (Article 3 TEU), of judicial remedies “to ensure effective legal protection” (Article 19 TEU,

⁶³ For an overview of the case-law of the EU Court of Justice denying EU citizens rights to invoke and enforce WTO obligations in national and European courts and request compensation for injury caused by persistent violations of the EU’s WTO obligations see: E.U. Petersmann, *Can the EU’s Disregard for “Strict Observance of International Law” (Article 3 TEU) Be Constitutionally Justified?*, in: M. Bronckers, V. Hauspiel, R. Quick (eds.), *Liber Amicorum for J. Bourgeois*, Edward Elgar, Cheltenham: 2011, pp. 214-225.

⁶⁴ Case C-308/06, *Intertanko* [2008] ECR I-4057.

⁶⁵ Joined cases C-402/05 P and C-415/05 P, *Kadi* [2008] ECR I-6351.

⁶⁶ Cf., *Trade, Growth and World Affairs – Trade Policy as a Core Component of the EU’s 2020 Strategy*, Document COM (2010) 612, Brussels 9 November 2010. On the EU’s negotiations of free trade agreements with, *inter alia*, Canada, the MERCOSUR member states, China, India and Korea see: European Commission, *Report on Progress Achieved on the Global Europe Strategy 2006-2010*, SEC (2010) 1268/2 (Brussels 9 November 2010).

⁶⁷ Cf., Article 8 of the Council Decision of 16 September 2010 (2011/265/EU) OJ 2011 L127/1. Similar draft provisions are included into other free trade agreements (e.g. Article 14.15 of the Draft EU-Canada Comprehensive Economic and Trade Agreement).

Article 47 EU Charter of Fundamental Rights), and of “consistent interpretation” of EU law (e.g. of the “freedom to conduct a business in accordance with Union law” as protected in Article 16 EU Charter of Fundamental Rights) in conformity with the international legal obligations of the EU.⁶⁸

- The EU Commission’s claim, following the entry into force of the Lisbon Treaty, to terminate the about 190 BITs concluded among EU member states – without offering investors equivalent legal and judicial remedies under EU law against governmental restrictions of their investor rights – continues to be resisted by many governments on the ground that these treaty-based safeguards of investor rights and judicial remedies complement and go beyond those of EU law.⁶⁹ The ECJ has held arbitration to be consistent with EU law provided arbitral awards comply with EU law;⁷⁰ as investor-state arbitral awards tend to interpret BITs as protecting not only rights of states but also of investors,⁷¹ the selfish tendency of the political EU institutions to curtail – rather than strengthen – individual economic rights and judicial remedies is politically regrettable and legally not justifiable.⁷²

Arguably, the “governance failures” to protect international public goods – like mutually beneficial liberalization and regulation of international markets in the WTO and financial institutions, prevention of greenhouse gas emissions leading to climate change – are also largely due to nationalist “interest group politics” in parliaments.⁷³ European integration law increasingly limits “democratic majority politics” by multilevel constitutional restraints for the benefit of EU citizens and their multilevel constitutional rights. Yet, the persistent violations of the EU

⁶⁸ The “consistent interpretation principle” has been applied by the EU Court in numerous judgments interpreting EU legal provisions in conformity with EU treaty obligations since Case C 286/90, *Poulsen*, ECR 1992, 6019, but is often ignored in disputes challenging EU regulations violating WTO law.

⁶⁹ Cf., N. Lavranos, *Member States’ BITs: Lost in Transition?* (29 September 2011), available at SSRN: <http://ssrn.com/abstract=1935625>.

⁷⁰ Cf., Case C-126/97, *Eco Swiss*, ECR 1999, I-3055.

⁷¹ See e.g., *Plama Consortium Ltd v Bulgaria*, Decision on Jurisdiction of 8 February 2005, ICSID Case No. ARB/03/24, para. 141.

⁷² In this sense also: Lavranos, *supra* note 69 and C. Tietje, *Bilateral Investitionsschutzverträge zwischen EU-Mitgliedstaaten (Intra-EU-BITs) als Herausforderung im Mehrebenen-system des Rechts*, 2 Kölner Schriften zum Wirtschaftsrecht 128 (2011).

⁷³ On the enhanced politicization of EU trade and investment policies resulting from the European Parliament’s involvement in the co-decision-making procedures see the empirical evidence and theoretical explanations by, e.g.: D. Kleimann, *Taking Stock: EU Common Commercial Policy in the Lisbon Era*, 66 *Aussenwirtschaft* 211 (2011).

treaty disciplines for national fiscal and debt policies (e.g. as prescribed in Article 126 TFEU and Protocol No.12 on the excessive deficit procedure) by most of the 17 Eurozone member states, and the inadequate supervision and protection of rule of law in the Eurozone by EU institutions and national parliaments, have entailed so far the biggest “rule of law crisis” in the EU challenging the legitimacy of multilevel financial governance in the Eurozone. The new EU Regulations, Directives and treaties among Eurozone members aim at strengthening fiscal, debt and economic governance⁷⁴ through stronger EU “top-down surveillance” based on complex reporting, consultation and supervision requirements. Yet, they do not change the basic existing constitutional principles underlying the Eurozone, including the EU’s “bail-out prohibitions” (Articles 123-125 TFEU) based on the “principle of subsidiarity” (Article 5 TEU) reserving for member states the primary responsibility for complying with the agreed monetary, fiscal, debt and financial disciplines, for granting “financial stability support” (e.g. through the newly established “Financial Stability Mechanism”), and for promoting economic growth through “an open market economy with free competition” (Articles 119-121 TFEU). As illustrated by the regular strikes and citizen protests in Greece, realizing the explicit aim of these EU Regulations to ensure “stronger national ownership of commonly agreed rules and policies” will ultimately depend on EU citizens assuming their democratic responsibilities (e.g. to ensure that national tax legislation in Greece is not systematically undermined by fraud and tax evasion) and insisting on stronger “democratic ownership” of rule-of-law so as to prevent private and public debt defaults and other breaches of the law in Eurozone member states.

Arguably, the current “rule of law crisis” inside the Eurozone entails a broader historical lesson for the future of European integration: Without empowering EU citizens to hold national governments and EU institutions accountable for “rule of law and respect for human rights” (Article 2 TEU), the EU risks losing not only its democratic legitimacy but also its rules-based capacity of stimulating the economic growth and peaceful adjustments necessary for financing the uniquely successful “European model” of protecting cosmopolitan rights, democratic peace and social welfare for the benefit of 500 million EU citizens. At *national levels*, the diverse traditions of constitutional democracy, majoritarian democracy, non-liberal

⁷⁴ Cf., the five Regulations and the Council Directive of November 2011 (OJ EU L 306 of 23 November 2011) on the strengthening of budgetary and economic surveillance in the Euro area, which explicitly aim at “stronger national ownership of commonly agreed rules and policies” so as to render national compliance with EU law more effective. The 2012 “Treaty on Stability, Coordination and Governance in the Economic and Monetary Union” likewise aims at rendering the existing EU legal disciplines more effective in the domestic legal systems of Eurozone member states.

democracies and authoritarian forms of governance in many UN member states are likely to continue in the 21st century. At the ever-more important *transnational level* of multilevel governance of interdependent public goods, however, protection of international public goods for the benefit of citizens requires multilevel constitutional restraints on national “majority politics” and on rent-seeking interest group politics based on stronger constitutional rights of citizens, parliamentary supervision and judicial remedies against arbitrary violations of transnational rule of law. More effective protection of international public goods in the 21st century – like the realization of the “Durban agreement” of December 2011 to conclude, by 2015, a legally binding worldwide agreement on climate change prevention with carbon-emission reduction commitments by developed and developing countries – requires more “cosmopolitan public reason” based on “responsible sovereignty” and “duties to protect” internationally recognized public goods and “common concerns” across frontiers for the benefit of citizens and their cosmopolitan rights.

Andreas Zimmermann* ■

ABIDING BY AND ENFORCING INTERNATIONAL HUMANITARIAN LAW IN ASYMMETRIC WARFARE: THE CASE OF “OPERATION CAST LEAD”

Abstract

“Operation Cast Lead” undertaken by the Israeli armed forces against Hamas forces in the Gaza strip in 2008/2009 raises a significant number of international legal issues. These issues relate to the nature of the military conflict, the legal status of the Gaza strip under international humanitarian law, but also, more generally, to the applicability and suitability of international humanitarian law in such kinds of asymmetric warfare taking place in densely populated areas.

Besides, the article also questions at least some of the findings made by the “Goldstone Report” tasked by the United Nations Human Rights Council to investigate alleged violations of international humanitarian law during the armed conflict.

INTRODUCTION

Asymmetric military conflicts raise a wide set of dilemmas for States confronting non-State armed groups. The armed conflict that took place between the Israeli army and armed Palestinian groups in the Gaza strip between December 27, 2008 and January 18, 2009 constitutes one of the most recent and most dramatic examples of such asymmetric conflicts. It is against this background that the article will deal with some of the most serious allegations of Israel having violated

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applicable rules of *jus in bello*, i.e. international humanitarian law, particularly those contained in the 2009 “Report of the United Nations Fact Finding Mission on the Gaza Conflict” (“Goldstone report”).¹ In doing so the article will focus on the legal status of Gaza as such and that of the parties to the conflict and ensuing legal consequences; the legal character of the conflict; possible violations by Israel of the laws of war related to the means and methods of warfare; and finally, the question how to eventually implement and enforce prohibitions arising under international humanitarian law in asymmetric warfare, as exemplified by the Gaza war. Accordingly, the article does not deal at all with issues of *jus ad bellum*, and, in particular, it does not deal with the legality of acts of self-defence against armed acts emanating from *non-State* actors such as Hamas.²

Moreover, the article will not address as to whether at all, and if so to what extent and under what circumstances, human rights arising under either customary

¹ UN Doc. A/HRC/12/48 (hereinafter referred to as “Goldstone report”); but *cf.*, also more recently R. Goldstone, *Reconsidering the Goldstone Report on Israel and War Crimes*, Washington Post, April 1, 2011, available at: http://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC_story.html (accessed November 4, 2011), where the chairman of the “Goldstone Commission” himself takes a much more cautious position as to such allegations.

For a particularly critical view of the Goldstone report, *cf.*, N. Rostow, *The Human Rights Council (Goldstone) Report and International Law*, 40 Israel Yearbook of Human Rights 275 (2010); *cf.*, also, 2009 resolution adopted by the United States House of Representatives, 111th CONGRESS, 1st Session, H. RES. 867, calling on the US administration to oppose any endorsement or further consideration of the Goldstone report; but *cf.*, also the response of Richard Goldstone thereto, as well as the rejoinder by a member of the US House of Representatives, Howard Berman, who was one of the co-sponsors of the aforementioned resolution, both available at: <http://washingtonindependent.com/66189/bermans-response-to-goldstone-on-house-gaza-war-crimes-resolution#> (accessed November 4, 2011).

² *Cf.*, specifically with regard to Gaza A. Bell, *International Law and Gaza: The Assault on Israel's Right to Self-Defense*, <http://www.jcpa.org/JCPA/Templates/ShowPage.aspx?DBID=1&LANGID=1&TMID=111&FID=378&PID=0&IID=2021> (accessed November 4, 2011); I. Rosenzweig & Y. Shany, *Armed Conflict in Gaza – The General Jus ad Bellum Framework*, http://www.idi.org.il/sites/english/ResearchAndPrograms/NationalSecurityandDemocracy/Terrorism_and_Democracy/Newsletters/Pages/2nd%20newsletter/1/Armed_Conflict_in_Gaza.aspx (accessed November 4, 2011); J. van der Vyver & D. Johan, *Legal Ramifications of the War in Gaza*, 21(3) Florida Journal of International Law 403 (2009). *Cf.*, generally, C. Tams, *The Use of Force against Terrorists*, 20(2) European Journal of International Law 359 (2009); Y. Dinstein, *War, Aggression and Self-Defence*, 4th ed., Cambridge University Press, Cambridge: 2005, p. 244 *et seq.*

As to the conflict between Israel and Hezbollah *cf.*, T. Ruys, *Crossing the Thin Blue Line: an Inquiry into Israel's Recourse to Self-Defense against Hezbollah*, 43 Stanford Journal of International Law 285 (2007), p. 274, as well as A. Zimmermann, *The Second Lebanon War: Jus ad Bellum, Jus in Bello and the Issue of Proportionality*, 11 Max-Planck Yearbook of United Nations Law 99 (2007).

international law or human rights treaties, governed the behaviour of the parties during the armed conflict, be it due to the extraterritorial character of the acts of the Israeli armed forces, be it due to the non-State character of the Palestinian actors, or be it finally due to the *lex specialis* character of applicable norms of international humanitarian law. It will neither deal with the issue of the mandate of the fact-finding commission which was originally limited to cover alleged violations of international law by the Israeli side only,³ and which was only later extended by virtue of an informal agreement reached between the head of the mission, Richard Goldstone, and the then President of the Human Rights Council so as to cover “all violations of international human rights law and international humanitarian law that might have been committed at any time in the context of the military operations that were conducted in Gaza during the period from December 27, 2008 and January 18, 2009, whether before, during or after.”⁴ Nor will it address the issue of the alleged bias of one of the members of the fact-finding commission, Professor Christine Chinkin, who, while the conflict was ongoing, had signed a public letter referring to violations of international law by the parties to the conflict.⁵

Before doing so, it has to be noted, however, that many factual questions concerning the Gaza war continue to remain open,⁶ and will most probably do so for

³ On January 12 2009, the United Nations Human Rights Council (UNHRC) adopted Resolution S-9/1, deciding in para. 14 *inter alia*:

(...) to dispatch an urgent, independent international fact-finding mission, to be appointed by the President of the Council, to investigate all violations of international human rights law and international humanitarian law by the occupying Power, Israel, against the Palestinian people throughout the Occupied Palestinian Territory, particularly in the occupied Gaza Strip, due to the current aggression, and calls upon Israel not to obstruct the process of investigation and to fully cooperate with the mission (emphasis added).

⁴ Goldstone report, *supra* note 1, para. 1. It seems that, originally, former United Nations High Commissioner for Human Rights Mary Robinson had been asked to head the mission which she refused.

⁵ *Inter alia*, the letter stated that:

As things stand, its invasion and bombardment of Gaza amounts to collective punishment of Gaza's 1.5m inhabitants contrary to international humanitarian and human rights law. In addition, the blockade of humanitarian relief, the destruction of civilian infrastructure, and preventing access to basic necessities such as food and fuel, are *prima facie* war crimes.

Cf., *Israel's bombardment of Gaza is not self-defence – it's a war crime*, Sunday Times January 11, 2009, available at: <http://www.timesonline.co.uk/tol/comment/letters/article5488380.ece> (accessed November 4, 2011).

⁶ As to the limits of fact-finding missions mandated by the Human Rights Council *cf.*, C. Chinkin, *U.N. Human Rights Council Fact-finding Missions: Lessons from Gaza*, in: M. H. Arsanjani et al. (eds.), *Looking to the Future – Essays on International Law in Honor of*

a significant period of time, if not forever, as was confirmed by Richard Goldstone himself.⁷ This is the case regardless how one judges the efforts of the Goldstone Commission and the cooperation, or lack thereof, with the commission by the parties to the conflict. It follows therefrom that any evaluation of legal issues arising under applicable norms of international humanitarian law is also significantly hampered. This is particularly true, *inter alia*, with regard to the status of certain individuals, as well as with regard to attacks on both, civilian objects which might have been misused for military purposes, and on military objects within, or in the vicinity of, civilian settlements, as well as finally to alleged, but denied, instances of using civilians as human shields.

The following considerations will thus focus almost exclusively – and indeed necessarily given the lack of access to all of the relevant facts – on the rules of international humanitarian law that were applicable during the conflict, and how they had to be applied on the ground.

1. LEGAL CHARACTER OF THE CONFLICT

A first fundamental issue relates to the legal character of the armed conflict, *i.e.* whether it was a conflict of an international or non-international character.⁸ That question in turn relates back to the status of Gaza during the period of the conflict, *i.e.* whether it then was (and possibly continues to be) occupied territory, Israel accordingly being the occupying power, or whether, instead, the unilateral withdrawal of Israeli forces in 2006 had also led to a change in the legal status of Gaza and hence (possibly) in the character of the armed conflict that took place from December 2008 to January 2009.

Michael. W. Reisman, Martinus Nijhoff Publishers, Leiden: 2011, p. 475 *et seq.*; the article does not deal, however, with the mission which forms the subject-matter of this article. *Cf.*, also specifically as to an alleged evidentiary bias of the Goldstone Commission and the ensuing report A. Dershowitz, *The Case against the Goldstone Report: a Study in Evidentiary Bias*, available at: <http://www.alandershowitz.com/goldstone.pdf> (accessed November 4, 2011).

⁷ R. Goldstone, *Reconsidering the Goldstone Report on Israel and War Crimes*, Washington Post, April 1, 2011, available at: http://www.washingtonpost.com/opinions/reconsidering-the-goldstone-report-on-israel-and-war-crimes/2011/04/01/AFg111JC_story.html (accessed 4 November 2011), stating *inter alia*: “[w]e know a lot more today about what happened in the Gaza war of 2008-09 than we did when I chaired the fact-finding mission appointed by the UN Human Rights Council (...).”

⁸ As to this issue *cf.*, K. Mastorodimos, *The Character of the Conflict in Gaza – Another Argument towards Abolishing the Distinction between International and Non-international Armed Conflicts*, 12(4) International Community Law Review 437 (2010).

1.1. Gaza: occupied territory?

The question whether, during the relevant time, Gaza had remained occupied territory notwithstanding the Israeli withdrawal,⁹ is relevant at the very least to the extent that it is only under this hypothesis that Israel could have violated certain provisions of Geneva Convention IV (e.g., Art. 53 relating to the protection of private property or Art. 59 as to the granting of permissions for relief agencies to provide relief supplies).

In order to address this question, it should first be noted that it is, as of today, largely unquestioned that Geneva IV applies to various forms of occupied territory, even if – like in the case of Gaza – the territory in question does not form part of the territory of another High Contracting Party.¹⁰ Indeed, this position has unequivocally been confirmed, *inter alia*, by the International Court of Justice in its 2004 Wall advisory opinion¹¹ after a careful analysis of the wording and structure of Art. 2 of Geneva IV, its drafting history, subsequent State practice, as well as by the International Committee of the Red Cross (ICRC),¹² and, notably, by the Israeli Supreme Court.¹³

Yet, Art. 2 of Geneva IV itself does not contain a legal definition as to what is understood as constituting “occupied territory”. Art. 42 of the Hague Regulations on the Laws and Customs of War at Land, the content of which is generally considered to constitute customary international law¹⁴ (even if the applicability of Geneva IV does not necessarily, in all of its aspects, depend on such situation of occupation under general international law), in turn, however provides that territory is considered occupied whenever “it is actually placed under the authority of the hostile army”, *i.e.* where “such authority has been established and *can*

⁹ Cf., *inter alia*, S. Darcy & J. Reynolds, *An Enduring Occupation – the Status of the Gaza Strip from the Perspective of International Humanitarian Law*, 15(2) *Journal of Conflict & Security Law* 211 (2010); E. Samson, *Is Gaza Occupied? Redefining the Status of Gaza under International Law*, 25 *American University International Law Review* 915 (2010).

¹⁰ B. Rubin, *Disengagement from the Gaza Strip and Post-occupation Duties*, 42 *Israel Law Review* 528 (2009); Y. Shany, *Forty Years after 1967 – Reappraising the Role and Limits of the Legal Discourse on Occupation in the Israeli-Palestinian Context*, 41(1) *Israel Law Review* 6 (2008).

¹¹ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, ICJ Rep. 2004, p. 172 *et seq.*, paras. 89-96.

¹² *Ibidem*, para. 97 *et seq.*, quoting the Supreme Court of Israel in a judgment dated May 30, 2004 (*Beit Sourik Village Council v. The Government of Israel*, HCJ 2056/04).

¹³ *Ibidem*.

¹⁴ Cf., e.g., ICTY Judgment Trial Chamber, 31 March 2003, *Prosecutor v. Nikolic*, Case no. IT-98-34-T, para. 215; Y. Shany, *Faraway, So Close: The Legal Status of Gaza After Israel's Disengagement*, 7 *Yearbook of International Humanitarian Law* 369 (2005), p. 374.

be exercised.”¹⁵ In light of the official heading of Section III of the Hague Regulations, of which Art. 42 Hague Regulations forms part, which refers to “military authority over the territory of the hostile State”, one has to determine therefore whether there is military control over the territory in question.

This notion of “military control” is, however, generally understood, given the very wording of Art. 42 Hague Regulations (“can be exercised”), to also include situations where there is only the potential to exercise such authority.¹⁶ This was already confirmed in 1949 by the US Military Tribunal, when it found that Germany had been the occupying power of both Greece and Yugoslavia, even if parts of these territories had then been subject to the control by partisan forces since, as the Tribunal then put it, “the Germans could at any time they desired assume physical control of any part of the country.”¹⁷

Most notably, it was the Israeli Supreme Court itself that found with regard to the situation in Southern Lebanon in the early 1980s, that “the mere military control of [an] area” leads to the area being occupied, even if the occupying power has decided to leave large parts of the administrative powers to the former local government.¹⁸

In the *Congo v. Uganda* case, the ICJ found that, in order to decide the question whether a State ought to be considered an occupying power, it is decisive as to whether “there is sufficient evidence to demonstrate that the said authority was in fact established and exercised by the intervening State in the areas in question.”¹⁹ It is true that the ICJ in *Congo/Uganda* limited its finding of Ugandan occupation to the Ituri province,²⁰ but that might be explained by the simple fact that, given the sheer size of the Democratic Republic of Congo combined with the limited number of Ugandan forces involved in the conflict, Uganda would have never been able to extend its control beyond the boundaries of Ituri anyhow.²¹

¹⁵ Emphasis added.

¹⁶ A. Roberts, *Termination of Military Occupation*, in: *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford: 2009, para. 3.

¹⁷ *US v. List*, VIII Law Reports of Trials of Major War Criminals (1949), p. 39 *et seq.* (55-56); *cf.*, also Shany, *supra* note 10, p. 374.

¹⁸ *Tsemel v. Minister of Defence*, HCJ 102/82, 7(3), PD 365, p. 373-374; translation to be found in Shany, *supra* note 10, p. 376.

¹⁹ *Case Concerning Armed Activities on the Territory of the Congo (DRC v. Uganda)*, ICJ Rep. 2005, para. 173.

²⁰ *Ibidem*, para. 177.

²¹ It is thus not convincing to rely on the *Congo/Uganda* judgement as an indication that a *de facto* presence and control of all parts of the territory in question are necessary in order to establish an occupation regime; but *cf.*, Shany, *supra* note 10, p. 378 for such a proposition.

As to the case of Gaza, it should be noted that, at least at the time of the unfolding conflict, Israel was almost completely controlling the entry and exit of both persons and goods (including foodstuff) to and from Gaza. Besides, it also controlled the territorial sea adjacent to Gaza and its airspace. Israel had also, *inter alia*, a control over the registry of the population living in the area.²²

Moreover, the Gaza area was occupied jointly with other parts of Palestine, *i.e.* the West Bank during the very same military conflict. Additionally, both Gaza and the West Bank, are considered to form one single geo-political unit.²³ Accordingly, given that Israel continues to exercise full-fledged control over at least certain parts of the West Bank and Eastern Jerusalem, the unilateral withdrawal from Gaza amounted only to a limited retreat from parts of the overall occupied Palestinian territories, but did not, nor could it, terminate the occupation regime as such. Finally, under the Oslo Accords, Israel has retained overall responsibility as to public security even in those areas of the Palestinian territories that are currently subject to Palestinian rule.²⁴

Taking these factors together, it thus seems safe to assume that, during the relevant period, Israel continued to be the *de jure* occupying power as to Gaza notwithstanding the 2006 Israeli unilateral disengagement, despite the fact that Israel no longer fulfilled, and could no longer fulfil, some of the obligations of an occupying power.²⁵

Yet, even assuming that Gaza continued to be occupied territory by the time Operation “Cast Lead” took place, it still remains questionable whether all rules applicable in international armed conflicts automatically applied to the 2008/2009 conduct of hostilities between Hamas militants on the one hand and Israeli armed forces on the other, or only the rules contained in Geneva IV.

As a matter of fact, it is less than clear whether all forms of armed conflicts taking place in occupied territory, in particular when they do not involve regular armed forces of the occupied State or entity, but instead informal militias and insurgents, are necessarily governed by the rules of international humanitarian applicable in international armed conflicts.

²² Cf., Goldstone report, *supra* note 1, para. 187.

²³ Cf., Declaration of Principles on Interim Self-Government (Israel/PLO) of September 12, 1993, as well as Art. XI Interim Agreement on the West Bank and Gaza Strip (Israel/PLO), ILM 1997, p. 551, and Israeli Supreme Court, *Ajuri v. IDF West Bank Military Commander*, H CJ 7015/02, 56(6) PD 352.

²⁴ Art. X para. 4 of the Interim Agreement, *supra* note 23.

²⁵ Israel's status as an occupying power might change however *inter alia* depending on the question whether Palestinians might leave respectively enter the Gaza strip via the Rafah crossing subject only to usual identity controls.

1.2. Operation “Cast Lead”: international armed conflict?

The Israeli Supreme Court considered already in its Targeted Killings case²⁶ that *any* armed conflict which takes place between an occupying power and rebel or insurgent groups in territory that is placed under occupation *ipso facto* amounts to an international armed conflict²⁷ triggering, as a matter of principle, the whole set of rules applicable in such types of conflicts.

Prima facie, this would mean, however, that not only the rules on means and methods of warfare (which in any case are, as of today, by and large identical in both types of armed conflict by virtue of customary law²⁸), but also rules on combatant status (provided non-State insurgents in such territories were to fulfil the conditions laid down in Art. 4 of Geneva III), as well as those related to protected persons, such as prisoners of war, would apply in such conflicts.

Indeed, this seems to be, at least implicitly, the approach of the Goldstone Commission, when it stated that Israeli soldiers captured by Hamas forces enjoy prisoner of war status under Geneva III.²⁹ However, prisoner of war status does not only imply a right of the individual to be treated accordingly. Rather, Art. 21 of Geneva III also, *inter alia*, provides for a *right* of the parties to the conflict to subject such persons to internment.

Moreover, if one were to qualify any type of armed conflict in situations of occupation to be international in character, one would have to also recognize the right of insurgents and similar militias to be recognized as combatants, provided they have a distinctive sign, carry their arms openly (at least within the meaning of Art. 44 para. 3 of Additional Protocol I, provided one considers Art. 44 para. 3 to constitute, as of today, customary international law), and abide by international humanitarian law. As a matter of fact, the Goldstone report seems to accept this very possibility when finding that members of the Gaza police forces would have acquired combatant status (*sic!*) in case they had either individually, or collectively, been incorporated into the so-called “armed forces” of Hamas.³⁰

In order to decide, however, whether the mere fact of belligerent occupation triggers the applicability of the whole set of rules of international humanitarian

²⁶ Israeli Supreme Court, Judgment of December 11 2005, *The Public Committee against Torture in Israel et al. v. The Government of Israel et al.*, HCJ 769/02.

²⁷ Israeli Supreme Court, *supra* note 23, paras. 18 and 21 quoting A. Cassese, *International Law*, 2nd ed., Oxford University Press, Oxford: 2005, p. 420.

²⁸ Cf., J.-M. Henckaerts & L. Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* Cambridge University Press, Cambridge: 2005 (hereinafter referred to as ICRC Customary Law Study), especially Rules 1-24 and 46-86.

²⁹ Goldstone report, *supra* note 1, para. 77.

³⁰ *Ibidem*, para. 429.

law applicable in international armed conflicts even *vis-à-vis* groups that do not belong to the armed forces of the occupied State respectively to the entity representing the people in question, one has to consider that Geneva IV was originally meant to cover occupation of foreign territory subsequent to an inter-State conflict, even more so since the drafters had the occupations by Germany and Japan during World War II as paradigmatic examples in their minds.

In contrast thereto, one wonders why a conflict between a State and a non-State group on territory not belonging to the former State, or why armed confrontations between occupying forces and armed insurgents not belonging to the hostile army, such as, for example in the case of Iraq after the officially declared end of hostilities, should automatically qualify as international armed conflicts.³¹

Indeed, as the current conflict in Afghanistan confirms,³² there are forms of armed conflicts involving non-State fighters which, despite possessing an international element by involving third States as parties to the conflict, and, moreover, by taking place on foreign soil, are nevertheless still generally accepted to constitute *non-international* armed conflicts.³³

Finally, Art. 1 para. 4 of Additional Protocol I, to which Israeli is however not even a party,³⁴ confirms that only certain types of armed conflicts taking place in a situation of occupation might amount to international armed conflicts as such. Said provision, by using the notion of alien occupation, also covers cases of occupation of a territory which has not yet been fully formed as a State.³⁵ Yet, even

³¹ Cf., generally as to this issue K. Mastorodimos, *The Character of the Conflict in Gaza – Another Argument Towards Abolishing the Distinction between International and Non-international Armed Conflicts*, 12(4) International Community Law Review 437 (2010).

³² Cf., generally, M. N. Schmitt (ed.), *The War in Afghanistan: A Legal Analysis*, US Naval War College, International Law Studies, Vol. 85 (2009).

³³ Cf., only R. Geiß & M. Siegrist, *Armed Conflict in Afghanistan (2001-2011): Has It Affected International Humanitarian Law?*, 881 International Review of Red Cross 11 (2011). But cf., the opinion that the nature of the conflict between the ISAF contributing States and the Taliban has not changed, i.e. that the conflict remains an international armed conflict, Y. Dinstein, *Terrorism and Afghanistan*, in: Schmitt, *supra* note 32, pp. 51-53.

³⁴ Israel could even argue to qualify as a persistent objector with regard to Art. 1 para. 4 of Additional Protocol I; cf., as to this question A. Zimmermann, *Responsibility for Violations of International Humanitarian Law, International Criminal Law and Human Rights Law – Synergy and Conflict?*, in: V. Epping & W. Heintschel von Heinegg (eds.), *International Humanitarian Law – Facing New Challenges*, Springer-Verlag, Berlin, Heidelberg: 2006, pp. 218 *et seq.*; cf., generally as to the concept of persistent objectors T. L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 Harvard International Law Journal 457 (1985).

³⁵ Y. Sandoz, C. Swinarski & B. Zimmermann (eds.), *ICRC Commentary on the Additional Protocols*, Martinus Nijhoff Publishers, Geneva: 1987, para. 112.

under Art. 1 para. 4 of Additional Protocol I, armed conflicts taking place in such occupied territories only qualify as international armed conflict provided further criteria are met. In particular, it is required, in order to internationalize the conflict in question, that the non-State group involved in the conflict, as confirmed by Art. 96 para. 3 of Additional Protocol I, represents a people exercising its right of self-determination and thus, requiring that this non-State party to the conflict constitutes more than a mere group *de facto* exercising control over a certain part of the occupied territory.

However, as far as Palestine is concerned, while the international community, as well as the International Court of Justice,³⁶ has, and for good reason, recognized the right of the Palestinian people to exercise its right of self-determination, it has, by the same token, always recognized the Palestine Liberation Organization (PLO) and the Palestinian Authority, and them alone, but not the *de facto* authorities in Gaza or Hamas, as representing the Palestinian people.

Accordingly, even under Additional Protocol I, the armed conflict between Israeli armed forces and Hamas-affiliated armed groups should not be considered an international one. *A fortiori*, Israel not being a party to Additional Protocol I, and eventually even being a persistent objector to at least some of its contents, the conflict taking place in 2008/2009 between Israel on the one hand and Hamas on the other was not automatically internationalized by the mere fact that Gaza continued to be occupied territory by the time the armed confrontation between Israeli armed forces and armed groups affiliated with Hamas broke out.

Accordingly, the question as to whether the conduct of hostilities during the Gaza war was governed by the rules of international humanitarian law applicable in international armed conflict is not predetermined by the question as to whether Gaza was or was not, at the relevant time, occupied territory.

Instead, recent State practice, at least in its majority, continues to qualify armed conflicts with non-State groups as being non-international in character, even when they possess a transboundary or international element.³⁷ As a matter of fact, Art. 1 para. 4 of Additional Protocol I, as of today ratified by 170 States, confirms that States were only willing to accept the “internationalization” of

³⁶ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Rep. 2004, p. 171 *et seq.*, paras. 88-115.

³⁷ US Supreme Court, *Hamdan v Rumsfeld*, *Secretary of Defense et al.*, Judgment of 29 June 2006 (2006) 548 US 67. *Cf.*, also C. Kress, *Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts*, 15(2) *Journal of Conflict & Security Law* 245 (2010). *Cf.*, also, R. Schöndorf, *Extra-State Armed Conflicts: Is There a Need for a New Legal Regime?*, 37(1) *New York University Journal of International Law and Politics* 1 (2004), p. 26; M. Sassòli, *Transnational Armed Groups and International Humanitarian Law*,

armed conflicts involving non-State groups in very limited circumstances, namely in particular where the non-State party is representing people exercising its right of self-determination.

2. RELEVANT RULES OF INTERNATIONAL HUMANITARIAN LAW

Regardless of whether “Operation Cast Lead” amounted to an international armed conflict or not, it has to be noted that, as of today, almost all rules of international humanitarian law, at least those governing the means and methods of warfare in both types of conflict, are identical, notwithstanding certain rare exceptions.

In particular, this is true for the distinction between civilians not taking part in hostilities on the one hand, and those actively involved in the fighting on the other (be they enemy combatants, civilians taking direct part in hostilities, or even persons considered so-called “unlawful combatants”).³⁸ A similar requirement of distinction applies *mutatis mutandis* to military objects *versus* civilian ones in both types of conflict.³⁹ Apart, certain civilian objects such as hospitals,⁴⁰ places of worship⁴¹ or United Nations installations⁴² enjoy special protection which they might only forfeit under specific circumstances.

Harvard University Program on Humanitarian Policy and Conflict Research Occasional Papers Series, no. 6/2006, available at: [http://www.reliefweb.int/rw/lib.nsf/db900sid/EVOD-6WQFE2/\\$file/OccasionalPaper6.pdf](http://www.reliefweb.int/rw/lib.nsf/db900sid/EVOD-6WQFE2/$file/OccasionalPaper6.pdf)? Openelement (accessed November 4, 2011).

³⁸ ICRC Customary Law Study, *supra* note 28, Rule 1. In its advisory opinion on the legality of nuclear weapons the International Court of Justice stated that the principle of distinction constitutes one of the “cardinal principles of international humanitarian law”; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Rep. p. 226 *et seq.*, para. 78. *Cf.*, also, K. Dörmann, *The Legal Situation of Unlawful/Unprivileged Combatants*, 849 *International Review of Red Cross* 45 (2003).

³⁹ ICRC Customary Law Study, *supra* note 28, Rule 7.

⁴⁰ *Ibidem*, Rule 30; *cf.*, also J. Kleffner in: D. Fleck (ed.), *The Handbook of International Humanitarian Law* (2 ed.), Oxford University Press, Oxford: 2008, p. 353 *et seq.*

⁴¹ ICRC Customary Law Study, *supra* note 28, Rules 38-42. *Cf.*, also R. O’Keefe, *The Protection of Cultural Property in Armed Conflict*, Cambridge University Press, New York: 2006, *passim*.

⁴² *Cf.*, Art. 8 para. 2(b)(iii) and para. 2(e)(iii) ICC Statute. *cf.*, M. Cottier, in: O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, p. 330 *et seq.* *cf.*, also UN Convention on the Safety of United Nations and Associated Personnel; Annex to U.N. Doc A/RES/49/59 (1994) (not yet in force).

More specifically with regard to individuals actively participating in hostilities, it is beyond doubt that within the framework of international armed conflicts, enemy combatants constitute legitimate military targets unless they are placed *hors de combat*.⁴³ However, as was the case in the Gaza conflict, where persons do not possess combatant status, either due to the non-international character nature of the conflict, or because they did not fulfil the criteria laid down in Art. 4 of Geneva III and/or Art. 44 para. 3 of Additional Protocol I,⁴⁴ they are to be considered civilians, unless they form part of the “armed forces” of the insurgents. Even civilians could nevertheless be the subject to legitimate attack when taking direct part in hostilities.⁴⁵

There is also general agreement that, whatever the nature of the armed conflict, even attacks on legitimate military targets, which are to be expected to cause excessive collateral civilian damage, are prohibited.⁴⁶ Moreover, there is a general prohibition to use either civilians or other protected persons as human shields,⁴⁷ so as to render certain points, areas or one’s own military forces immune from military operations.⁴⁸ Finally, certain weapons are prohibited, the use of which might, especially in urban warfare, be indiscriminatory in nature, or might raise serious problems.⁴⁹

⁴³ Cf., ICRC Customary Law Study, *supra* note 28, Rule 47. Cf. also Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 2nd ed., Cambridge University Press, Cambridge: 2010, p. 92; S. Oeter, *Methods and Means of Combat*, in: D. Fleck (ed.), *supra* note 40, pp. 34, 178.

⁴⁴ Cf., J. C. Yoo & C. Ho, *The Status of Terrorists*, 44 Virginia Journal of International Law 207 (2003/2004), pp. 226-227; G. B. Roberts, *The New Rules for Waging War: the Case against Ratification of AP I*, 29 Virginia Journal of International Law 109 (1985/86), p. 129; A.D. Sofaer, *The Rationale for the United States Decision*, 82 American Journal of International Law 784 (1988), p. 786. Cf., generally, Dinstein, *supra* note 43, pp. 53-54.

⁴⁵ As to attempts to qualify non-combatant civilians (illegally) taking part in hostilities as so-called “illegal combatants” cf., Dinstein, *supra* note 43, p. 33 *et seq.*

⁴⁶ H. Parks, *Air War and the Law of War*, 32 Air Force Law Review 135 (1990); cf., also, I. Henderson, *The Contemporary Law of Targeting: Military Objectives, Proportionality and Precautions in Attack under Additional Protocol I*, Martinus Nijhoff Publishers, Leiden: 2009, p. 221. W. Fenrick, *The Rule of Proportionality and Protocol I in Conventional Warfare*, 98 Military Law Review 95 (1982); M. N. Schmitt, *The Principle of Discrimination in 21st Century Warfare*, 2 Yale Human Rights and Development Law Journal 143 (1999).

⁴⁷ Cf., Oeter, *supra* note 43, p. 193 *et seq.*; E. Gross, *Use of Civilians as Human Shields*, 16 Emory International Law Review 445 (2002).

⁴⁸ Cf., Art. 8 para. 2 (b) (xxiii) ICC-Statute.

⁴⁹ W. H. Boothby, *Weapons and the Law of Armed Conflict*, Oxford University Press, Oxford: 2009, p. 62; cf., also, H. Meyrowitz, *The Principle of Superfluous Injury or Unnecessary Suffering from the Declaration of St. Petersburg of 1868 to Additional Protocol I of 1977*,

Having thus outlined the main rules of international humanitarian law generally accepted to apply to the conflict,⁵⁰ their application, and alleged violations during Operation “Cast Lead” will now be analyzed.

3. ALLEGED ATTACKS ON CIVILIAN OBJECTS

The prohibition on attacking civilian objects raises two different issues, namely for deliberate Israeli attacks on Hamas governmental facilities and for attacks against civilian installations (recognized as such) allegedly used for military purposes.

3.1. Attacks against government buildings: the notion of military objectives

In its report on factual and legal aspects of Operation “Cast Lead” Israel claimed that “[m]any of the ostensibly civilian elements of [the Hamas] regime are in reality active components of its terrorist and military efforts” and that “Hamas does not separate its civilian and military activities in the manner in which a legitimate government might”, but rather “uses apparatuses under its control, including quasi-governmental institutions, to promote its terrorist activity.” This raises the question as to whether installations, such as the Palestinian Legislative Council Building or Hamas “ministries”, could be considered legitimate military targets.

A generally accepted⁵¹ definition of what constitutes a military objective is to be found in Art. 52 para. 2 of Additional Protocol I. Under said provision, in order to qualify as a military target, it is decisive whether these are objects

which by their nature, location, purpose, or use make an effective contribution to military actions and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at time, offers a definite military advantage.

299 International Review of Red Cross 98 (1994), p. 109 *et seq.*; H. Blix, *Means and Methods of Combat* in: UNESCO (ed.), *International Dimensions of Humanitarian Law*, Henry Dunant, Geneva: 1997, p. 138.

⁵⁰ With regard to further rules concerning the conduct of hostilities such as the prohibition to deny quarter, the prohibition to use starvation as a method of warfare or the principle of precautions in attack, including the obligation to give effective advance warning, provided circumstances so permit, *cf.*, Oeter, *supra* note 43, pp. 126-137.

⁵¹ For a general overview as to the notion of “military target”, *cf.*, A.P.V. Rogers, *What is a Legitimate Military Target?*, in: R. Burchill *et al.* (eds.), *International Conflict and Security Law*, Cambridge University Press, Cambridge: 2005, p. 160 *et seq.* *Cf.*, also Henderson, *supra* note 46.

Moreover, the qualification of a specific object as a military or non-military depends on the specific circumstances prevailing at the time of the attack, as confirmed by the phrase “in the circumstances ruling at time” contained in Art. 52 para. 2 of Additional Protocol I. This limitation also applies in non-international armed conflicts by virtue of customary international law.⁵²

Thus, in order for a Hamas “ministry” or the Gaza Legislative Council building to qualify as a military objective, one would have to reach the conclusion that it was connected with the Hamas’ military efforts within the meaning of the two-pronged test provided for in Art. 52 para. 2 of Additional Protocol I and its customary law equivalent. That would be the case – apart from scenarios where enemy fighters or weapons were present within these compounds – provided military planning took place therein, or if part of the Hamas operational command and control facilities were located within such facilities.

In contrast, the mere fact that they were part of the Hamas propaganda machinery⁵³ or part of its political apparatus, not connected to military planning, nor forming part of its control and command installations, would not turn them into legitimate military targets, as such use would not have made an effective contribution to military actions, and neutralizing them accordingly would not constitute a military advantage either.

It would be otherwise if specific governmental installations had been connected to the Hamas military operations efforts, or, as Israel has put it,⁵⁴ constituted “active components of military efforts.” However, Israel has not laid out this claim in detail in its own submissions.

⁵² ICRC Customary Law Study, *supra* note 28, Rule 8. *Cf.*, also the commentary to the recently adopted HPCR Manual on International Law Applicable to Air and Missile Warfare, May 15, 2009, p. 88, available at: <http://www.ihlresearch.org/amw/manual/>.

⁵³ *Cf.*, the Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, para. 47, available at: <http://www.un.org/icty/pressreal/nato061300.htm> (accessed November 4, 2011). The report stated:

Whether the media constitutes a legitimate target group is a debatable issue. If the media is used to incite crimes, as in Rwanda, then it is a legitimate target. If it is merely disseminating propaganda to generate support for the war effort, it is not a legitimate target.

⁵⁴ *The operation in Gaza: Factual and legal aspects*, July 2009, published on the website of the Israeli Ministry of Foreign Affairs, available at: http://www.mfa.gov.il/MFA/Terrorism-+Obstacle+to+Peace/Terrorism+and+Islamic+Fundamentalism-/Operation_in_Gaza-Factual_and_Legal_Aspects.htm (accessed November 4, 2011), para. 235 (hereinafter referred to as “The operation in Gaza”).

3.2. Other civilian installations used for military purposes

It is generally accepted that, whenever a civilian object is being used for military purposes, such as for example for the storage of weapons or as a military planning site, as Israel claims has been frequently the case as far as Gaza is concerned,⁵⁵ it loses its civilian status *when and for such time* such misuse is actually taking place⁵⁶ and may then be subject of attack.⁵⁷

It should be noted, however, that such loss of civilian status is only a temporary one, *i.e.* an otherwise civilian building does not *permanently* lose its civilian status once used *e.g.* as a rocket launch site.⁵⁸ Accordingly, in order to find a violation of international humanitarian law in case of Israeli attacks on alleged civilian objects during Operation “Cast Lead”, one would have to clarify as to whether the object in question had indeed previously been used for military purposes, and whether such military use might have already been terminated well before the attack took place.

On the other hand, one has to acknowledge that Art. 52 para. 2 of Additional Protocol I not only refers to the use, but also to the “purpose” of such an object. It thereby hints at the possibility of a civilian object losing its protected status once it is being turned into an object to be used for military goals.⁵⁹ Yet, not every single, one-time military usage of a civilian object turns it into a military object by virtue of the “purpose” clause, since otherwise the limiting effect of the “in the circumstances ruling at time” clause would in turn become obsolete. Accordingly, the best way to reconcile the various parts of Art. 52 para. 2 is to require that there must be indications for an intention of the enemy to use a civilian object for military purposes *ad futurum* on a continuous basis in order for it not to regain its civilian status once the actual military use has come to an end.

⁵⁵ *Ibidem*, paras. 233-235.

⁵⁶ ICRC Customary Law Study, *supra* note 28, Rule 6.

⁵⁷ *Ibidem*. Cf., also, Article 8, para. 2 lit. (b)(ii), as well as Article 8, para. 2, lit. (b)(ix) and lit. (e)(iv) ICC Statute concerning specifically attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected.

⁵⁸ Henderson, *supra* note 46, p. 76 *et seq.*

⁵⁹ Cf., ICRC Commentary on the Additional Protocols, *supra* note 35, para. 2022, which notes that the criterion of “purpose” is concerned with the intended future use of an object while that of “use” is concerned with its present function. Most civilian objects can become useful objects to the armed forces. Thus, for example, a school or a hotel is a civilian object, but if they are used to accommodate troops or headquarters staff, they become military objectives. Cf., also, R. Geiß, *The Conduct of Hostilities in Asymmetric Conflicts – Reciprocity, Distinction, Proportionality, Precautions*, Humanitäres Völkerrecht 2010, p. 122 *et seq.*

In that regard, it is also relevant to note that not even the customary law study of the ICRC, which some States have furthermore argued is too liberal in determining the existence of rules of customary law,⁶⁰ claims that the presumption of civilian status contained in Article 52 para. 3 of Additional Protocol I forms part of customary law, as applicable in international armed conflict, and thus even less so in non-international armed conflicts.⁶¹

On the whole, the problems of finding a violation of the prohibition of attacks against civilian objects, once again, highlights the extreme relevance of a proper fact finding, which, however, given the prevailing circumstances in armed conflict generally, and the Gaza conflict in particular, is very complex, if not impossible.⁶²

4. ATTACKS ON PERSONS AFFILIATED WITH HAMAS

4.1. General considerations

The requirement to distinguish between civilians on the one hand (who may not, as a matter of principle, be attacked), and members of the armed forces underlies the whole fabric of international humanitarian law.⁶³ Both, in international as well as in non-international armed conflicts, civilians are negatively defined as being those persons that do not belong to the armed forces of a party to the conflict.⁶⁴

International humanitarian law contains an express definition of who are the members of the armed forces as far as international armed conflicts are concerned: all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates.⁶⁵ However, there is no generally accepted parallel definition as far as non-international armed conflicts are concerned.

Nonetheless, both common Art. 3 of Geneva I–IV, by referring to the armed forces of *both* sides of a non-international armed conflict (thus including the

⁶⁰ Cf., only, J. B. Bellinger III & W. J. Haynes II, *A US Government Response to the International Committee of the Red Cross Study Customary International Humanitarian Law*, 866 *International Review of Red Cross* 443 (2007).

⁶¹ ICRC Customary Law Study, *supra* note 28, p. 35 *et seq.*

⁶² Cf., only, D. Akande, *Clearing the Fog of War – the ICRC's Interpretive Guidance on Direct Participation in Hostilities*, 59 *International & Comparative Law Quarterly* 180 (2010).

⁶³ ICJ, *Nuclear Weapons advisory opinion*, *supra* note 38, para. 179.

⁶⁴ Dörmann, *supra* note 38, p. 45–74.

⁶⁵ ICRC Customary Law Study, *supra* note 28, Rule 3 and commentary at p. 12.

non-State side), as well as Additional Protocol II, by referring to “other organized armed groups”, presuppose that individuals can be “incorporated” into non-State armed groups. Given that such individuals are supposed to fulfill a continuous combat function equivalent to that of soldiers, as the ICRC has rightly put it in its work on direct participation in hostilities,⁶⁶ they then become legitimate targets of attacks simply by belonging to the armed group, even if they do not, at the time of the attack, directly participate in hostilities.⁶⁷

However, it is noteworthy that, like States, insurgent, secessionist or similar movements – and thus also Hamas – comprise, at least in most cases,⁶⁸ not only military formations, but also political segments, parts or wings. Members of the political sections, while supporting their respective “armed forces”, are neither necessarily trained for military operations, nor involved in such military operations. Conceptually, one has to therefore distinguish between the non-State party

⁶⁶ The ICRC’s Interpretive Guidance on the notion of direct participation in hostilities under international humanitarian law (2009), p. 33 (hereinafter “ICRC Interpretive Guidance”).

For a critical discussion of the ICRC’s Interpretive Guidance *cf.*, K. Watkin, *Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities” Interpretive Guidance*, 42 New York University Journal of International Law & Policy 641 (2010); M.N. Schmitt, *Deconstructing Direct Participation in Hostilities: The Constitutive Elements*, 42 New York University Journal of International Law & Policy 697 (2010); B. Boothby, *“And for Such Time As”: The Time Dimension to Direct Participation in Hostilities*, 42 New York University Journal of International Law & Policy 741 (2010); W. H. Parks, *Part IX of the ICRC “Direct Participation in Hostilities Study”: No Mandate, No Expertise, and Legally Incorrect*, 42 New York University Journal of International Law & Policy 769 (2010); but *cf.*, also, N. Melzer, *Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities*, 42 New York University Journal of International Law & Policy 831 (2010).

⁶⁷ ICRC Interpretive Guidance, *supra* note 66, Recommendation II and p. 23. Recommendation II entitled “The concept of civilian in non-international armed conflict” provides: For the purposes of the principle of distinction in non-international armed conflict, all persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. In non-international armed conflict, organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities (continuous combat function).

⁶⁸ C. Schaller, *Humanitäres Völkerrecht und nicht-staatliche Gewaltakteure*, available at: <http://www.swp-berlin.org/de/produkte/swp-studien-de/swp-studien-detail/article/humanitaeres-voelkerrecht-und-nichtstaatliche-gewaltakteure.html> (accessed November 4, 2011). *Cf.*, also, U. Schneckener, *Fragile Statehood, Armed Non-State Actors and Security Governance*, in: A. Bryden & M. Caparini (eds.), *Private Actors and Security Governance*, Lit Verlag, Berlin: 2006, p. 23 *et seq.*

to the conflict on the one hand generally, and its “armed forces” on the other. As a consequence, individuals who do not assume a continuous combat function within the organized armed group as such (including the respective military leadership) are therefore qualifying as civilians. Accordingly, they may only be subject to attack provided they directly participate in hostilities, even if they belong to the overall political structure of the non-State party to the conflict.⁶⁹

It has to be noted, however, that the inclusion into the armed forces of a non-State party to a conflict (unlike in the case of a State) does not require any formal act of recruitment or incorporation, nor do members of such organized armed groups regularly wear uniforms or other fixed distinctive emblems or signs, which, admittedly,⁷⁰ makes it extremely difficult to make a well-informed decision as to who belongs to such organized armed groups.⁷¹

4.2. Gaza police: part of Hamas’ “organized armed group”?

Applying these principles specifically to the Gaza conflict and the attacks on members of the Gaza police force, it seems to be misleading to apply, either *mutatis mutandis* or directly, as the Goldstone report does⁷², the mere formal incorporation test provided for in Art. 43 of Additional Protocol I⁷³ to the case at hand since this does not correspond to the realities on the ground.

Rather, one would have to determine whether at all, and if so to what extent, the Gaza police force as such, or larger numbers of its members, were *de facto* linked to the Hamas military wing or other armed groups by assuming a continuous combat function. The Goldstone report is thus correct to the extent that it states that the mere membership in Hamas (unlike *e.g.* membership in its Al-Qassam-Brigade or other organized armed factions of Hamas or related armed groups) did not automatically turn members of the Gaza police forces *per se* into members of the “organized armed forces” of the enemy, and thus did not terminate their civilian status either.

On the other hand, provided allegations made by Israel were true, that the Gaza police forces generally, and not only single policemen in their individual

⁶⁹ *But cf.*, K. Watkin, *supra* note 66, p. 641 *et seq.*, who favours a much broader approach on who might be legitimately targeted as far as persons belonging to the non-State side of an armed conflict are concerned.

⁷⁰ ICRC Interpretive Guidance, *supra* note 66, p. 33.

⁷¹ This is admitted by the ICRC in the Interpretive Guidance, *ibidem*, p. 33.

⁷² Goldstone report, *supra* note 1, paras. 34, 214.

⁷³ As example of a formal incorporation of police forces into national armed forces was the (former) German Federal Border Guard (Bundesgrenzschutz, now Bundespolizei/Federal Police) which until 1994 did *ipso facto* acquire combatant status once hostilities had started, *cf.*, Sect. 64 Bundesgrenzschutzgesetz as it stood until 1994, Bundesgesetzblatt 1974 I, p. 1834 *et seq.*

capacity, would have been incorporated into the Al-Quassam Brigades in the event of Israeli military operations taking place against Gaza,⁷⁴ the Gaza police force and its members *in toto* would have then constituted a legitimate military target. If this was not the case, however, they were not legitimate targets as such unless they were directly participating in hostilities, an issue that will now be addressed.

4.3. Civilians taking a direct part in hostilities

In the context of the Gaza conflict, and indeed in all forms of asymmetric warfare, one of the most complex issues related to such types of conflicts consists in determining under what circumstances a civilian is to be considered to directly participate in hostilities (thereby making him or her a legitimate military target). Besides, it is also crucial to determine whether such a civilian, once having directly participated in hostilities, loses his or her civilian status for good, or whether instead, he or she does so only for the time such direct participation is actually taking place⁷⁵ – issues that have also already previously and extensively been discussed.⁷⁶

Yet, the Goldstone report devotes surprisingly little space to the discussion as to whether individuals, not incorporated into non-State armed groups, continue to be legitimate targets of attacks once they have taken a direct part in hostilities. Rather, after having determined that the members of the local police force had not been, as such, incorporated into the “organized armed forces” of Hamas,⁷⁷ the report simply states that they could not be considered as civilians taking direct part in hostilities since they were, at the time of the attack, “engaged in civilian tasks inside civilian police facilities.”⁷⁸

The report thus seems to take it for granted that civilians, provided they take a direct part in hostilities, only *temporarily* lose their protection under international humanitarian law while doing so. It thereby claims that the relevant qualifying part of Art. 51 para. 3 of Additional Protocol I reflects, at least as of today and with regard to international armed conflicts, a norm of customary international law.

In contrast thereto, some academic commentators continue to deny, however, the customary law status of the “and for such time” clause *in toto*.⁷⁹ Yet, the Israeli

⁷⁴ The operation in Gaza, *supra* note 54, para. 243.

⁷⁵ *Cf.*, as to this issue on the one hand the ICRC’s Interpretive Guidance, *supra* note 66, p. 70 *et seq.* and, on the other, B. Boothby, *supra* note 66, pp. 741-769.

⁷⁶ For a detailed critique of various aspects of the ICRC Interpretive Guidance, *cf.*, K. Watkin, M. N. Schmitt et al., *supra* note 66.

⁷⁷ As to this issue *cf.*, above p. 8 *et seq.*

⁷⁸ Goldstone report, *supra* note 1, para. 435.

⁷⁹ *Cf.*, Y. Dinstein, *The ICRC Customary International Humanitarian Law Study*, 36 Israel Yearbook of Human Rights 1 (2006), p. 11.

government, contrary to its own pleadings before the Israeli Supreme Court in the Targeted Killings case, at least *no longer*, seems to share this position.⁸⁰ Rather, with regard to the conduct of hostilities during Operation “Cast Lead”, Israel argued along the lines of the judgment of the Israeli Supreme Court in the Targeted Killings case.⁸¹ In said case, the Court, as is well-known – after having determined that *all* parts of Article 51 para. 3 of Additional Protocol I (including the “for such time” clause) constituted an expression of customary international law (at least as far as international armed conflicts are concerned) – adopted a relatively broad concept of what constitutes direct participation in hostilities.

The Court claimed that not only persons performing the function of a “combatant”, such as persons operating weapons, or civilians bearing arms (openly or concealed) on their way to hostilities or on his or her return from the battlefield⁸² directly participate in hostilities, but also persons collecting intelligence, transporting combatant enemies to or from places where hostilities are taking place, and, finally, also persons supervising military operations or providing services to members of the organized armed forces.⁸³

In contrast thereto, the Court considered that individuals providing general strategic analysis, granting general logistical support or distributing propaganda for the insurgents do *not* qualify as persons directly participating in hostilities.⁸⁴

Applying this standard, as developed by the Israeli Supreme Court, to the case at hand, it is questionable whether members of the police force (assuming they had not been incorporated into Hamas armed forces or were to be so incorporated with the start of hostilities) could be considered to have directly participated in the hostilities given that the attack on the police headquarters and five police stations had taken place in the very first minutes of the aerial bombardments, *i.e.* even before there was any possibility for the members of the police to

⁸⁰ *But cf.*, the argument by the representatives of the State of Israel in the Targeted Killings case before the Israeli Supreme court, where the Israeli government in 2004 had still argued that “[r]egarding the period of time during which such harm [against civilians who have directly participated in hostilities] is permitted, there is no restriction (...)” and where therefore “according to the position of the State [of Israel], the non-customary part of article 51 para. 3 of the First Protocol is the part which determines that civilians do not enjoy protection from attack “*for such time*” as they are taking a direct part in hostilities” (*supra* note 26, para. 30).

⁸¹ The operation in Gaza, *supra* note 54, para. 98.

⁸² *Cf.*, Article 43 of Additional Protocol I.

⁸³ The operation in Gaza, *supra* note 54, para. 98. *Cf.*, also Israeli Supreme Court, *supra* note 26, paras. 35-36.

⁸⁴ Israeli Supreme Court, *supra* note 26, para. 35.

actually get involved in fighting or undertaking any of the combat-related activities considered by the Israeli Supreme Court to constitute direct participation in hostilities.⁸⁵

5. COLLATERAL DAMAGE

Especially in urban warfare taking place in densely populated areas, the prohibition on excessive damage to civilians and civilian objects is at the same time of particular relevance, and the most difficult to abide by.

5.1. Customary law prohibition to cause excessive civilian damage⁸⁶

The principle of proportionality, as a limit for military attacks, is enshrined, in particular, in Art. 51 para. 5 of Additional Protocol I, according to which any attack is prohibited “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”

While it is true that Israel itself is not a contracting party to Additional Protocol I, and therefore not bound by its Art 51 para. 5 as a matter of treaty law, it has to be noted that this rejection of the protocol is not due to the principle contained in Art. 51 para. 5 of the Protocol.⁸⁷ The general nature and applicability of the principle of proportionality in every kind of armed conflict, be they of an international or a non-international armed conflict, has also been confirmed by the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia,⁸⁸ as well as by relevant State practice.⁸⁹ These reasons led the International Committee of the Red Cross in its customary law study to the conclusion that the principle of proportionality indeed equally applies to both international and non-international armed conflicts.⁹⁰

⁸⁵ Evidently, at later stages of the conflict such a line of reasoning could no longer be applied.

⁸⁶ Cf., also, L. Vierucci, *Sul principio di proporzionalità a Gaza, ovvero quando il fine non giustifica i mezzi*, Diritti umani e diritto internazionale 2009, p. 319 *et seq.*

⁸⁷ As to the reasons why Israel has not become a contracting party of the Additional Protocol I cf., p. 24 *et seq.*

⁸⁸ International Criminal Tribunal for the Former Yugoslavia, IT-95-16-T, Judgment of 14 January 2000, *Prosecutor v. Zoran Kupreskic et al.*, paras. 521 *et seq.*

⁸⁹ For a survey of relevant State practice in that regard cf., ICRC Customary Law Study, *supra* note 28, p. 47.

⁹⁰ *Ibidem*, Rule 14; D. Casey, *Breaking the Chain of Violence in Israel and Palestine: Suicide Bombings and Targeted Killings Under International Humanitarian Law*, 32 Syracuse Journal of International Law 311 (2005), p. 319. Cf., also as to the position of the Israeli

It is true that, as far as the Rome Statute of the International Criminal Court is concerned, the crime of causing excessive collateral damage only applies in international armed conflicts.⁹¹ Yet, the Rome Statute is, at least in that regard, not fully in line with modern customary international law.⁹² Moreover said norm, as contained in the Rome Statute, solely covers the issue of individual criminal responsibility for the causation of excessive damage to civilians or civilian objects.⁹³ This, therefore, does not preclude that a more far-reaching prohibition does indeed exist under customary international law for purposes of State responsibility.⁹⁴ Accordingly, regardless of how one qualifies the Gaza war, as being international or non-international in character, the prohibition on causing excessive collateral damage did apply – as in fact acknowledged by Israel itself.⁹⁵

Supreme Court, *supra* note 26, para. 43, where the Court affirmatively referred to Art. 51 of Additional Protocol I, as being declaratory of customary international law.

⁹¹ *Cf.*, on the one hand Art. 8 para. 2 lit. (b)(iv) of the ICC Statute, and the lack of any parallel provision in Art. 8, para. 2, lit. (e) of the ICC Statute on the other; for the underlying reasons of this unfortunate *lacuna*, *cf.*, A. Zimmermann, *Preliminary Remarks on Para. 2(c) – (f) and Para. 3: War Crimes Committed in an Armed Conflict not of an International Character*, in: Triffterer (ed.), *supra* note 42, p. 263 *et seq.*

⁹² C. Kress, *War Crimes Committed in Non-international Armed Conflict and the Emerging System of International Criminal Justice*, 30 *Israel Yearbook of Human Rights* 103 (2000), p. 134.

⁹³ Art. 25 para. 4 of the ICC Statute. As to the interrelationship between the Rome Statute and general international law, as well as international humanitarian law *cf.*, A. Pellet, *Applicable Law*, in: A. Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. II, Oxford University Press, Oxford: 2002, pp. 1082-1084.

⁹⁴ For a similar proposition distinguishing attribution for purposes of State responsibility from involvement of a third State in a military conflict in order to internationalize the conflict *cf.*, the judgment of the ICJ in the Bosnian Genocide case, where the Court stated:

It should first be observed that logic does not require the same test to be adopted in resolving the two issues, which are very different in nature: the degree and nature of a State's involvement in an armed conflict on another State's territory which is required for the conflict to be characterized as international, can very well, and without logical inconsistency, differ from the degree and nature of involvement required to give rise to that State's responsibility for a specific act committed in the course of the conflict.

ICJ, *Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, judgement of 26 February 2007, p. 144, para. 405.

⁹⁵ The operation in Gaza, *supra* note 54, para. 120 *et seq.* *Cf.*, also the fact that the official manual on the laws of war of the Israeli Defence Forces provides that the commander shall not go ahead with an attack, if it is to be anticipated that the damage to the civilian population would be excessive as compared to the anticipated military advantage, ICRC Customary Law Study, *cf.*, *supra* note 28, p. 302.

5.2. Operation “Cast Lead” and possible violations of the principle of proportionality

The Goldstone report has alleged several violations of the prohibition on causing excessive collateral damage. For example, consider the Israeli shelling in al-Fakhura Street close to a United Nations Relief and Works Agency for Palestine Refugees in the Near East (“UNRWA”) school then used as a shelter, in regard of which the report concludes that Israel had caused excessive collateral damage.⁹⁶

In that regard, one wonders first whether it is indeed correct to state that, as the report claims, the “military advantage to be gained was to stop the alleged firing of mortars”⁹⁷ only. Rather, the neutralisation of enemy fighters, the number of which is however disputed between the parties, is also a relevant military advantage to be taken into account.

Moreover, one also wonders why it is considered pertinent to state that the Israel military action was taken “very near a shelter with 1,368 civilians”, if nobody within the UNRWA compound was wounded or killed. Besides, as to the most difficult question, both legally and morally, as to whether the killing of 35 innocent civilians amounts to excessive collateral damage when compared with the neutralization of at least five enemy fighters, one has to take into account the fact that the Israeli forces, when reaching the decision to launch the attack had themselves been under attack. Therefore, they might not have had sufficient information to anticipate such a degree of collateral damage so as to oblige them not to launch the attack, even if one were to consider such damage to be excessive in nature.⁹⁸

Finally, and with regard to the related obligation to take any feasible precautions in the choice of means and methods of attack with a view to minimize, as much as possible, collateral damage, it seems to be far-reaching to at least imply that Israel ought to have used weapon systems such as helicopters or fighter jets other than the mortar systems actually used⁹⁹ since no information is provided in the report as to whether such alternatives were available, and what the impact on civilians of such alternative weapons would have been.

⁹⁶ Goldstone Report, *supra* note 1, para. 694 *et seq.*

⁹⁷ *Ibidem.*

⁹⁸ It has to be noted, however, that future eventual risks emanating from a combatant enemy (such as the risk that he or she will eventually kill or neutralize a large number of members of one’s own troops) cannot be taken into account when considering the proportionality of an attack against such enemy, given that only concrete (and not mere hypothetical) military advantages are to be taken into account when determining the proportionality of an attack.

⁹⁹ Goldstone report, *supra* note 1, para. 696.

6. ALLEGED USES OF HUMAN SHIELDS BY ISRAEL

One of the most serious violations of international humanitarian law Israel¹⁰⁰ has allegedly committed relates to the use of human shields.¹⁰¹ Yet, while the facts are again highly disputed, it must be noted that Israel claims that no incidences of using civilians as human shields have taken place.¹⁰²

On the other hand, and as far as applicable rules of international humanitarian law are concerned, it must be noted that Art. 28 of Geneva IV unequivocally provides that the “presence of a protected person may not be used to render certain points or areas immune from military operations”¹⁰³ which includes the usage of civilians to protect members of one’s own military against attack.¹⁰⁴ In a 2005 case, the Israeli Supreme Court has confirmed this, when considering the practice of the Israeli Armed Forces of so-called “early warnings” involving the use of Palestinians *volunteering* to request persons searched for to surrender to Israeli forces. In particular, the Israeli government had confirmed during these proceedings that it considers it to be strictly forbidden to use locals as live shields against attacks,¹⁰⁵ to use them as hostages, or, finally, make them locate explosives,

¹⁰⁰ With regard to human shields, a controversy has arisen as to the question whether, and if so under which circumstances, a person who acts as a human shield may lose his or her protection from direct attack, in other words under which circumstances the practice of shielding a military objective would amount to a direct participation in hostilities. *De facto*, however, a distinction on the basis of whether a person acts freely when shielding a given military objective, or whether the person has been coerced to do so, can hardly ever be made *bona fide* under battlefield conditions. The ICRC therefore suggests to distinguish whether a human shield amounts to a physical obstacle, for example in the context of ground operations where a person shielding a given objective may physically hamper military operations, or whether instead a human shield only amounts to a legal obstacle, for example in the context of aerial operations where the presence of human shields does not physically impede the bombardment of a military object. In the latter case the ICRC suggests that the activity of shielding would not amount to a direct participation in hostilities, given that the relevant threshold of harm is not reached. *cf.*, ICRC Interpretive Guidance, *supra* note 66, p. 56 *et seq.*

¹⁰¹ Goldstone report, *supra* note 1, para. 55.

¹⁰² *Cf.*, *ibidem*, para. 1085; but *cf.*, also the fact that in the meantime several investigation had been started by the Israeli military justice system, Report of the Committee of independent experts in international humanitarian and human rights law established pursuant to Council resolution 13/9, A/HRC/16/24, 18 March 2011, paras. 30-32; in one case two Israeli soldiers who had forced a boy to search bags suspected of being body trapped were demoted and received sentences of three months each, *ibidem*, para. 30.

¹⁰³ Pictet correctly noted that the use of people as a “human shield” is a “cruel and barbaric” act; *cf.*, J. Pictet, *Commentary IV Geneva Convention*, ICRC Geneva: 1958, p. 208; *cf.*, also the ICRC Customary Law Study, *supra* note 28, Rule 97.

¹⁰⁴ Pictet, *supra* note 103.

¹⁰⁵ Quoted in Goldstone report, *supra* note 1, para. 1095.

gather intelligence or have them march ahead of Israeli forces.¹⁰⁶ Indeed, the Israeli Supreme Court had even considered, and rightly so, the use of volunteers in order to inform individuals present at a given location about a request to surrender, to be illegal under international humanitarian law.¹⁰⁷

7. USE OF CERTAIN WEAPONS: THE CASE OF WHITE PHOSPHOROUS

Finally, the Goldstone report raises concerns about the use of three types of weapons, namely white phosphorous,¹⁰⁸ so-called flechettes¹⁰⁹, and, finally, so-called DIME (dense inert metal explosive) ammunition,¹¹⁰ the first type of which will now be considered.

With regard to the use of white phosphorous, one has to first note that, as Israel has rightly noted,¹¹¹ there does not exist a general ban on incendiary weapons generally, or white phosphorous specifically. Even Protocol III to the United Nations Conventional Weapons Convention (“CCW”) on Prohibitions or Restrictions on the Use of Incendiary Weapons (“Incendiary Weapons Protocol”) of which, in any case, Israel is not a party, and which, besides, by virtue of Art. 1 CCW only applies in international armed conflicts, does not contain such a general prohibition. Moreover, one has to distinguish between exploding munitions containing white phosphorous on the one hand, and projectiles used to develop smoke for camouflage purposes on the other, since even under the Incendiary Weapons Protocol, the latter type of weapons is not considered incendiary weapons.¹¹²

In fact, Israel employed the latter usage during the conflict causing incidental harm to civilians.¹¹³ This raises the question whether such practice is subject to

¹⁰⁶ *Ibid. cf.*, Article 51 para. 7 of Additional Protocol I. *Cf.*, also Israeli Supreme Court, *supra* note 26, paras. 21 and 22. HCJ 3799/02 1. *Adalah – The Legal Center for Arab Minority Rights in Israel* 2. *The Association for Civil Rights in Israel* 3. *Kanon – The Palestinian Organization for the Protection of Human and Environmental Rights* 4. *Physicians for Human Rights* 5. *B’tselem – The Israeli Information Center for Human Rights in the Occupied Territories* 6. *The Public Committee Against Torture in Israel* 7. *Center for the Defense of the Individual v. 1. GOC Central Command, IDF* 2. *Chief of the General Staff, IDF* 3. *The Minister of Defense* 4. *The Prime Minister of Israel*, The Supreme Court Sitting as the High Court of Justice [June 23, 2005].

¹⁰⁷ Israeli Supreme Court, *supra* note 26, para. 25.

¹⁰⁸ Goldstone report, *supra* note 1, para. 887-901.

¹⁰⁹ *Ibidem*, paras. 902-905.

¹¹⁰ *Ibidem*, paras. 906-908.

¹¹¹ The operation in Gaza, *supra* note 55, para. 407.

¹¹² Art. 1 para. 1 lit. (b)(i) Incendiary Weapons Protocol.

¹¹³ Goldstone report, *supra* note 1, paras. 883-895.

the generally accepted obligation not to cause excessive collateral damage, nor to use weapons which are indiscriminate.¹¹⁴ Israel claims that, given that in such circumstances it did not use white phosphorous for targeting purposes, white phosphorous cannot be classified as an indiscriminate weapon since otherwise "any smoke-screening means would be prohibited" which, in its view, would stand in sharp contrast to established State practice.¹¹⁵

Without explicitly saying so, Israel thereby puts forward the argument that under Additional Protocol I (and a parallel norm of customary law applicable in both international and non-international armed conflicts) only indiscriminate attacks, *i.e.* "means of violence against the adversary" are prohibited, while white phosphorous, when used for smoke screens, is not directed against enemy forces but instead used for protective purposes only.¹¹⁶ It has to be noted, however, that such argument disregards the very object and purpose of the relevant norms, *i.e.* disregards that Arts. 48 *et seq.* aim at the protection of the civilian population, which object would be undermined by a narrow, purely textual interpretation. Besides, Art. 49 para. 2 of Additional Protocol I confirms that Arts. 48 *et seq.* were meant to have a broad scope of application. Finally, even the wording of Art. 49 para. 1 confirms that the use of weapons in order to protect one's own troops, such as their camouflage, is subject to the limits of *inter alia* Arts. 51 *et seq.* of Additional Protocol I, since the term "adversary", as used in Art. 49 para. 1, includes civilians belonging to the adverse party. Accordingly, acts of violence inflicting damage on such civilians, even when not targeting combatant enemies, do amount to an "attack".

It follows that, in order to evaluate the legality of the use of white phosphorous during the Gaza war, one would have to carefully evaluate the collateral damage to civilians caused by such use, which question, however, is once again mainly a factual one. In any case, and regardless of how one perceives the legal regime governing the use of white phosphorous, one wonders whether it was appropriate, and indeed within the mandate of the Goldstone commission, to take a position as to a possible ban *de lege ferenda* of the use of this kind of weapon in urban warfare.¹¹⁷

¹¹⁴ ICRC Customary Law Study, *supra* note 28, Rule 71.

¹¹⁵ The operation in Gaza, *supra* note 54, para. 416.

¹¹⁶ *Ibidem*, para. 406 *et seq.*

¹¹⁷ *But cf.*, for such a proposition Goldstone report, *supra* note 1, para. 897, as well as the most recent recommendation by the Human Rights Council that the General Assembly considers launching "an urgent discussion on the legality of the use of certain munitions (...) as recommended by the United Nations Fact-Finding Mission on the Gaza Conflict", Un Doc. A/HRC/16/L. 31, para. 9.

8. ENFORCING INTERNATIONAL HUMANITARIAN LAW

8.1. Invoking the (possible) State responsibility of Israel

Traditionally, violations of international law including, obviously, violations of international humanitarian law, are remedied by invoking applicable norms of State responsibility. In the case at hand, one has to therefore consider who may invoke the responsibility of Israel, assuming that violations of international humanitarian law, attributable to Israel, have indeed occurred given that, due to the asymmetric character of the conflict, there is no injured State which might invoke such responsibility.

a) “Palestine” as injured entity

It has to be noted at the outset that not only States, but also other non-State subjects of international law may invoke the responsibility of a State, a principle acknowledged already by the International Court of Justice in its advisory opinion on *Reparation for Injuries Suffered in the Service of the United Nations*,¹¹⁸ and extended to all international organizations in the ILC’s draft articles on the responsibility of international organizations,¹¹⁹ but also applying to other subjects of international law such as the PLO, at least *vis-à-vis* those States (including Israel) that have recognized it.¹²⁰

It should be also noted, however, that Hamas – the so-called “*de facto* authorities in Gaza” – have not yet been able to gain any form of status under international law.¹²¹ Rather, Gaza continues to form part of the territory of “Palestine” (whatever its exact scope might be with respect to territory and population) being represented internationally by the Palestinian Authority.

The criteria for defining when an entity such as “Palestine” is injured by an internationally wrongful act of a State do not appear to depend on the nature of that entity.¹²² Hence, Palestine could invoke the responsibility of Israel provided the obligations that were breached (to the extent there were such breaches) were

¹¹⁸ ICJ Reports 1949, p. 174, pp. 184-185.

¹¹⁹ Cf., G. Gaja, *Sixth Report on the Responsibility of International Organizations*, A/CN.4/597 (60th session, 2008), para. 8.

¹²⁰ Such recognition is contained in a letter dated September 9, 1993 from Yitzhak Rabin, then Prime Minister of Israel to Yasser Arafat, then chairman of the PLO stating, *inter alia*, that the Government of Israel has decided to recognize the PLO as the representative of the Palestinian people.

¹²¹ Cf., only, Y. Ronen, *ICC Jurisdiction over Acts Committed in the Gaza Strip: Art. 12 Para. 3 of the ICC Statute and Non-State Entities*, 7(1) Journal of International Criminal Justice 3 (2010).

¹²² Cf., *mutatis mutandis*, Gaja, *supra* note 119, para. 9.

owed to Palestine. Given the fact that the alleged violations occurred on territory forming part of “Palestine” (its continued lack of statehood notwithstanding), and that the alleged victims belong to the people which is generally acknowledged to be represented by the PLO, there seems to be no doubt that “Palestine” may invoke the responsibility of Israel in that regard even if, to state the obvious, it may lack, legally or otherwise, the means to enforce a possible State responsibility of Israel.

b) Invocation of Israel’s State responsibility by third parties

According to the holding of the International Court of Justice in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,¹²³ “a great many rules of humanitarian law applicable in armed conflict are (...) fundamental to the respect of the human person and elementary considerations of humanity (...)” and for this reason incorporate obligations possessing an *erga omnes* character.¹²⁴ Given the overall structure of the Geneva Conventions and the system of grave breaches protecting, in particular, the rights of protected persons, it seems to be safe to assume that the grave breaches provisions and analogous prohibitions applicable in non-international armed conflicts belong to this category and are thus to be considered to reflect obligations *erga omnes*. It follows that even third States may invoke the responsibility of Israel for such violations of international humanitarian law during Operation “Cast Lead”, provided they did take place.

On the other hand, and as confirmed by the International Court of Justice in its Wall opinion, common Article 1 of the four Geneva Conventions obliges all State parties, including third States, not parties to the conflict, to ensure that the requirements of the instruments in question are complied with. Yet, given the treaty-specific nature of common Art. 1 of Geneva I–IV, possible violations of customary law do not give rise to such obligation. Accordingly, given the non-international character of the conflict, only violations of common Art. 3 could be invoked by third parties.

8.2. Private claims

Apart from inter-State or quasi (Palestinian-Israeli) inter-State claims one might also wonder whether private individuals, claiming to be victims of violations of international humanitarian law, may claim compensation.

¹²³ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *supra* note 11, p. xxx *et seq.*

¹²⁴ *Ibidem*, para. 157.

Even leaving aside questions of State immunity,¹²⁵ it seems to be safe, given abundant State practice to assume that, still as of today, victims of violations of international humanitarian law do not have an individual right arising under international law to claim compensation *vis-à-vis* the State allegedly having violated international humanitarian law.¹²⁶ Even the *Advisory Opinion of the International Court of Justice in the Wall* case does not necessarily lead to this conclusion, even if the relevant passage is not free from ambiguities.¹²⁷

More specifically with regard to Israel, Israeli law explicitly provides that “[t]he State [of Israel] is not civilly liable for an act done *in the course of a war operation* of the Israel Defense Forces,”¹²⁸ while the Israeli Supreme Court has confirmed that “the ordinary law of torts was not designed to contend with tortuous acts that are caused during the combatant activities of the security forces outside Israel in an armed conflict” since moreover the “ordinary law of torts is not suited to addressing liability for tortuous acts in the course of combat.”¹²⁹

Given this situation, it is surprising that the committee of independent experts set up by the Human Rights Council to monitor and assess domestic proceedings by both the Israeli and the Palestinian side subsequent to the Goldstone report¹³⁰

¹²⁵ See, judgment of the International Court of Justice in the *Case concerning Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment of 3 February 2012, available at: <http://www.icj-cij.org/docket/files/143/16883.pdf>

¹²⁶ For a detailed analysis *cf.*, the brief submitted by the German government to the German Constitutional Court in the Varvarin case concerning the 1999 NATO Kosovo campaign, A. Zimmermann, *Verfassungsbeschwerdeverfahren- 2 BvR 2660/06 und 2 BvR 487/07- Stellungnahme der Bundesregierung*, available at: http://www.nato-tribunal.de/varvarin/Stellungnahme_d_Bundesregierung_nebst_Anlagen.pdf (accessed 4 November 2011), *passim*, in particular p. 34 *et seq.*

¹²⁷ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, *supra* note 11, para. 153.

¹²⁸ Israeli Civil Wrongs (Liability of State) Law 5712-1952.

¹²⁹ *Adalah et al. v. Minister of Defense / State of Israel et al.* (HCJ 8276/05; HCJ 8338/05 und HCJ 11426/05); Israel Law Reports [2006] (2) IsrL Rev, p. 352 *et seq.* (380 (para. 33) and 381 (para. 35); also available at http://elyon1.court.gov.il/files_eng/05/760/082/a13/05082760.a13.pdf.

¹³⁰ In Resolution A/HRC/RES/13/9 of 14 April 2010 the Human Rights Council decided:

(...), in the context of the follow-up to the report of the Independent International Fact-Finding Mission, to establish a committee of independent experts in international humanitarian and human rights laws to monitor and assess any domestic, legal or other proceedings undertaken by both the Government of Israel and the Palestinian side, in the light of General Assembly resolution 64/254, including the independence, effectiveness, genuineness of these investigations and their conformity with international standards.

(“Tomuschat Committee”),¹³¹ seems to have taken the (at least implied) position – albeit only *en passant* and by way of an *obiter dictum* – that such a remedy does indeed exist. The Committee criticized Israel for not processing civil claims in an effective and transparent way,¹³² which is only relevant if the underlying individual right to receive compensation is provided under international law.

Admitting individual claims for compensation would also lead to yet another asymmetry in armed conflicts involving non-State actors as one of the parties to the conflict: victims of violations of international humanitarian law *committed by a State* would not only have a forum to bring a claim, but could also rely on the fact that a State is responsible for any act of its organs which are *ipso facto* attributable to said State. In contrast, victims of violations of international humanitarian law committed by non-State groups in turn would not only lack a forum where they could bring their case, but would also be in a significantly more difficult position to prove the attributability of any such violations.

8.3. Investigations by the International Criminal Court

Yet another possibility to enforce international humanitarian law lies in criminal prosecutions of alleged war crimes,¹³³ if there were such, to be eventually undertaken by the International Criminal Court. Given the fact that Israel is not a contracting party of the Rome Statute¹³⁴ and since it is, to say the least, unlikely that the Security Council will ever refer the situation to the International Criminal Court,¹³⁵ not the least given the position of the United States on the

ibidem, para. 9. The Committee, which was chaired by Christian Tomuschat, is colloquially referred to as the “Tomuschat Committee” or the “Goldstone Follow-up Committee”.

¹³¹ On its work *cf.*, C. Tomuschat, *Ein “Follow-up” zum Goldstone-Bericht*, Vereinte Nationen 2010, p. 249 *et seq.*

¹³² *Ibidem*, para. 58.

¹³³ *Cf.*, generally, E. Lambert, *Droit international pénal: le rapport Goldstone sur les crimes commis à Gaza et ses suites*, Revue de science criminelle 263 (2010).

¹³⁴ Israel had signed the Rome Statute on December 31, 2000, but, following the example of the United States (for further details on the US position *vis-à-vis* the ICC *cf.*, A. Zimmermann & H. Scheel, *USA und Internationaler Strafgerichtshof: Konfrontation statt friedlicher Koexistenz?*, Vereinte Nationen 2002, p. 137 *et seq.*), later informed the depositary of its intention not to become a party, thereby excluding the effect of Art. 18, lit. a) Vienna Convention on the Law of Treaties.

¹³⁵ But *cf.*, for such proposition Goldstone report, *supra* note 1, para. 1766, as well as the recent resolution by the Human Rights Council of 25 March 2011, A/HRC/16/L.31, para. 10:

(...) urges the [General] Assembly to submit that report to the Security Council for its consideration and appropriate action, including consideration of referral of the situation in the Occupied Palestinian Territory to the prosecutor of the International Criminal Court, pursuant to article 13 (b) of the Rome Statute.

matter,¹³⁶ the only possible avenue is to consider the referral made by “Palestine” in January 2009 (*sic!*) under Art. 12 para. 3 of the Rome Statute to be an effective one.¹³⁷

While a full discussion of the question would be beyond the scope of this article, it should be noted that Art. 12 para. 3 of the Rome Statute was meant to serve as an *aliud* for a full-fledged ratification of the Rome Statute by a State. This is confirmed by the very wording of the provision which refers to “a State *which is not a Party to this Statute*”,¹³⁸ i.e. implies that the entity concerned could (if it wanted) become a contracting party, which possibility in turn again only exists for States, but not for non-State entities. It follows that a functional approach to the question of statehood when it comes to Art. 12 para. 3 of the Rome Statute including “quasi-State entities” exercising a limited degree of territorial and personal jurisdiction only, as contemplated by some authors,¹³⁹ was not meant to be covered by Art. 12 para. 3 of the Rome Statute. Accordingly, only States *stricto sensu* may submit declarations under Art. 12 para. 3. Yet, at least at the current juncture, Palestine is, as recently confirmed by the decision of the Office of the Prosecutor of the ICC to not open investigations subsequent to the Palestine declaration

Cf., generally on the problems involved in Security Council referrals under Art. 13 lit. b) of the Rome Statute A. Zimmermann, *Two Steps Forward, One Step Backwards? – Security Resolution 1593 (2005) and the Council’s Power to Refer Situations to the International Criminal Court*, in: P.-M. Dupuy *et al.* (eds.), *Festschrift für Christian Tomuschat*, N.P. Engel, Kehl: 2006, p. 681 *et seq.*

¹³⁶ *Cf.*, US Statement: Report of the United Nations Fact-Finding Mission on the Gaza Conflict resolution, Human Rights Council 16th Session, Geneva, March 25, 2011, stating that

(...) [w]ith respect to the present resolution, we object, in particular, to the following elements: (...) the resolution’s recommendation for the UN General Assembly to suggest to the UN Security Council that it consider referring the situation to the ICC Prosecutor. Further UN consideration of this matter is not productive.

available at <http://geneva.usmission.gov/2011/03/25/gaza-conflict-resolution/> (accessed 4 November 2011).

¹³⁷ For the text of the declaration *cf.* <http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf> (accessed November 4, 2011).

As to its possible legal effects, if ever, *cf.*, on the one hand Y. Ronen, *ICC Jurisdiction over Acts Committed in the Gaza Strip – Article 12 para. 3 of the ICC Statute and Non-State Entities*, 8(1) *Journal of International Criminal Justice* 3 (2010), and, on the other, A. Pellet, *The Palestinian Declaration and the Jurisdiction of the International Criminal Court*, 8(4) *Journal of International Criminal Justice* 981 (2010).

¹³⁸ Emphasis added.

¹³⁹ Pellet, *supra* note 138, *passim*.

purportedly made under Art. 12 para. 3 of the Rome Statute,¹⁴⁰ not yet generally recognized by the international community as a State, as may be discerned from its still pending request for membership in the United Nations.

Finally, it must also be noted that during the Kampala review conference, which took place *after* the Palestinian declaration under Art. 12 para. 3 had been lodged, “Palestine” did *not* participate as an observer *State* under Rule 71 of the Rules of Procedure of the Conference, but rather as a mere observer under Rule 69 of its Rules of Procedure, which has to be taken as evidence of agreed subsequent State practice within the meaning of Art. 31 para. 3 of the Vienna Convention on the Law of Treaties as to the status of Palestine with regard to the Rome Statute.

CONCLUSION

Asymmetric warfare, in particular when taking place in densely populated urban areas, poses significant challenges for armed forces aiming at upholding applicable rules of international humanitarian law. This is particularly true where, like in the case at hand, the non-State armed group is trying to take advantage of international humanitarian law so as to protect its own fighters from attack by placing them in civilian locations or protected sites, dressing in civilian clothes or making improper use of the emblems of the Geneva Conventions. Paraphrasing the Israeli Supreme Court one might say that, although a State abiding by international humanitarian law must often fight with one hand tied behind its back, preserving international humanitarian law and recognizing the obligation to protect civilians must constitute an important component in its understanding of military security.¹⁴¹

Finally, while this article has concentrated, given the background and main focus of the Goldstone report, on alleged violations of international humanitarian law by the *State* involved in the conflict, *i.e.* Israel, it is a truism that international humanitarian law applies no less to non-State actors such as Hamas. Indeed, ensuring that such non-State actors respect these principles constitutes probably the more demanding challenge by far, given the extent of violations of international humanitarian law committed by this and other non-State actors.

¹⁴⁰ See, Office of the Prosecutor, ‘Situation in Palestine’, dated April 3, 2012, available at: <http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf>

¹⁴¹ Cf., *mutatis mutandis*, Israeli Supreme Court H.C. 5100/94, 4054/95, 6536/95, 5188/96, 7563/97, 7628/97 and 1043/99, *Public Committee Against Torture in Israel et al. v. The State of Israel et al.*, para. 39.

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THE COURT OF JUSTICE OF THE EUROPEAN UNION AND THE PROTECTION OF FUNDAMENTAL RIGHTS

Abstract

The present contribution looks at the protection of fundamental rights under EU law, paying special attention to the Charter of Fundamental Rights of the European Union (the Charter) which, since the entry into force of the Treaty of Lisbon, enjoys “the same legal value as the Treaties”. First, by looking at the recent case law of the European Court of Justice, it explores the scope of application of the Charter. Second, it examines the conditions that the limitations on the exercise of the rights and freedoms recognised by the Charter must fulfil in order to be valid. Third, it looks at the interaction between, on the one hand, the Charter and the European Convention for the Protection of Human Rights and Fundamental Freedoms and between, on the other hand, the Charter and the constitutional traditions common to the Member States. Finally, a brief conclusion contains some remarks as to the requirements private applicants must fulfil in order to build strategic human rights cases successfully.

INTRODUCTION

In accordance with Article 19 of the Treaty on European Union (the TEU), the Court of Justice of the European Union (the CJEU) – which includes the European Court of Justice (the ECJ), the European General Court (the EGC) and specialised courts (the Civil Service Tribunal) – “shall ensure that in the interpretation and application of the Treaties the law is observed.” Stated simply, the authors of the Treaties entrusted the CJEU with the task of upholding the rule of law.

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As the most important part of that task, the CJEU must ensure that EU law is interpreted and applied in compliance with fundamental rights. In so doing, the CJEU is bound by three different, albeit complementary, normative sources, namely the Charter of Fundamental Rights of the European Union (the Charter),¹ the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR)² and the constitutional traditions common to the Member States. In contrast to the latter two which still operate as a source of inspiration in the interpretation and discovery of general principles of EU law,³ the Charter enjoys, since the entry into force of the Treaty of Lisbon,⁴ “the same legal value as the Treaties,” i.e. it is primary EU law.⁵ Accordingly, in the EU legal order, the protection of fundamental rights is governed by a two-tiered system: the provisions of the Charter and the general principles of EU law.

Moreover, in light of Article 6(1) TEU, the protection of fundamental rights shall not extend in any way the competences of the Union as defined in the Treaties. A similar statement is also reproduced in Article 51(2) of the Charter.⁶ As the EU is bound by the principle of conferral (or enumerated powers),⁷ it follows that there must be “a link” between the violation of the fundamental right at issue and the EU legal order. That constitutional requirement is precisely what distinguishes the protection of fundamental rights under EU law from that under the ECHR or under the national constitutions of the Member States. It is only where such violations fall within the scope of EU law that private individuals may have recourse to the judicial protection afforded to them by the Treaties.

The purpose of this article is threefold. First, by looking at the recent case law of the ECJ, I would like to explore the scope of application of the Charter. Second, I shall examine the conditions that the limitations on the exercise of the rights and freedoms recognised by the Charter must fulfil in order to be valid. Last, but not least, I would like to make some brief comments on the interaction between,

¹ See, [2010] OJ C 83/02.

² It is worth noting that prior to the entry into force of the Treaty of Lisbon, the EU lacked the legal basis to accede to the ECHR. See, Opinion of the ECJ 2/94 [1996] ECR I-1759. However, this is no longer the case as such legal basis is set out in Article 6(2) TEU.

³ See, Article 6(3) TEU.

⁴ The Treaty of Lisbon entered into force on 1 December 2009.

⁵ See, Article 6(1) TEU.

⁶ Article 51(2) of the Charter reads as follows: “[t]he Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.”

⁷ See, Article 5(2) TEU.

on the one hand, the Charter and the ECHR and between, on the other hand, the Charter and the constitutional traditions common to the Member States.

1. THE SCOPE OF APPLICATION OF THE CHARTER

Since from now on the Charter is primary EU law, it fulfils a triple function.⁸ First, just as general principles of EU law, the Charter serves as an aid to interpretation, since both EU secondary law and national law falling within the scope of EU law must be interpreted in light of the Charter. Second, just as general principles, the Charter may also be relied upon as providing grounds for judicial review. EU legislation found to be in breach of an article of the Charter is to be held void and national law falling within the scope of EU law that contravenes the Charter must be set aside. Finally, it continues to operate as a source of authority for the “discovery” of general principles of EU law.⁹

However, from the fact that the Charter is now legally binding it does not follow that the EU has become a “human rights organisation”¹⁰ or that the ECJ has become “a second European Court on Human Rights” (the ECtHR). To this effect, the second paragraph of Article 6(1) TEU stresses that “[t]he provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.” A similar statement is also reproduced in Article 51(2) of the Charter.¹¹ It requires that, in interpreting and applying the Charter, the ECJ respects the principle of conferral as set out in Article 5(2) TEU.

The scope of application of the Charter is therefore the keystone which guarantees that the principle of conferral is complied with. To this effect, Article 51(1) of the Charter states that “the provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing

⁸ K. Lenaerts, J. A. Gutiérrez-Fons, *The Constitutional Allocation of Powers and General Principles of EU Law*, 47 *Common Market Law Review* 1629 (2010), pp. 1656 *et seq.*

⁹ After the entry into force of the Treaty of Lisbon, *see* Case C-403/09 PPU *Detiček* [2009] ECR I-12193, para. 53 (where the Charter was relied upon as an aid to interpretation of Regulation Brussels II bis, [2003] OJ L 338/1). *See also*, Case C-555/07, *Kücükdeveci*, judgment of 19 January 2010, not yet reported, para. 22.

¹⁰ T. Tridimas, *The General Principles of EU Law*, 2nd ed., Oxford University Press, Oxford: 2006, p. 613.

¹¹ Article 51(2) of the Charter reads as follows: “[t]he Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.”

Union law.”¹² While in relation to the EU institutions, bodies, offices and agencies, Article 51(1) focuses on guaranteeing compliance with the principle of subsidiarity, this Article makes the Charter applicable to the Member States “only when they are implementing Union law.”¹³ But what does “implementing Union law” mean?

In accordance with Article 6(1) TEU, “[t]he rights, freedoms and principles in the Charter shall be interpreted [...] with due regard to the explanations [relating to it].”¹⁴ In the same way, Article 52(7) of the Charter states that “[those] explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States”. As explained below, the ECJ may not interpret the Charter in a way that conflicts with the explanations relating to it. In this regard, in order to clarify the exact meaning of the terms “implementing Union law” one must look at the explanations relating to Article 51 of the Charter, which read as follows:

As regards the Member States, it follows unambiguously from the case-law of the [ECJ] that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act in the scope of [EU] law.

Next, the explanations relating to Article 51 of the Charter cite *Wachauf*, *ERT* and *Annibaldi*.¹⁵ They also quote a passage from paragraph 37 of *Karlsson*,¹⁶

¹² Note that Article 51(1) of the Charter does not refer to private parties. Thus, one could argue that, unlike general principles of EU law (see, Case C-555/07, *Küçükdeveci*, *supra* note 9), the provisions of the Charter do not apply in a private dispute. In this vein, see, J. Kokott, Ch. Sobotta, *The Charter of Fundamental Rights of the European Union after Lisbon*, EUI Working Papers, No. 2010/06, available at: <http://cadmus.eui.eu/handle/1814/15208>, p. 14 (opining that “Article 51 of the Charter [...] does not provide for a direct effect of the prohibition of age discrimination on private parties. Article 51 only refers to institutions, bodies, offices and agencies of the Union and Member States implementing Union law, but not to private parties. Moreover, the Charter repeatedly emphasizes the limits of the Union’s competencies [...]. Accordingly, the Charter should not be seen as a reason to extend the Union’s competencies”).

¹³ In German, “ausschließlich bei der Durchführung des Rechts der Union.” In French, “aux États membres uniquement lorsqu’ils mettent en oeuvre le droit de l’Union.” In Dutch, “uitsluitend wanneer zij het recht van de Unie ten uitvoer brengen.” In Spanish, “a los Estados miembros únicamente cuando apliquen el Derecho de la Unión.” In Italian, “agli Stati membri esclusivamente nell’attuazione del diritto dell’Unione.”

¹⁴ See, the explanations relating to the Charter of Fundamental Rights, [2007] OJ C 303/17 (“the explanations relating to the Charter”).

¹⁵ Case 5/88 *Wachauf* [1989] ECR 2609; Case C-260/89 *ERT* [1991] ECR I-2925, and Case C-309/96 *Annibaldi* [1997] ECR I-7493.

¹⁶ Case C-292/97 *Karlsson* [2000] ECR I-2737, para. 37.

which reads as follows: “[i]n addition, it should be remembered that the requirements flowing from the protection of fundamental rights in the [EU] legal order are also binding on Member States when they implement [EU] rules ...”

Finally, the explanations stress that the terms “Member States” contained in Article 51(1) of the Charter should be interpreted broadly so as to include not only the central authority, but also regional bodies, local bodies, and public organisations when they are “implementing Union law.”

In light of the explanations relating to Article 51(1) of the Charter, it appears that the expression “only when [Member States] are implementing Union law” should thus cover all situations where Member States fulfil their obligations under the Treaties as well as under secondary EU law (adopted pursuant to the Treaties), i.e. the Charter applies whenever Member States fulfil an obligation imposed by EU law.

In light of the case law of the ECJ, one may distinguish two different types of obligations that EU law imposes on the Member States, namely (1) EU obligations that require a Member State to take action (as the situations in *Wachauf* and *Karlsson* show) and (2) EU obligations that must be complied with when a Member State derogates from EU law (as the situation in *ERT* reveals). Conversely, where EU law imposes no obligation on the Member States, the Charter simply does not apply (as the example of *Annibaldi* demonstrates).

1.1. *Wachauf* as a token of positive action on the part of the Member States

As is well-known, in *Wachauf* – to which the explanations relating to Article 51(1) of the Charter refer – the ECJ held that fundamental rights, understood as general principles of EU law, were binding upon the Member States when they applied EU (then Community) rules on the common organisation of the milk market as provided for by Regulation No 1371/84.¹⁷ For the case at hand this meant that national authorities had to apply EU (then Community) rules governing the transfer of milk quotas which were exempted from an additional levy following a change of ownership or occupancy of a holding, in such a way as to ensure that a lessee was not deprived of the fruits of his labour and of his investment in the tenanted holding without compensation.¹⁸

Likewise, in *Karlsson* – another milk quota case to which the explanations relating to Article 51(1) of the Charter also refer – the ECJ examined whether

¹⁷ Commission Regulation (EEC) No 1371/84 of 16 May 1984 laying down detailed rules for the application of the additional levy referred to in Article 5c of Regulation (EEC) No 804/68, [1984] OJ L 132/11.

¹⁸ Case 5/88 *Wachauf*, *supra* note 15, paras. 20-21.

Swedish law, which sought to implement Regulation No 3950/92 complied with the principle of equality.¹⁹ That regulation limited the production of milk in Sweden to 3.3 million tons per year. At the outset, the ECJ noted that new milk producers and producers who had increased their milk production were treated less favourably than normal producers who had not altered their average milk production from 1991 to 1993. Unlike the milk quotas allocated to normal producers, the milk quotas allocated to them were set at a level below their production capacity.²⁰ However, the ECJ held that such a difference in treatment pursued a legitimate aim recognised by the common organisation of the milk market, namely the reduction of structural surpluses and the improvement of the milk market. Notably, the ECJ observed that “the reductions applied unilaterally to new producers and producers who [had] increased their production appear[ed] to be objectively justified, having regard to the specific contribution made by such producers to exceeding the guaranteed total quantity.”²¹ As to the principle of proportionality, the milk quotas allocated to new producers and producers who had increased their production did not go beyond what was necessary for achieving the legitimate aim pursued, as their milk quotas were calculated on the basis of the risk that the total quantity of milk would be exceeded.²²

Wachauf and *Karlsson* show that, when adopting national measures which aim to apply a normative scheme put in place by the EU legislator, Member States are implementing EU law, and are thus bound by the fundamental rights contained in the Charter. This is so even if “Member States enjoy wide discretion in ensuring the implementation of [EU] rules within their territory,”²³ as the recent ruling of the ECJ in *N.S.* illustrates.²⁴

In that case, the ECJ was called upon to determine whether the Charter was applicable to a national decision adopted by a Member State on the sole basis of Article 3(2) of Regulation No 343/2003 (the Dublin Regulation).²⁵ In accordance with that provision, which is known as the “sovereign or discretionary

¹⁹ Council Regulation (EEC) No 3950/92, of 28 December 1992, establishing an additional levy in the milk and milk products sector, [1992] OJ L 405/1.

²⁰ Case C-292/97 *Karlsson*, *supra* note 16, para. 42.

²¹ *Ibidem*, para. 47.

²² *Ibidem*, para. 59.

²³ *Ibidem*, para. 35.

²⁴ Joined Cases C-411/10 and 493/10 *N.S.*, judgment of 21 December 2011, not yet reported.

²⁵ 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 L50/1.

clause”, a Member State is, in principle, free to decide whether it examines a claim for asylum which is not its responsibility under the criteria set out in Chapter III of the Dublin Regulation.

In *N.S.*, the question thus boiled down to whether, having decided to make use of that provision, a Member State must comply with the Charter, in particular with Articles 1, 4, 18, 19(2) and 47 thereof. The ECJ replied in the affirmative. It noted that Article 3(2) of the Dublin Regulation “grants Member States a discretionary power which forms an integral part of the Common European Asylum System provided for by the FEU Treaty and developed by the [EU] legislature.”²⁶ That discretionary power, the ECJ wrote, “must be exercised in accordance with the other provisions of that regulation.”²⁷ Indeed, the ECJ pointed out that “a Member State which decides to examine an asylum application itself becomes the Member State responsible within the meaning of [the Dublin] Regulation [...] and must, where appropriate, inform the other Member State or Member States concerned by the asylum application.”²⁸ Accordingly, “a Member State which exercises that discretionary power must be considered as implementing [EU] law within the meaning of Article 51(1) of the Charter.”²⁹

It follows from *N.S.* that as long as a Member State enjoys a discretionary power the exercise of which must comply with other provisions of EU law, that Member State is “implementing EU law.” Accordingly, the exercise of that power must be compatible with the Charter.

As to the substance, the ECJ ruled that the concept of “Member State responsible” for examining an asylum application within the meaning of Article 3(1) of the Dublin Regulation could not be interpreted as designating a Member State with “systemic deficiencies in the asylum procedure and [whose] reception conditions of asylum seekers [...] amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter.”³⁰ Consequently, the Member State where the asylum seeker is present must proceed to examine the other hierarchical criteria listed in the Dublin Regulation so as to determine the “Member State responsible”, provided that such determination does not take an unreasonable length of time which could worsen the situation of the asylum seeker. If that determination is excessively time-consuming, the Member State where the asylum seeker is present must examine his or her application under Article 3(2) of

²⁶ Joined Cases C-411/10 and 493/10 *N.S.*, *supra* note 24, para. 65.

²⁷ *Ibidem*, para. 66.

²⁸ *Ibidem*, para. 67.

²⁹ *Ibidem*, para. 68.

³⁰ *Ibidem*, para. 94

the Dublin Regulation. Stated differently, if compliance with fundamental rights requires the Member State where the asylum seeker is present to examine the asylum application, that Member State has no choice but to do it.³¹

Moreover, the principle of effectiveness, which is now enshrined in Article 19(1) TEU,³² ensures that the substantive rights which EU law confers on individuals do not become “an empty promise.” By virtue of that principle, in the absence of EU measures harmonising national rules of procedure, it is for the Member States to ensure the *full effect* of EU law. In this regard, the ECJ has, time and again, stated that national remedies must afford an effective judicial protection to EU rights,³³ a fundamental right which is now enshrined in Article 47 of the Charter. The ruling of the ECJ in *DEB* illustrates this point.³⁴

In that case, the ECJ was requested to rule on the question whether EU law and, more specifically, the principle of effective judicial protection, as enshrined in Article 47 of the Charter, must be interpreted as meaning that, in the context of a procedure for pursuing a claim, brought by a legal person, seeking to establish State liability under EU law, that principle precludes a national rule under which the pursuit of a claim before the courts is subject to the making of an advance payment in respect of costs and under which a legal person does not qualify for legal aid even though it is unable to make that advance payment. The ECJ found that that principle must be interpreted as meaning that it is not impossible for legal persons to rely on that principle and that aid granted pursuant to that principle may cover, *inter alia*, dispensation from advance payment of the costs of proceedings and/or the assistance of a lawyer. In that connection, it is for the national court to ascertain whether the conditions for granting legal aid constitute a limitation on the right of access to the courts which undermines the very core of that right, whether they pursue a legitimate aim and whether there is a reasonable relationship of proportionality between the means employed and the legitimate aim which the national rule seeks to achieve.³⁵ The ECJ further held that, in making that assessment, the national court must take into consideration the subject-matter of the litigation, whether the applicant has a reasonable prospect of success, the importance of what is at stake for the applicant in the proceedings,

³¹ *Ibidem*, para. 98.

³² Article 19(1) TEU states that “Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.”

³³ The explanations relating to the Charter, *supra* note 14, p. 29, refer to Case 222/84 *Johnston* [1986] ECR 1651; Case 222/86 *Heylens* [1987] ECR 4097, and Case C-97/91 *Borelli* [1992] ECR I-6313.

³⁴ Case C-279/09 *DEB Deutsche Energiehandels- und Beratungsgesellschaft*, judgment of 22 December 2010, not yet reported.

³⁵ *Ibidem*, paras. 59 and 60.

the complexity of the relevant law and procedure and the applicant's capacity to represent himself effectively. In order to assess the proportionality of the national rule, the national court may also take account of the amount of the costs of the proceedings in respect of which advance payment must be made and whether or not those costs might represent an insurmountable obstacle to access to the courts. With regard, more specifically, to legal persons, the national court may take into consideration, *inter alia*, the form of the legal person in question and whether it is profit-making or non-profit-making, the financial capacity of the partners or shareholders and the ability of those partners or shareholders to obtain the sums necessary to institute legal proceedings.³⁶

Referring expressly to Article 51 of the Charter,³⁷ the ECJ held that the principle of effective judicial protection, as enshrined in Article 47 of the Charter, may be relied upon in order to determine the limits within which a Member State may exercise its procedural autonomy. This means that a national court may have recourse to the principle of effective judicial protection, as enshrined in Article 47 of the Charter, in order to set aside a national procedural rule that prevents a legal person from bringing a claim seeking to establish State liability under EU law. Stated differently, the principle of effective judicial protection, as enshrined in Article 47 of the Charter, applies in relation to national procedural rules which hinder the effectiveness of EU law in general and thus, relate to the implementation of EU law in the Member State concerned. That is sufficient to qualify these procedural rules as "implementing Union law." Hence, they fall within the scope of application of the Charter.

It follows that the Charter applies where Member States adopt measures in order to comply with the obligations imposed by a normative scheme set out by EU law. The Charter, notably Article 47 thereof, also applies in order to guarantee the *full effect* of the substantive rights EU law confers on individuals.

1.2. The derogation situation

For some scholars, the Charter should not apply when examining the validity of national measures derogating from EU requirements, i.e. in the so-called "derogation situation."³⁸ For example, contrary to the general principles of EU law, the Charter should not apply in cases such as *Familiapress*, *Schmidberger*, or *Viking Line*.³⁹

³⁶ *Ibidem*, paras. 61 and 62.

³⁷ *Ibidem*, para. 30.

³⁸ Case C-260/89 *ERT*, *supra* note 15.

³⁹ Case C-368/95 *Familiapress* [1997] ECR I-3689; Case C-112/00 *Schmidberger* [2003] ECR I-5659, and Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union, Viking Line*, [2007] ECR I-10779.

This narrow reading of the terms “when [the Member States] are implementing Union law” finds support in the drafting process of the Charter, which “illustrates an emergent reluctance to commit the Member States to observing the norms of the Charter other than in the cases which are most closely linked to the European Union where the Member States have little or no autonomy.”⁴⁰ Likewise, the Convention on the Future of Europe also favoured limiting the scope of application of the Charter, so as to minimise national resistance to the Charter’s legally binding status as provided for by the Treaty establishing a Constitution for Europe.⁴¹ Put simply, both the Convention in charge of drafting the Charter and the Convention on the Future of Europe sought to assure the Member States that the Charter would not upset the vertical allocation of powers.

For Lord Goldsmith, where Member States derogate from EU law, “the protection of fundamental rights for the citizen will be the existing structure of national law and constitutions and important international obligations like [the ‘ECHR’].”⁴² In his view, the Charter has to be read as an instrument which limits the powers of the EU, as opposed to “an exercise in extending [its] competences.”⁴³ Likewise, former AG Jacobs – writing extrajudicially – argued that in derogation situations, a Member State’s compliance with fundamental rights should not be subject to judicial review of the ECJ.⁴⁴ He posited that “[o]nce it has been established that a restriction is justified from the perspective of [EU] law, the restriction might still be caught as infringing fundamental rights. But that would be a matter for national law, or possibly the [ECHR], not for [EU] law.”⁴⁵ The former Advocate General referred to *Familiapress*⁴⁶ to illustrate this point. In that case, the ECJ was asked to determine whether Austrian legislation prohibiting the sale of periodicals containing prize competitions complied with Article 34 TFEU (ex Article 28 EC). Austria alleged that its legislation was justified on the ground of preserving press diversity, an important aspect of the freedom of expression. According to the former Advocate General, the ECJ should have lim-

⁴⁰ G. De Búrca, *The Drafting of the European Union Charter of Fundamental Rights*, 26 *European Law Review* 126 (2001), p. 137.

⁴¹ A. Knook, *The Court, the Charter, and the Vertical Division of Powers in the European Union*, 42 *Common Market Law Review* 367 (2005), p. 373.

⁴² Lord Q. Goldsmith, *A Charter of Rights, Freedoms and Principles*, 38 *Common Market Law Review* 1201 (2001), p. 1205.

⁴³ *Ibidem*, p. 1206.

⁴⁴ F.G. Jacobs, *Human Rights in the European Union: the Role of the Court of Justice*, 26 *European Law Review* 331 (2001).

⁴⁵ *Ibidem*, p. 336.

⁴⁶ Case C-368/95 *Familiapress*, *supra* note 39.

ited itself to examining whether the Austrian legislation at issue complied with the public policy derogations contained in the Treaty. If so, then that national measure should have been upheld as a matter of EU law. The question whether such a measure complied with the freedom of press was a separate issue, and was not for EU law to decide. However, Eeckhout argues that the problem with that view is that it would allow “the relevant Treaty provisions [to] be interpreted in a way which tolerates the violation of fundamental rights.”⁴⁷ In addition, he rightly notes that the notion of “public policy” is difficult to apprehend without considering fundamental rights. By way of example he observes that had the ECJ decided in *Grogan*⁴⁸ that the freedom to provide services was applicable to the Irish ban on the distribution of specific information about clinics in another Member State where abortions were performed, it would have been very difficult for the ECJ to decide whether such a measure complied with EU law without considering Ireland’s argument based on the right to life.⁴⁹ Most importantly, in the “derogation situations”, determining whether a Member State complies with fundamental rights vests the rulings of the ECJ with legitimacy. It reassures national courts, in particular the constitutional courts, that the Union embraces the values and principles in which national constitutions are grounded. As Tridimas says, the protection of fundamental rights guarantees “ideological continuity” between the two levels of governance.⁵⁰ Accordingly, in order to demonstrate that the Union takes fundamental rights seriously, “they should be all pervasive in EU law.”⁵¹ Even if Article 51(1) of the Charter were subject to a strict interpretation, the scope of application of general principles of EU law should not be adversely affected. General principles would take over where the scope of application of the Charter ends. However, Dougan believes that such a dual regime would not be without difficulties, as it “might prove burdensome.”⁵² He notes that, while the fundamental rights protected may be the same, a dual regime could give rise to arbitrary divergences as to the actual quality and potency of those rights.⁵³ In the same way, AG Bot observes that by

⁴⁷ P. Eeckhout, *The EU Charter of Fundamental Rights and the Federal Question*, 39 Common Market Law Review 951 (2002), p. 977.

⁴⁸ Case C-159/90 *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others* [2001] ECR I-4685.

⁴⁹ Eeckhout, *supra* note 47, p. 978.

⁵⁰ Tridimas, *supra* note 10, p. 302.

⁵¹ Eeckhout, *supra* note 47, p. 977.

⁵² M. Dougan, *The Treaty of Lisbon 2007: Winning Minds, Not Hearts*, 45 Common Market Law Review 617 (2008), pp. 664-665.

⁵³ *Ibidem*.

weakening the protection of fundamental rights at EU level, such a dual regime would run counter to Article 53 of the Charter.⁵⁴

In order to overcome the difficulties inherent in this discussion, it seems to me that the terms “implementing Union law” must be read so as to also include the derogation situation.⁵⁵ Indeed, the explanations relating to Article 51(1) of the Charter expressly refer to *ERT*.⁵⁶ In that case, the ECJ held that national rules which constitute a restriction on the freedom to provide services may be justified on the grounds laid down in Article 52(1) TFEU, in so far as those rules are “interpreted in light of [...] fundamental rights.” In order for those rules to fall within the scope of Article 52(1) TFEU, they must be “compatible with the fundamental rights the observance of which the [ECJ] ensures.”⁵⁷ It follows from *ERT* that when a Member State derogates from the substantive law of the EU, it is also “implementing EU law”, given that such derogation must always meet the conditions imposed by EU law. Not only must the national measure conflicting with the fundamental freedoms pursue a legitimate interest recognised by EU law, be free from any discrimination, and respect the principle of proportionality, but it must also comply with fundamental rights. Contrary to the views of Lord Goldsmith and former AG Jacobs, *ERT* suggests that whether the derogations put forward by a Member State comply with fundamental rights is a determination that does not fall outside the scope of application of the Treaties. Far from that, all derogations put forward by a Member State must always pass muster under EU law, of which the Charter is now part and parcel.

Moreover, this would mean that the scope of application of the Charter and that of general principles of EU law overlap. Thus, the Charter would not alter the scope of application of fundamental rights protection under EU law, respecting the constitutional allocation of powers sought by the authors of the Treaties. Does this mean, as Weiler considers,⁵⁸ that a catalogue of fundamental rights has little added value? In my view, the answer to this question should be in the negative. Since the material scope of the Charter is broader than that of general principles,⁵⁹ the Charter may contribute significantly to the “discovery” of general principles.

⁵⁴ See, Opinion of AG Bot in Case C-108/10 *Scattolon*, delivered on 5 April 2011, not yet reported, paragraph 120.

⁵⁵ Eckhout, *supra* note 47, p. 993. See Opinion of AG Bot in Case C-108/10 *Scattolon*, *supra* note 54, paras. 118 and 119. AG Bot supports the contention that “implementing Union law” should be interpreted as “acting within the framework of Union law.” In so doing, he relies on the explanations relating to the Charter.

⁵⁶ Case C-260/89 *ERT*, *supra* note 15.

⁵⁷ *Ibidem*, para. 43.

⁵⁸ J.H.H. Weiler, *Editorial: Does the European Union Truly Need a Charter of Rights?* 6 *European Law Journal* 95 (2006).

⁵⁹ Knook, *supra* note 41, at 371.

1.3. *Annibaldi* as an example of the situations where the Charter does not apply

Finally, the explanations relating to Article 51(1) of the Charter also refer to *Annibaldi*.⁶⁰ Contrary to *Wachauf* and *ERT*, it seems that the authors of the explanations relating to the Charter chose *Annibaldi* in order to illustrate the situations where EU law imposes no obligation on the Member States, i.e. cases where the compatibility of national measures with fundamental rights cannot be examined under EU law.

That case involved the refusal of Italian authorities to grant Mr Annibaldi permission to plan an orchard of 3 hectares within the perimeters of a regional park. Such refusal was adopted on the basis of Regional law No 22 of 20 June 1996, according to which the regional park was created in order to protect and enhance the value of the environment and cultural heritage of the area concerned. For his part, Mr Annibaldi, who owned an agricultural holding 33 hectares of which were located within the park, argued that the refusal at issue in the main proceedings amounted to an expropriation without compensation which was contrary to his fundamental right to property. At the outset, the ECJ recognised that the EU (then the Community) pursues objectives in the fields of the environment, culture and agriculture. However, it noted that Regional Law No 22 of 20 June 1996 was not intended to implement a provision of EU law in any of those three fields.⁶¹ Notably, that law pursued objectives other than those covered by the common agricultural policy and was general in character.⁶² Most importantly, in light of Article 345 TFEU (ex Article 222 EEC), EU (then Community) rules relating to the common organisation of the agricultural markets have no effect on systems of agricultural property ownership.⁶³ The ECJ thus ruled that it lacked jurisdiction to answer the questions referred by the Italian court.

It follows from *Annibaldi* that the compatibility of national measures which are not a means for a Member State to fulfil its obligations under EU law, with fundamental rights cannot be examined by the ECJ. Recently, the ruling of the ECJ in *Dereci* confirmed this point.⁶⁴

The question in that case was whether Mr Dereci, a third-country national, was entitled to a derivative right of residence grounded in his children's status of European citizen, in spite of the fact that the latter had never left the Member

⁶⁰ Case C-309/96 *Annibaldi*, *supra* note 15.

⁶¹ *Ibidem*, para. 21.

⁶² *Ibidem*, para. 22.

⁶³ *Ibidem*, para. 23.

⁶⁴ Case C-256/11 *Dereci*, judgment of 15 November 2011, not yet reported.

State of which they were nationals (Austria). The ECJ noted that, unlike the factual situation in *Ruiz Zambrano*,⁶⁵ a refusal to grant Mr Dereci a residence permit (the contested decision) did not deprive his children, who were minors, “of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union.”⁶⁶ The contested decision did not force his children “to leave [...] the territory of the Union as a whole.”⁶⁷ Accordingly, the contested decision did not fall within the scope of the Treaty provisions on EU citizenship. This meant that, under EU law, the Member State in question, i.e. Austria, had no obligation to grant such a residence permit to Mr Dereci. Just as in *Annibaldi*, since Austria was not “implementing EU law”, the ECJ lacked jurisdiction to examine whether such refusal was compatible with Article 7 of the Charter.

The fact that the refusal to grant Mr Dereci a residence permit could adversely affect his right to a family life and that of his children was not by itself sufficient to trigger the application of the Charter. This did not mean, however, that the fundamental rights of Mr Dereci and that of his children were left unprotected. If “[the national court] takes the view that that situation is not covered by [EU] law, [the ECJ reasoned that] it must undertake that examination in the light of Article 8(1) of the ECHR.”⁶⁸

2. THE LIMITATIONS ON THE EXERCISE OF THE RIGHTS AND FREEDOMS RECOGNISED BY THE CHARTER

Unlike the TEU or TFEU, the Charter lays down binding instructions as to the way in which it must be interpreted. Article 6(1) TEU – which refers to Title VII of the Charter and to the explanations relating to it – stresses the importance of those instructions. In the following section, I would like to focus on a particular aspect of those instructions, namely Article 52(1) of the Charter which contains the conditions that the limitations on the exercise of the rights and freedoms must fulfil in order to be valid.

Under the system of the ECHR, every right whose exercise may be subject to limitations (“qualified rights”) is followed by a specific derogation clause. By contrast, the Charter contains a horizontal provision. Article 52(1) is thus a “general limitation clause”, which sets out the conditions that every limitation

⁶⁵ Case C-34/09 *Ruiz Zambrano*, judgment of 8 March 2011, not yet reported.

⁶⁶ *Ibidem*, para. 42.

⁶⁷ Case C-256/11 *Dereci*, *supra* note 64, para. 66.

⁶⁸ *Ibidem*, para. 72.

on the exercise of the rights and freedoms recognised by the Charter must fulfil in order to comply with EU law. However, it is worth noting that, just as the ECHR, no limitation may be imposed on the rights under Title I of the Charter (Articles 1 to 5), i.e. human dignity,⁶⁹ the right to life, the right to the integrity of the person, the prohibition of torture and inhuman or degrading treatment or punishment, the prohibition of slavery and forced labour.

The wording of Article 52(1) of the Charter is largely inspired by the case law of the ECJ on the protection of fundamental rights,⁷⁰ which, in turn, draws on the case law of the ECtHR.⁷¹ Article 52(1) of the Charter states that “[a]ny limitation on the exercise of the rights and freedoms recognised by [the] Charter must be provided for by law.” In addition, any limitation must respect “the essence of those rights and freedoms” and comply with the principle of proportionality, i.e. “limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”

In light of *Knauf Gips v Commission*,⁷² the terms “provided for by law” are to be interpreted as meaning that, in the absence of a specific legal basis, an EU act of individual application may not by itself impose limitations on the exercise of the rights and freedoms recognised by the Charter. In that case, the ECJ held that the EGC had erred in considering that, in the absence of a specific legal basis, the Commission could limit the rights of an undertaking to an effective remedy and of access to an impartial tribunal, as guaranteed by Article 47 of the Charter.⁷³

⁶⁹ See, the explanations relating to the Charter of Fundamental Rights, [2007] OJ C 303/17 (“the explanations relating to the Charter”), p. 17 (given that “the dignity of the human person is part of the substance of the rights laid down in this Charter [, it] must therefore be respected, even where a right is restricted”). The same applies in relation to the right to life and to the right to the integrity of the person. In this regard, see, Case C-112/00 *Schmidberger*, *supra* note 39, para. 80 (“unlike other fundamental rights enshrined in [the ECHR], such as the right to life or the prohibition of torture and inhuman or degrading treatment or punishment, which admit of no restriction, neither the freedom of expression nor the freedom of assembly guaranteed by the ECHR appears to be absolute but must be viewed in relation to its social purpose”).

⁷⁰ See, e.g., Case C-62/90 *Commission v Germany* [1992] ECR I-2575, para. 23; Case C-44/94 *Fishermen’s Organisations and Others* [1995] ECR I-3115, para. 55; Case C-292/97 *Karlsson*, *supra* note 16, para. 45; Joined Cases C-317/08 to C-320/08 *Allassini and Others* [2010] ECR I-2213, para. 63.

⁷¹ See, e.g., ECtHR, *Fogarty v United Kingdom*, judgment of 21 November 2001, no. 37112/97, para. 33, ECHR 2001-XI.

⁷² Case C-407/08 P *Knauf Gips v Commission* [2010] ECR I-6371.

⁷³ *Ibidem*, paras. 87 *et seq.*

The question is then under what circumstances an EU act of individual application – or, as the case may be, a national measure of individual application falling within the scope of EU law – which limits a fundamental right, has (or lacks) a sufficient legal basis. For instance, is it possible to interpret the terms “provided for by law” as only including EU acts adopted under the ordinary legislative procedure? Or, should the ECJ follow the case law of the ECtHR, according to which those terms should also include EU acts adopted under a special legislative procedure? In accordance with the case law of the ECtHR, a limitation is “provided for by law”, provided that it meets the three following cumulative conditions. First, the limitation must have some basis in domestic law. However, the ECtHR has ruled that the intervention of the parliament is not always mandatory.⁷⁴ Second, the persons concerned must be able to know those limitations in advance, by, for example, reading them in the *Official Journal* of the EU. Finally, those limitations must be foreseeable.⁷⁵ Stated differently, any limitation on the fundamental rights recognised by the Charter must be consistent with the principle of legal certainty, i.e. it must be clear and precise.⁷⁶

In *Volker und Markus Schecke*,⁷⁷ the ECJ rejected a restrictive interpretation of the terms “provided for by law.” In that case, the referring court asked, in essence, whether Council Regulation No 1290/2005⁷⁸ and Commission Regulation No 259/2008⁷⁹ were compatible with Articles 7 (right to respect for his or her private and family life, home and communications) and 8 (right to the protection of personal data) of the Charter. Article 44a of Council Regulation No 1290/2005, on the financing of the common agricultural policy, provided that Member States had to ensure annual *ex-post* publication of the beneficiaries of the EAGF and the EAFRD and the amounts received per beneficiary under each of these Funds. That information had to be the subject of “general publication.” For its part,

⁷⁴ ECtHR, *Sunday Times v United Kingdom*, judgment of 26 April 1979, Series A no. 30. See also *Müller v Switzerland*, judgment of 5 November 2002, no. 41202/98 (Sect. 2) (Eng).

⁷⁵ ECtHR, *Kruslin v France*, judgment of 24 April 1990, Series A No 176-A, § 27.

⁷⁶ See to this effect, Opinion of AG Cruz Villalón in Case C-70/10 *Scarlet Extended SA* (pending), delivered on 14 April 2011.

⁷⁷ Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert*, judgment of 9 November 2010, not yet reported.

⁷⁸ [2005] OJ L 209/1, as amended by Council Regulation (EC) No 1437/2007 of 26 November 2007, [2007] OJ L 322/1 (“Regulation No 1290/2005”).

⁷⁹ Commission Regulation (EC) No. 259/2008 of 18 March 2008 laying down detailed rules for the application of Regulation No. 1290/2005 as regards the publication of information on the beneficiaries of funds deriving from the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD), [2008] OJ L 76/28 (Regulation No 259/2008).

Commission Regulation No 259/2008 set out the content of the publication, adding that “the municipality where the beneficiary resides or is registered and, where available, the postal code or the part thereof identifying the municipality” also had to be published. Article 2 of that regulation prescribed that the information was to be made available on a single website per Member State so that it could be consulted by means of a search tool.

In relation to the existence of an interference with the rights recognised by Articles 7 and 8 of the Charter, the ECJ held that the “publication on a website of data naming those beneficiaries and indicating the precise amounts received by them thus constitutes an interference with their private life within the meaning of Article 7 of the Charter.”⁸⁰ In addition, the ECJ ruled that the publication required by Article 44a of Regulation No 1290/2005 and Regulation No 259/2008 constitutes the processing of personal data falling under Article 8(2) of the Charter.⁸¹

As to the justification of the interference with the rights recognised by Articles 7 and 8 of the Charter, the ECJ ruled that “it is common ground that the interference arising from the publication on a website of data by name relating to the beneficiaries concerned must be regarded as ‘provided for by law’ within the meaning of Article 52(1) of the Charter. Articles 1(1) and 2 of Regulation No 259/2008 expressly provide for such publication.”⁸² Stated differently, limitations on the fundamental rights recognised by the Charter, which are grounded in a Council Regulation, must be considered as “provided for by law.” It follows that Article 52(1) of the Charter does not require limitations on fundamental rights to be grounded in an EU measure whose adoption is conditioned upon the European Parliament’s co-decision.

In providing that any limitation must “respect the essence of [the rights and freedoms recognised by the Charter],” the latter guarantees that no limitation will deprive those rights and freedoms of their substance. The term “essence” of a right or freedom draws on the constitutional traditions common to the Member States,⁸³ as well as on the case law of the ECtHR.⁸⁴ In the same way, the ECJ has consistently held that any limitation on fundamental rights may only be justified, “provided that those restrictions in fact correspond to objectives of general interest

⁸⁰ Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert*, *supra* note 77, para. 58.

⁸¹ *Ibidem*, para. 60.

⁸² *Ibidem*, para. 66.

⁸³ See, e.g., Article 19(2) of the German Basic Law, which provides that “[i]n no case may the essence of a basic right be affected.”

⁸⁴ See, e.g., ECtHR, *Sporrong and Lönnroth v Sweden*, judgment of 23 September 1982, Series A No. 52.

pursued by the European Union and do not constitute disproportionate and intolerable interference, impairing *the very substance of the rights guaranteed*.”⁸⁵

Article 52(1) of the Charter sets out two different types of legitimate objectives. On the one hand, there are “objectives of general interest recognised by the Union.” On the other hand, there are also objectives which aim “to protect the rights and freedoms of others.”

As to the former type of objectives, they are set out not only in Article 3 TEU but also in specific Treaty provisions.⁸⁶ The case law of the ECJ clearly shows that the latter has followed a rather broad approach when qualifying an objective as being “of general interest recognised by the Union.” For example, the following objectives have been recognised as falling within that category: the establishment of a common organisation of the market,⁸⁷ the protection of public health and public security,⁸⁸ and the requirements of international security.⁸⁹

Moreover, limitations on the fundamental rights of the Charter may have both a vertical and horizontal dimension. This means that, when asserting a fundamental right, one must comply with “the need to protect the rights and freedoms of others.”⁹⁰ The terms “rights and freedoms of others” refer not only to the fundamental rights of third parties, but also to all rights bestowed upon them by EU law,⁹¹ notably the rights that stem from the Treaty provisions on free movement and Union citizenship.⁹² In relation to conflicts between fundamental rights, or between fundamental rights and fundamental freedoms, it is worth

⁸⁵ In relation to the right to property, see Case 44/79 *Hauer* [1979] ECR 3727, para. 23; Case 265/87 *Schröder HS Kraftfutter* [1989] ECR 2237, para. 15; Case C-293/97 *Standley and Others* [1999] ECR I-2603, para. 54; Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, para. 355; and Joined Cases C-379/08 and C-380/08 *ERG* [2010] ECR I-2007, para. 80 (emphasis added).

⁸⁶ See, e.g., Articles 36, 45 (3), and 52 TFEU.

⁸⁷ Case 44/79 *Hauer*, *supra* note 85.

⁸⁸ Case C-293/97 *Standley and Others* [1999] ECR I-2603.

⁸⁹ Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission*, *supra* note 85.

⁹⁰ In relation to a conflict between the right to private life and the freedom of expression, see, e.g., Case C-101/01 *Lindqvist* [2003] ECR I-12971, para. 86 and Case C-73/07 *Satakunnan Markkinapörssi and Satamedia* [2008] ECR I-9831, paras. 53 to 56.

⁹¹ See, e.g., ECtHR, *Barthold v Germany*, judgment of 23 March 1985, no. 8734/79, Series A, no. 90, para. 58.

⁹² See, e.g., Case C-112/00 *Schmidberger*, *supra* note 39; Case C-36/02 *Omega* [2004] ECR I-9609; Case C-438/05 *Viking Lines*, *supra* note 39; Case C-250/06 *UnitedPan-Europe Communications Belgium and Others* [2007] ECR I-11135; Case C-244/06 *Dynamic Medien* [2008] ECR I-505.

noting that there is no hierarchy of qualified rights under the Charter.⁹³ Given that all qualified rights stand on an equal footing, conflicts between them must be solved by striking the right balance.

In that regard, Article 52(1) of the Charter states that any limitation on the rights thereof must comply with the principle of proportionality. It is thus for the EU institutions and, as the case may be, for the national authorities participating in the implementation of EU law to verify that any limitation on fundamental rights is suitable to meet the “objectives of general interest recognised by the Union” and “the need to protect the rights and freedoms of others”; and that it does not go beyond what is necessary for achieving the legitimate aim pursued. For example, in *Volker und Markus Schecke*, the ECJ found that the publication on a website of the names of the beneficiaries of aid from the EAGF and the EAFRD and of the amounts which they receive from those Funds was liable to increase transparency with respect to the use of the agricultural aid concerned. The ECJ reasoned that such display of information reinforced public control of the use to which that money is put and contributes to the best use of public funds.⁹⁴ However, regarding the necessity of the publication in question, the ECJ held that it went beyond what was necessary for achieving the legitimate aims pursued, given that neither the Council nor the Commission had “sought to strike [the right] balance between the European Union’s interest in guaranteeing the transparency of its acts and ensuring the best use of public funds, on the one hand, and the fundamental rights enshrined in Articles 7 and 8 of the Charter, on the other.”⁹⁵ Indeed, derogations and limitations in relation to the protection of personal data must apply only in so far as it is strictly necessary.⁹⁶ Thus, the Council and the Commission should have examined whether the legitimate objective pursued by the contested regulations could not be achieved by measures which interfere less with the right of the beneficiaries concerned to respect for their private life in general and the protection of their personal data in particular.⁹⁷ Accordingly, the ECJ ruled that Article 44a of Regulation No 1290/2005 and Regulation No 259/2008 were invalid.

⁹³ Needless to say, we are not referring here to the fundamental rights under Title I of the Charter.

⁹⁴ Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert*, *supra* note 77, para. 75.

⁹⁵ *Ibidem*, para. 80.

⁹⁶ Case C-73/07 *Satakunnan Markkinapörssi and Satamedia*, *supra* note 90, para. 56.

⁹⁷ Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert*, *supra* note 77, paragraph 78, and paragraphs 81 to 86 (where the ECJ referred, as an example, to measures “limiting the publication of data by name relating to those beneficiaries according to the periods for which they received aid, or the frequency or nature and amount of aid received”).

3. THE INTERACTION BETWEEN THE CHARTER, THE ECHR AND THE CONSTITUTIONAL TRADITIONS COMMON TO THE MEMBER STATES

3.1. The Charter and the ECHR

In light of the explanations relating to Article 52(3) of the Charter,⁹⁸ the latter “is intended to ensure the necessary consistency between the Charter and the ECHR,” “without thereby adversely affecting the autonomy of [EU] law and of that of the [ECJ].” However, the autonomy of EU law may only be grounded in the principle “of the more extensive protection,” i.e. the level of protection guaranteed under EU law may never be lower than that guaranteed by the ECHR (as interpreted by the ECtHR).

A combined reading of Article 52(3) and Article 53 of the Charter demonstrates that if the ECtHR raises the level of protection of a fundamental right (or decides to expand its scope of application) so as to overtake the level of protection guaranteed by EU law, then the autonomy of EU law may no longer exist.⁹⁹ With a view to attaining the level of protection guaranteed by the ECHR, the ECJ will be obliged to reinterpret the Charter. Conversely, if the ECtHR ever decides to lower the level of protection below that guaranteed by EU law, by virtue of Article 53 of the Charter, the ECJ will be precluded from interpreting the provisions of the Charter in a regressive fashion. Stated differently, interpreted as a “stand-still clause”, Article 53 of the Charter preserves the constitutional autonomy of EU law.¹⁰⁰

As to the rights recognised by the Charter which correspond to the rights guaranteed by the ECHR, Article 52(3) of the Charter states that, without prejudice to a more extensive protection, “the meaning and scope of those rights shall

⁹⁸ Article 52(3) of the Charter states that “[i]n so far as [the] Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.”

⁹⁹ Article 53 of the Charter reads as follows: “[n]othing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ constitutions.”

¹⁰⁰ See the explanations relating to the Charter, *supra* note 14, p. 35, which provide that “[t]his provision is intended to maintain the level of protection currently afforded within their respective scope by Union law, national law and international law.” The adverb “currently” refers to the moment when the Charter, as primary EU law, entered into force, i.e. 1 December 2009.

be the same as those laid down by [ECHR].”¹⁰¹ The explanations relating to the Charter provide a list enumerating those rights.¹⁰² It does not come as a surprise that the approach encapsulated in Article 52(3) of the Charter is no less that the codification of the case law of the ECJ, according to which the ECHR, as interpreted by the ECtHR, has “special significance” in the protection of fundamental rights within the EU legal order.¹⁰³ In addition, the explanations relating to Article 52(3) of the Charter provide a list with “the Articles [whose] meaning is the same as the corresponding Articles of the ECHR, but [whose] scope is wider.”¹⁰⁴ However, one must point out that the previous sentence is not entirely accurate, as

¹⁰¹ Regarding Article 7 of the Charter and Article 8 of the ECHR, the ECJ has held that they both have the same meaning and scope. *See*, Case C-400/10 PPU *McB.*, judgment of 5 November 2010, not yet reported, paragraph 53. Likewise, the ECJ has also ruled that “the second paragraph of Article 47 of the Charter corresponds to Article 6(1) of the ECHR.” *See* Case C-279/09 *DEB*, *supra* note 34, para. 32.

¹⁰² *See* the explanations relating to the Charter, *supra* note 14, at 33 and 34. Those rights are the following: “- Article 2 corresponds to Article 2 of the ECHR, - Article 4 corresponds to Article 3 of the ECHR, - Article 5(1) and (2) corresponds to Article 4 of the ECHR, - Article 6 corresponds to Article 5 of the ECHR, - Article 7 corresponds to Article 8 of the ECHR, - Article 10(1) corresponds to Article 9 of the ECHR, - Article 11 corresponds to Article 10 of the ECHR without prejudice to any restrictions which Union law may impose on Member States’ right to introduce the licensing arrangements referred to in the third sentence of Article 10(1) of the ECHR, - Article 17 corresponds to Article 1 of the Protocol to the ECHR, - Article 19(1) corresponds to Article 4 of Protocol No 4, - Article 19(2) corresponds to Article 3 of the ECHR as interpreted by the European Court of Human Rights, - Article 48 corresponds to Article 6(2) and (3) of the ECHR, - Article 49(1) (with the exception of the last sentence) and (2) correspond to Article 7 of the ECHR.”

¹⁰³ *See*, e.g., Joined Cases 46/87 and 227/88 *Hoechst v Commission* [1989] ECR 2859, p. 2859; and Case C-274/99 P *Connolly v Commission* [2001] ECR I-1611, para. 37.

¹⁰⁴ *See* the explanations relating to the Charter, *supra* note 14, p. 34. Those rights are the following: “- Article 9 covers the same field as Article 12 of the ECHR, but its scope may be extended to other forms of marriage if these are established by national legislation, - Article 12(1) corresponds to Article 11 of the ECHR, but its scope is extended to European Union level, - Article 14(1) corresponds to Article 2 of the Protocol to the ECHR, but its scope is extended to cover access to vocational and continuing training, - Article 14(3) corresponds to Article 2 of the Protocol to the ECHR as regards the rights of parents, - Article 47(2) and (3) corresponds to Article 6(1) of the ECHR, but the limitation to the determination of civil rights and obligations or criminal charges does not apply as regards Union law and its implementation, - Article 50 corresponds to Article 4 of Protocol No 7 to the ECHR, but its scope is extended to European Union level between the Courts of the Member States, - Finally, citizens of the European Union may not be considered as aliens in the scope of the application of Union law, because of the prohibition of any discrimination on grounds of nationality. The limitations provided for by Article 16 of the ECHR as regards the rights of aliens therefore do not apply to them in this context.”

that list also includes Articles of the Charter whose “meaning is wider”,¹⁰⁵ as well as Articles of the Charter “whose meaning *and* scope” are wider,¹⁰⁶ than those of the corresponding Articles of the ECHR.

Moreover, the interpretation of Article 50 of the Charter (the *ne bis in idem* principle) appears to be particularly complex, since its scope and meaning fluctuate according to the context in which that provision is invoked. In this regard, the explanations relating to Article 50 of the Charter state that, if the *ne bis in idem* principle is relied upon in a cross-border situation, then that principle must be interpreted in compliance with the EU *acquis*, i.e. in light of the case law of the ECJ under the Convention implementing the Schengen agreement.¹⁰⁷ By contrast, where the *ne bis in idem* principle is relied upon in a purely internal situation, then that principle has the same meaning and the same scope as the corresponding right in the ECHR. Such a dual regime may be problematic, notably in cases where it is difficult to ascertain whether a situation is purely internal. However, one must point out that in *Sergey Zolotukhin v Russia*,¹⁰⁸ the ECtHR has recently decided to interpret the concept “*idem*” in light of the case law of the ECJ, so that in interpreting the principle of *ne bis in idem*, the approach of both courts converges.¹⁰⁹

¹⁰⁵ See, Article 9 of the Charter (whose wording allows gay marriage, in contrast to the wording of Article 12 of the ECHR which provides that “[m]en and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right”).

¹⁰⁶ See, Article 47 of the Charter (which applies to both EU institutions and national authorities “implementing EU law.” In addition, the protection offered by that provision is more extensive since it guarantees the right to an effective remedy before a court. Hence, in contrast to Article 6(1) of the ECHR, Article 47 is not limited to proceedings relating to “the determination of his civil rights and obligations or of any criminal charge against him”).

¹⁰⁷ Joined Cases C-187/01 and C-385/01 *Gözütok and Brügge* [2003] ECR I-1345.

¹⁰⁸ ECtHR, *Sergey Zolotukhin v Russia*, judgment of 10 February 2009, [GC], no. 14939/03, ECHR 2009.

¹⁰⁹ In that case, the ECtHR reconsidered its approach in relation to the concept of the “same offence.” In placing the emphasis on the identity of the facts instead of their legal classification, the ECtHR held that the terms “same offence” must be interpreted as meaning “identity of the material acts.” In so doing, the ECtHR noted that “[t]he difference between the terms ‘same acts’ or ‘same cause’ (*mêmes faits*) on the one hand and the term ‘[same] offence’ (*[même] infraction*) on the other was held by the [ECJ] to be an important element in favour of adopting the approach based strictly on the identity of the material acts and rejecting the legal classification of such acts as irrelevant. In so finding, [the ECJ] emphasised that such an approach would favour the perpetrator, who would know that, once he had been found guilty and served his sentence or had been acquitted, he need not fear further prosecution for the same act.” The ECtHR referred to Case C-367/05 *Kraaijenbrink* [2007] ECR I-6619. See, ECtHR, *Sergey Zolotukhin v Russia*, *supra* note 108, paras. 37 and 79.

Sergey Zolotukhin v Russia shows how important it is for the ECJ and the ECtHR to engage in a constructive dialogue, notably in relation to the provisions of the Charter that refer to the ECHR. Such a dialogue provides an excellent means of avoiding divergences between the EU *acquis* in realm of fundamental rights and the case law of ECtHR.

In the same way, the rulings of the ECtHR in *Menarini*¹¹⁰ and of the ECJ in *KME v Commission*¹¹¹ also reveal a degree of convergence regarding Article 6 of the ECHR and Article 47 of the Charter. Before commenting those two rulings, it is worth recalling that Article 47(2) and (3) of the Charter corresponds to Article 6(1) of the ECHR, but the limitation to the determination of civil rights and obligations or criminal charges does not apply as regards EU law and its implementation. This means for example, that “[i]n Union law, the right to a fair hearing is not confined to disputes relating to civil law rights and obligations.”¹¹² However, aside from the fact that the material scope of Article 47 of the Charter is wider than that of Article 6 of the ECHR, “the guarantees afforded by the ECHR apply in a similar way to the Union.”

In *Menarini*, the ECtHR was asked to determine the level of judicial scrutiny required by Article 6 of the ECHR where an administrative authority, which is not “an independent and impartial tribunal” for the purposes of the ECHR, fines an undertaking on the ground that the latter had breached competition law. In this regard, the ECtHR reasoned that such an administrative authority is not precluded from fining undertakings, provided that an *ex post* full review of its decisions is undertaken by “an independent and impartial tribunal.” Accordingly, when testing the validity of an administrative decision imposing a fine, the “impartial and independent tribunal” must not limit itself to reviewing the legality of that decision but must also look into the facts. Stated simply, the “impartial and independent tribunal” must be empowered to set aside any determination, be that in law or in fact, made by the administrative authority.¹¹³ Notably, it must be empowered to modify the amount of the fine. A few weeks later, the ECJ reached a similar conclusion in *KME v Commission*. In that case, the appellants, three undertakings producing semi-finished products in copper and copper alloys, brought an appeal against the judgment of the EGC which upheld a Commission decision imposing on them a fine of several millions Euros for having participated in a cartel.

¹¹⁰ See, ECtHR, *A. Menarini Diagnostics S.r.l. v. Italy*, judgment of 27 September 2011, no. 43509/08 (Sect. 2) (fr).

¹¹¹ Case C-389/10P *KME Germany AG v Commission*, judgment of 8 December 2011, not yet reported.

¹¹² See the explanations relating to the Charter, *supra* note 14, p. 30.

¹¹³ See, ECtHR, *A. Menarini Diagnostics S.r.l. v. Italy*, *supra* note 110, para. 59.

The appellants argued that the EGC had committed a violation of their fundamental right to an effective judicial remedy by deferring excessively to the Commission's discretion. For the appellants, the EGC's judicial deference to the Commission's margin of appreciation was in breach of Article 47 of the Charter. Whilst the ECJ ruled out that the EGC had excessively deferred to the Commission's discretion, it did provide some interesting guidance as to the way in which the Commission's margin of appreciation in the realm of competition law must be interpreted in light of the principle of effective judicial protection. First, the ECJ recalled that the judicial review of a Commission decision imposing a fine includes not only the review of its legality, but also, by virtue of Article 261 TFEU and Article 31 of Regulation No 1/2003,¹¹⁴ unlimited jurisdiction in regard to the penalties laid down by EU Regulations.¹¹⁵ As to the review of legality, the ECJ recognised that in matters giving rise to complex economic assessment, the Commission enjoys a margin of appreciation. However, from such a margin it does not follow that EU Courts may "rubber-stamp" the Commission's interpretation of the information of an economic nature. On the contrary, "[n]ot only must [EU] Courts establish, among other things, whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it."¹¹⁶ With regard to the amount of a fine for infringements of competition law, the ECJ first recalled the factors that must be taken into account by the Commission when fixing the fine.¹¹⁷ Next, the ECJ stressed that EU Courts must "carry out the review of legality incumbent upon them on the basis of the evidence adduced by the applicant in support of the pleas in law put forward." "In carrying out such a review", the ECJ ruled, "[EU] Courts cannot use the Commission's margin of discretion [...] as a basis for dispensing with the conduct of an in-depth review of the law and of the facts."¹¹⁸ Moreover, notwithstanding the fact that proceedings

¹¹⁴ Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L1/1.

¹¹⁵ See, *KME Germany AG v Commission*, *supra* note 111, para. 120.

¹¹⁶ *Ibidem*, para. 121.

¹¹⁷ *Ibidem*, paras. 123-124. In order to determine the amount of the fine, EU Courts should look at the duration of the infringement, the gravity of the infringement, the role played by each undertaking participating in the cartel, the profit obtained by each undertaking, the size of the undertaking concerned, the value of the goods concerned, the threat that that infringement may pose to the Union. They must also examine the content and duration of the anticompetitive conduct, the number of incidents and their intensity, the extent of the market affected and the damage to the economic public order.

¹¹⁸ *Ibidem*, para. 129.

before EU Courts are *inter partes*, in accordance with Article 261 TFEU, those courts are empowered, “in addition to carrying out a mere review of the lawfulness of the penalty, to substitute their own appraisal for the Commission’s and, consequently, to cancel, reduce or increase the fine or penalty payment imposed.”¹¹⁹ Hence, the ECJ ruled that “[t]he review of legality provided for under Article 263 TFEU, supplemented by the unlimited jurisdiction in respect of the amount of the fine, provided for under Article 31 of Regulation No 1/2003, is not therefore contrary to the requirements of the principle of effective judicial protection in Article 47 of the Charter.”¹²⁰

Finally, the Charter also incorporates rights that cannot be found in the ECHR.¹²¹ As a result, it is for the ECJ itself to interpret and develop those rights. Needless to say, the ECJ will still take into account the other sources of inspiration set out in Article 52 of the Charter, such as international agreements ratified by the EU or all its Member States, or the constitutional traditions common to the Member States. For example, the Charter aims to provide an answer to the challenges brought about by the new technologies, in particular, by bioethics. In this regard, Article 3(2)(d) thereof provides that the reproductive cloning of human beings is prohibited. In *Brüstle*,¹²² the ECJ was confronted with a difficult question which was particularly sensitive to the public morality of the Member States: it was asked to interpret the concept of “human embryo” within the meaning of and for the purposes of the application of Article 6(2)(c) of Directive 98/44,¹²³ which provides that the uses of human embryos for industrial or commercial purposes are unpatentable. That question arose in proceedings brought by Greenpeace e.V. seeking the annulment of the German patent held by Mr Brüstle, which related to neural precursor cells and the processes for their production from embryonic stem cells and their use for therapeutic purposes. At the outset, the ECJ noted that Directive 98/44 did not contain a definition of the concept of “human embryo”. Nor did it make a reference to the laws of the Member States to that end. The ECJ thus reasoned that the terms “human embryo” convey an autonomous concept that had to be defined in accordance with the context in which those terms operate and the purposes pursued by Directive 98/44. Referring to the preamble of that Directive, the ECJ observed that “patent law must be applied so as to

¹¹⁹ *Ibidem*, para. 130.

¹²⁰ *Ibidem*, para. 133.

¹²¹ See, e.g., the economic and social rights under Title IV of the Charter, such as the right of collective bargaining and action, including the right to strike. See also the right to good administration (Article 41 of the Charter).

¹²² Case C-34/10 *Brüstle*, judgment of 18 October 2011, not yet reported.

¹²³ Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions, [1998] OJ L 213/13.

respect the fundamental principles safeguarding the dignity and integrity of the person,”¹²⁴ which are enshrined in Articles 1 and 3 of the Charter. In this regard, the ECJ found that the EU legislature sought to exclude any possibility of patentability where respect for human dignity could thereby be affected. Accordingly, “the concept of ‘human embryo’ within the meaning of Article 6(2)(c) of the Directive must be understood in a wide sense.”¹²⁵ This meant that the prohibition contained in Article 6(2)(c) applied not only to any fertilised human ovum, but also to any non-fertilised human ovum which, through scientific techniques, is capable of commencing the process of development of a human being.

3.2. The Charter and constitutional traditions common to the Member States

In accordance with Article 52(4) of the Charter, “[i]n so far as [the latter] recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.” By referring to the constitutional traditions common to the Member States, the Charter does not seek to define the fundamental rights recognised thereby in accordance with the “smallest common denominator” of the Member States’ constitutions, but to interpret the fundamental rights enshrined therein in a way that offers a high level of protection; that is adapted to the nature of EU law; and that is in harmony with the national constitutional traditions.

Moreover, Article 53 of the Charter states that “[n]othing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, [...] by the Member States’ constitutions.” The question is then whether Article 53 of the Charter must be interpreted as a codification of the Solange approach,¹²⁶ according

¹²⁴ *Brüstle*, *supra* note 122, para. 32.

¹²⁵ *Ibidem*, paras. 34-37. This meant that “any human ovum after fertilisation, any non-fertilised human ovum into which the cell nucleus from a mature human cell has been transplanted and any non-fertilised human ovum whose division and further development have been stimulated by parthenogenesis constitute a ‘human embryo’ within the meaning of Article 6(2)(c) of [...] Directive [98/44].” By contrast, the ECJ left to the national court to decide whether “in the light of scientific developments, whether a stem cell obtained from a human embryo at the blastocyst stage constitutes a ‘human embryo’ within the meaning of Article 6(2)(c) of [...] Directive [98/44].”

¹²⁶ See the judgments of the German *Bundesverfassungsgericht* of 29 May 1974, known as *Solange I* (2 BvL 52/71) and of 22 October 1986, known as *Solange II* (2 BvR 197/83); the judgment of the Italian *Corte Costituzionale* of 21 April 1989 (No 232, *Fragd*, in *Foro it.*, 1990, I, 1855); the declaration of the Spanish *Tribunal Constitucional* of 13 December 2004 (DTC 1/2004). See also, ECtHR, *Bosphorus Hava Yollari Turizm v Ireland ve Ticaret Anonim Şirketi*, judgment of 30 June 2005, ECHR 2005-VI.

to which the primacy of EU law is conditioned upon that law offering a level of fundamental right protection, at least, equivalent to that guaranteed by the legal orders of the Member States.

In my view, one should not read Article 53 of the Charter as a rule of conflict, but as a rule which seeks to strengthen the primacy of EU law by demanding from the ECJ that it states the reasons why it decided to follow (or depart from) the level of fundamental right protection provided for by the Member States' constitutions. Article 53 of the Charter thus mandates the ECJ to engage in a dialogue with the national constitutional courts or, as the case may be, with the national supreme courts. In accordance with such a reading, Article 53 of the Charter would be an expression of constitutional pluralism. Article 53 of the Charter would not endorse the primacy of an EU law measure which does not pay due homage to the constitutional traditions common to the Member States; nor would that provision of the Charter deprive EU law of its primacy because of a national constitution which, though offering a higher level of protection than that guaranteed under EU law, does not take into account the essential elements of that law. Accordingly, Article 53 of the Charter is not to be interpreted in accordance with the Solange approach, but in light of the rulings of the ECJ in *Omega*¹²⁷ and *Sayn-Wittgenstein*.¹²⁸ In those cases, the ECJ ruled that "it is not indispensable for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected and that, on the contrary, the need for, and proportionality of, the provisions adopted are not excluded merely because one Member State has chosen a system of protection different from that adopted by another State."¹²⁹ This means that, in so far as the essential interests of the EU are not adversely affected by national measures implementing EU law, the ECJ defers to the Member States the question of determining the level of protection of fundamental rights they consider consistent with their national constitution.

¹²⁷ Case C-36/02 *Omega*, *supra* note 92.

¹²⁸ Case C-208/09 *Sayn-Wittgenstein*, judgment of 22 December 2010, not yet reported.

¹²⁹ *Ibidem*, para. 91 (referring to Case C-36/02 *Omega*, *supra* note 92, paras. 37 and 38).

CONCLUSION

I would like to conclude this article with some brief remarks as to the requirements private applicants must fulfil in order to build a case successfully.

First of all, they must make sure that the measure causing a violation of the fundamental right at issue falls within the scope of EU law. This is easy to demonstrate if NGO lawyers call into question the validity of an EU measure, either by bringing an annulment action before the ECJ under Article 263 TFEU or by inviting the national court to make a preliminary reference to the ECJ. However, if they challenge a national measure, then they must show, in accordance with Article 51(1) of the Charter, that the measure “implements EU law”. As results from *DEB* and *N.S.*, a Member State is “implementing EU law” when it is called upon to fulfil an obligation imposed by that law.

Second, as the ECJ made clear in *Volker und Markus Schecke*, NGO lawyers must prove that there is a restriction to the fundamental right at issue which is brought about by the challenged measure. Next, they must demonstrate that such a restriction fails to comply with the requirements set out in Article 52(1) of the Charter, i.e. that the restriction is provided for by law; that it respects the essence of the rights and freedoms adversely affected; and that it complies with the principle of proportionality.

Third, NGO lawyers may base their arguments on the existing case law of the ECtHR, in particular in relation to the fundamental rights contained in the Charter which correspond to those guaranteed by the ECHR. Indeed, as *Sergey Zolotukhin v Russia* and *Menarini* reveal, the ECtHR both influences and is influenced by the case law of the ECJ.

Last, but not least, if NGO lawyers wish to set aside a national measure implementing EU law which, at the same time, embodies a national interest which is vital to the identity (or the general interest) of a Member State, then they must show that such a national measure is also in breach of an interest vital to the EU (e.g. the principle of non-discrimination on grounds of nationality). Otherwise, in light of *Omega* and *Sayn-Wittgenstein*, the ECJ will defer to the standard of human rights protection guaranteed by the constitution of that Member State. Stated simply, in the absence of any interest of fundamental importance to the EU, the ECJ will favour “value diversity”.

Patrick C. R. Terry* ■

AFGHANISTAN'S CIVIL WAR (1979-1989): ILLEGAL AND FAILED FOREIGN INTERVENTIONS

Abstract

For about ten years now people in NATO member states have, on a daily basis, been confronted with the faltering attempts by their troops to create a semblance of stability in Afghanistan. It is now widely recognized that Afghanistan has become an intractable international problem.

This article, however, focuses on previous attempts to impose solutions. Beginning in the late 1970s and continuing throughout the 1980s, the two Cold War superpowers, the USSR and the USA, intervened in Afghanistan's affairs. In this article the legality, under international law, of those efforts is examined. This requires an extensive analysis of international law as applicable to external interventions in civil wars.

It will be demonstrated that neither the USSR's invasion of Afghanistan, nor the USA's massive support of the Afghan rebels, was reconcilable with international law. Considering the fact that these ill-advised interventions in Afghanistan backfired on both superpowers, they constitute a good object lesson to demonstrate that the prohibition of external interventions in civil wars not only reflects what international law demands, but is also simple common sense. Recent interventions in Bahrain and Libya are also briefly examined as to their legality, and this examination includes projections whether the unsatisfactory results of the Afghanistan interventions will be replicated there.

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INTRODUCTION

Since 2001 NATO forces, partly in the guise of ISAF, have been engaged in a seemingly never-ending war in Afghanistan. Despite a plethora of new initiatives aimed at stabilizing the deteriorating situation, it is not possible to estimate whether, or when, the foreign troops will ever be able to leave Afghanistan without the country immediately spiralling into an escalating civil war.

The current conflict is, however, only the latest episode in a history of external aggression and internal civil war in Afghanistan. Ever since its emergence as an entity distinguishable from its neighbours at some point in the 18th century, Afghanistan has been the object of foreign interference and attempts at occupation, often accompanied by civil strife.

This unwanted outside attention is not due to Afghanistan's natural riches, but rather to the coincidence of its geographical location: it is situated at the eastern most edge of the strategically important and resource-rich Middle East, and borders Central Asia, another strategic hub full of natural resources.¹ Thus it has been Afghanistan's fate to serve alternately as a buffer between, or as a battleground for, rival powers seeking domination in neighbouring areas.

The "War on Terror" launched by the USA and its allies in response to the deadly terrorist attacks on America in September 2001 led to a direct attack upon and invasion of a feuding Afghanistan. Ironically, the Soviet Union, the USA and others had just over a decade earlier intervened in Afghanistan's previous civil war, which had escalated as of 1978.

This article examines the legality of these earlier interventions. It begins with a brief outline of the historical background to the USSR's invasion of Afghanistan in 1979 and the USA's response thereto, and then examines in depth the international law rules on external interventions in civil wars. Based on this detailed legal analysis it will be shown that neither the Soviet nor the American actions regarding Afghanistan could be justified under the UN Charter and/or customary international law.

This violation of the law is made all the more relevant by the fact that subsequent events demonstrated that the Soviet and American interference had actually "boomeranged" on both superpowers. The Soviet Union, by the time of its

¹ D. Ross, *Beyond the Soviet Invasion: Afghanistan and the Concept of Self-Determination*, 48 University of Toronto Faculty of Law Review 92 (1990), p. 99; T.M. Cynkin, *Aftermath of the Saur Coup: Insurgency and Counter-insurgency in Afghanistan*, 6 Fletcher Forum of World Affairs 269 (1982), p. 269; M. Hauner, *The Soviet Geostrategic Dilemma*, in M. Hauner, R. L. Canfield (eds.), *Afghanistan and the Soviet Union, Collision and Transformation*, Westview Press, Boulder: 1989, Ch. 7, p. 161; A. Hyman, *Afghanistan Under Soviet Domination, 1964-83*, (2nd ed.), Macmillan Press Ltd., London: 1984, p. 3.

withdrawal in 1989, had suffered a humiliating defeat, and the massive American support of the mostly radical Afghan rebels was to set in motion a chain of events that would lead to 9/11 and the current conflict.

An analysis of the events between 1979 and 1989 – during Afghanistan's civil war – reveals that the prohibition of external interventions in civil wars not only reflects the state of the law but is also simply common sense, a conclusion which unfortunately may be confirmed by the ongoing events in Bahrain and Libya.

1. BACKGROUND

Afghanistan, a desperately poor country always prone to internal rebellion, finally achieved full independence in 1919, following three Anglo-Afghan Wars and repeated threats to its existence by Tsarist Russian (later Soviet) expansionism in Central Asia.

Following the abolition of its monarchy in 1973, Afghan communists were able to take power in a coup, the so-called *Saur Revolution*, in 1978. It is unlikely the Soviets instigated the coup, but it certainly became a turning point in the bilateral relationship.² Vital Soviet economic and military assistance, which had been pouring into the country since the 1950s, increased to the point where it became the vehicle for complete Afghan dependence on the USSR.³

² A. Rasanayagam, *Afghanistan, A Modern History* (2nd ed.), I. B. Tauris, London: 2005, p. 70. He points out that the Soviet news agency TASS at first referred to the events in Afghanistan as a "coup d'état", not as a revolution, indicating unpreparedness; a point also made by W. Maley, *The Afghanistan Wars*, (2nd ed.), Palgrave Macmillan, Basingstoke: 2009, pp. 20, 23-24; S. Galster, *Afghanistan: The Making of U.S. Policy, 1973-1990*, in *The National Security Archive, Volume II: Afghanistan: Lessons from the Last War, The September 11th Sourcebooks*, 2001, <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB57/essay.html> accessed December 1, 2011; p. 8. He claims that "U.S. Embassy officials in Kabul ... detected no Soviet hand in the coup"; H. Bräker, *Die langfristigen Interessen der Sowjetunion in der Region Mittelost und die Islam-Frage in Zentralasien* (The long-term interests of the Soviet Union in the Middle East and the question of Islam in Central Asia) in H. Vogel (ed.), *Die sowjetische Intervention in Afghanistan, Entstehung und Hintergründe einer weltpolitischen Krise*, Nomos Verlagsgesellschaft, Baden-Baden: 1980, p. 17. He, on the other hand, claims the USSR at least supported, if not organized, the coup; he argues that a military coup in Afghanistan was impossible without the many Soviet military advisors knowing about and supporting it.

³ G. Linde, *Afghanistan und der Nachbar im Norden* (Afghanistan and the neighbour to the north) in H. Vogel (ed.), *Die sowjetische Intervention in Afghanistan, Entstehung und Hintergründe einer weltpolitischen Krise*, Nomos Verlagsgesellschaft, Baden-Baden: 1980, p. 74. According to him, the Soviets provided 56.5 % of all aid received by Afghanistan in the period 1956-1961 and 65 % of all aid for the period 1962-1967; Hyman, *supra* note 1, pp. 33-34; L. Dupree, *Afghanistan* (2nd ed.), Princeton University Press, Princeton: 1980, p. 630.

Communist infighting and a radical reform programme had, by early 1979, led to civil war. After first rejecting Afghan requests earlier in the year for a military intervention, the Soviet government changed its mind in late 1979, and the Soviet invasion of Afghanistan began at Christmas. During the next decade on average about 100,000 Soviet troops were stationed there.

Faced with severe international criticism by both the west and the non-aligned states of its intervention in Afghanistan's civil war,⁴ the Soviet Union was forced to articulate a legal justification for its actions. In doing so, it relied on customary international law and the UN Charter. It was argued that Soviet troops had been sent to Afghanistan at the request of the Afghan government,⁵ a move entirely consistent with the traditional right of every state to aid a foreign government in restoring order in the face of a rebellion, a legal right even more valid when the rebellion was supported by foreign powers.⁶

The USSR argued that inasmuch as the Afghan rebellion was supported and instigated from abroad, Soviet actions were also consistent with Article 51 of the UN Charter and Article 4 of the 1978 Soviet-Afghan Treaty of Friendship. By supporting the legitimate Afghan government the Soviet Union was merely exercising collective self-defence.⁷ Furthermore, the actions of these foreign powers were also threatening the Soviet Union's borders, allowing the Soviets to take defensive action in their own right.⁸

⁴ GA Resolution ES- 6/2 (January 1980), passed by 104:18:18 votes (call for withdrawal: para. 4); Afghanistan was also suspended from the Organisation of Islamic Conference; many states imposed sanctions on the USSR.

⁵ *Russia says military airlift was justified*, M. Binyon, *The Times*, 29.12.1979, pp. 1, 4; *UN votes for troop withdrawal*, *The Times*, 15.01.1980, p. 1; L. Doswald-Beck, *The Legal Validity of Military Intervention by Invitation Of the Government*, 56 *British Yearbook of International Law* 189 (1985), pp. 231-233.

⁶ Binyon, *supra* note 5, pp. 1, 4; Doswald-Beck, *supra* note 5, pp. 231-233.

⁷ Instructions to the Soviet Ambassador to the UN in New York, ordering him to argue that the Soviet invasion was justified according to Article 51 of the UN Charter; Instructions to the Soviet Ambassadors in Berlin, Warsaw, Budapest, Prague, Sofia, Havana, Ulan-Bator and Hanoi; these Ambassadors were also instructed to inform the respective governments that the Soviet Union had acted at the request of the Afghan government and in conformity with Article 51 of the UN Charter and the Afghan-Soviet Treaty of 1978; similar instructions were issued to the other Soviet Ambassadors (pp. 138-141); reprinted (incl. German translation) in P. Allan, P. Bucherer, D. Kläy, A. Stahel, J. Stüssi-Lauterburg (eds.), *Sowjetische Geheimdokumente zum Afghanistankrieg (1978-1991)* (Secret Soviet documents relating to the war in Afghanistan), vdf Hochschulverlag, Zürich: 1995, pp. 132-137, 142-147 (UN).

⁸ *Concerning the events in Afghanistan*, *Pravda*, 31.12.1979. In this article it is pointed out that the Soviet Union had never made a secret of the fact that it would not allow Afghanistan to become a bridgehead for an "imperialistic" aggression against the USSR;

Elements of all these justifications can be found in Brezhnev's speech at the Soviet Communist Party Congress on February 23, 1981:

Imperialism launched a real undeclared war against the Afghan revolution. This also created a direct threat to the security of our southern frontier. In the circumstances, we were compelled to render the military aid asked for by that friendly country. We will be prepared to withdraw with the agreement of the Afghan government. Before this is done, the infiltration of counterrevolutionary gangs into Afghanistan must be completely stopped ... Dependable guarantees are required that there will be no new intervention.⁹

Within the socialist bloc the Soviet invasion was also justified on the basis of the so-called "Brezhnev Doctrine" (which will later be briefly examined). This socialist version of international law both justified and demanded the support of the proletarian class that had triumphed in Afghanistan in the *Saur Revolution* of 1978 against any imperialistic attack, be it foreign or domestic.¹⁰

These justifications require close examination.

reprinted in P. Bucherer-Dietschi, A. Stahel, J. Stüssi-Lauterburg (eds.), *Strategischer Überfall - das Beispiel Afghanistan, Quellenband - Teil 1* (Strategic attack- the example of Afghanistan, Primary Sources, Volume 1), Grauwiller Offsetdruck, Liestal: 1991, pp. 261-266 (incl. German translation); *US help for Afghan rebels threatened Russia, Pravda says*, M. Binyon, The Times, 02.01.1980, p. 5; Nicholas Rostow, *Law and the Use of Force by States: The Brezhnev Doctrine*, 7 Yale Journal of World Public Order 209 (1980-1981), p. 237; R. J. Matsson, *Politische und völkerrechtliche Aspekte der sowjetischen Invasion Afghanistans 1979/1980 und die Position der Sowjetunion* (Political and international law aspects of the Soviet invasion of Afghanistan in 1979/1980 and the Position of the Soviet Union), 21 Österreichische Zeitschrift für Außenpolitik 79 (1981), p. 86.

⁹ Leonid Brezhnev, *Address to the 26th Soviet Communist Party Congress*, February 23, 1981; translated by TASS; excerpts printed in The New York Times, *Excerpts From Address By Brezhnev To The Soviet Communist Party Congress*, 24.02.1981, p. 6.

¹⁰ Instructions to the Soviet Ambassadors in Berlin, Warsaw, Budapest, Prague, Sofia, Havana, Ulan-Bator and Hanoi; the Ambassadors were instructed to inform the respective governments that the Soviet Union had also acted to "defend the revolution's achievements" against Amin's attempts at "liquidating" them. This particular justification was omitted in the instructions to the other Soviet Ambassadors (pp. 138-141); reprinted (incl. German translation) in P. Allan et al. (eds.), *supra* note 7, pp. 132-137. In an editorial in the East German daily Neues Deutschland, 29.12.1979, it is claimed that the Soviets had been guided by their "internationalist duty" when deciding to defend the Afghan people against "external aggression" and "internal counter-revolution"; *Concerning the events in Afghanistan*, Pravda, 31.12.1979. In this article Soviet actions are also justified as having been in defence of the "achievements of the April Revolution," as the revolution and its success had become the most important matter of concern for the Afghan people; both reprinted in P. Bucherer-Dietschi, et al. (eds.), *supra* note 8, pp. 247-248 (Neues Deutschland); pp. 261-266 (Pravda and German translation).

2. THE LEGALITY OF THE SOVIET INVASION OF AFGHANISTAN

2.1 Intervention by invitation of the Afghan government

There is no doubt that by the time of the Soviet invasion in December 1979 Afghanistan was in a state of civil war. The Central Committee of the Soviet Communist Party had already come to this conclusion in the spring of 1979, when the Afghan government did not manage to fully re-assert its control over Herat following the uprising there in March.¹¹ The Afghan army was falling apart, as many recruits, and especially conscripts, were deserting, often joining the rebels to fight against the government. During the Herat crisis the Afghan government requested Soviet military support, as the leading Afghan politicians had come to the conclusion that they no longer had the resources to reassert control.¹² Although the USSR first turned down this request, the Afghan situation was deemed dire by the Soviets.¹³ Once Herat had been brought back under the control of the government, other provinces erupted.¹⁴

¹¹ D. Loyn, *Butcher & Bolt, Two Hundred Years of Foreign Entanglement in Afghanistan*, Windmill Books, London: 2009, p. 185; W. M. Reisman, J. Silk, *Which Law Applies to the Afghan Conflict?*, 82 *American Journal of International Law* 459 (1988), p. 469.

¹² Soviet Prime Minister Kosygin, when reporting to the Politburo on a telephone conversation he had had with Taraki on March 17, 1979, states that Taraki “requests that we dispatch Tadzhiks to serve as crews for tanks and armoured cars, dressed in Afghan uniforms” (at p. 11); Foreign Secretary Gromyko reports a similar request made by then Afghan Foreign Secretary Amin (at p. 17); *Meeting of the Politburo of the Central Committee of the Communist Party of the Soviet Union*, March 17-18, 1979 (Source: Storage Center for Contemporary Documentation (TsKhSD), Moscow; Fond 89, Perechen 25, Document 1, Listy 1, pp. 12-25); The National Security Archive, *Volume II: Afghanistan: Lessons from the Last War, The Soviet Experience in Afghanistan: Russian Documents and Memoirs*, Document 1; available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB57/soviet2.html> last accessed December 1, 2011; also Document 2 (Transcript of Telephone Conversation between Kosygin and Taraki of March 18, 1979, during which the Afghan request is made); Loyn, *supra* note 11, p. 186 (he claims there were twenty requests).

¹³ G. Lenczowski, *The Soviet Union and the Persian Gulf: an Encircling Strategy*, 37 *International Journal*, 307 (1981-1982), p. 317; Matsson, *supra* note 8, p. 84; W. Blum, *Killing Hope, US Military & CIA Interventions since World War II*, Zed Books Ltd., London: 2003, p. 342; Cynkin, *supra* note 1, p. 277; Reisman & Silk, *supra* note 11, pp. 470-471.

¹⁴ Loyn, *supra* note 11, 186; Cynkin, *supra* note 1, 276; Reisman & Silk, *supra* note 11, p. 470; Henning Behrens, *Die Afghanistan-Intervention der UdSSR, Unabhängigkeit und Blockfreiheit oder Mongolisierung Afghanistans: Eine Herausforderung für das internationale Krisenmanagement* (The intervention in Afghanistan by the USSR, independence and non-alignment or Afghanistan's mongolization: A challenge for international crisis management), Tuduv-Verlagsgesellschaft, München: 1982, p. 51; Linde, *supra* note 3, p. 84; W. Berner, *Der Kampf um Kabul: Lehren und Perspektiven* (The battle for Kabul: lessons and perspectives), in H. Vogel (ed.), *Die sowjetische Intervention in Afghanistan, Entstehung und Hintergründe einer weltpolitischen Krise*, Nomos Verlagsgesellschaft, Baden-Baden: 1980, p. 357.

There can therefore be no doubt that the Soviet Union intervened in a civil war within Afghanistan, and did not merely aid a legitimate government in restoring law and order following a small uprising (which might warrant a different legal evaluation).¹⁵ As far as the right of foreign states to intervene in civil wars is concerned, customary international law is the only source of legal rules which can be referred to. Rules on this subject specifically applicable to Afghanistan have never been codified.

As is often the case in matters dealt with in customary international law, the rights of foreign powers in civil war situations have always been extremely controversial and remain so. Nearly every possible position has been adopted at one time or another, although it is argued herein that by 1979 a consensus had developed with regard to the right of foreign powers to intervene in civil war situations.

At the outset however it should be noted that “intervention,” as evaluated and discussed here, is to be understood as an *active engagement* – involving military support (weapons and/or soldiers) – by a foreign state in favour of one of the participants in a civil war situation. The customary international law rules discussed here do not necessarily apply to lesser means of “intervention” in a civil war, such as broadcasting propaganda from abroad, politically and diplomatically supporting one side in the conflict or maintaining pre-agreed bilateral economic assistance, although it must be acknowledged that in some instances it is difficult to draw the line between bilateral “assistance” and active military support. However, in assessing the legality of the Soviet invasion of Afghanistan there can be no doubt that the USSR rendered active military support to the government side in the civil war.

2.1.1. Pre-WW II customary international law

Traditionally, there was wide-spread consensus on the right of foreign governments to intervene in civil wars, probably derived from the concept that a state can act legitimately only through its government.¹⁶ Thus it was seen as legitimate

¹⁵ Article 3 e) of the *Definition of Aggression* (GA Resolution 3314 (XXIX)) implies that a state can legally send its troops onto another country's territory at that country's request, which is implied in its definition of an act of aggression, *inter alia*, as follows: “The use of armed forces which are within the territory of another state with the agreement of the receiving state, in contravention of the conditions provided for in the agreement”; Doswald-Beck, *supra* note 5, p. 189; Ch. C. Joyner & M. A. Grimaldi, *The United States and Nicaragua: Reflections on the Lawfulness of Contemporary Intervention*, 25 Virginia Journal of International Law 621 (1984-1985), pp. 643-644.

¹⁶ Permanent Court of International Justice, *German Settlers in Poland*, Advisory Opinion (Series B, B06), September 10, 1923, at 22: “States can act only by and through their agents and representatives” (available at: http://www.icj-cij.org/pcij/serie_B/B_06/Colons_allemands_en_Pologne_Avis_consultatif.pdf last accessed 12/12/2011); Doswald-Beck,

and legal to intervene in a foreign civil war if that intervention was based on the request or invitation of the recognized government of the state concerned.¹⁷

Conversely, this meant that foreign intervention on the behalf of rebels was always illegal, as such support was directed against the state's representatives and therefore, by implication against the state itself.¹⁸ Only when a rebellion had gained such force that it was granted "belligerent status" did a policy of neutrality become obligatory.¹⁹ This traditional view is reflected in the Convention on the

supra note 5, p. 190; T. J. Farer, *Harnessing Rogue Elephants: A Short Discourse on Foreign Intervention in Civil Strife*, 82 *Harvard Law Review* 511 (1968-1969), p. 526; he also correctly points out that the "ruling classes" were anxious to protect each other from internal revolution; N. J. Padelford, *The International Non-Intervention Agreement and the Spanish Civil War*, 31 *American Journal of International Law* 578 (1937), p. 586. He adds that it was in the interest of "public law and authority" to differentiate between "established governments" and "unrecognized and irresponsible rebels".

¹⁷ S. R. Schwenninger, *The 1980s: New Doctrines of Intervention or New Norms of Nonintervention?*, 33 *Rutgers Law Review* 423 (1980), p. 428; W. Friedman, *Intervention, Civil War and the Role of International Law*, 59 *American Society of International Law Proceedings* 67 (1965), p. 72; E. Luard, *Superpowers and Regional Conflicts*, 64 *Foreign Affairs* 1006 (1985-1986), p. 1010; R. Oglesby, *A Search for Legal Norms in Contemporary Situations Of Civil Strife*, 30 *Case Western Reserve Journal of International Law* 30 (1970-1971), pp. 36-37; T. J. Farer, *Intervention in Civil Wars: A Modest Proposal*, 67 *Columbia Law Review* 266 (1967), p. 271; and Farer, *supra* note 16, pp. 511, 526-530; J. N. Moore, *Legal Standards for Interventions in Internal Conflicts*, 13 *Georgia Journal of International & Comparative Law* 191 (1983), p. 194; J. W. Garner, *Questions of International Law in the Spanish Civil War*, 31 *American Journal of International Law* 66 (1937), p. 68; I. Brownlie, *International Law and the Use of Force by States*, Oxford University Press, Oxford: 1963 (reprint 1968), p. 327; Padelford, *supra* note 16, p. 586; P. C. Jessup, *The Spanish Rebellion and International Law*, 15 *Foreign Affairs* 260 (1936-1937), p. 265.

¹⁸ T. D. Woolsey, *Introduction to the Study of International Law, Designed As an Aid in Teaching, and in Historical Studies* (4th ed.), Scribner, Armstrong & Co., New Haven: 1874, p. 56 (§ 41); Doswald-Beck, *supra* note 5, p. 190; Friedman, *supra* note 17, pp. 69, 72; Farer, *supra* note 17, pp. 271-272; and *supra* note 16, pp. 511, 526-530; Moore, *supra* note 17, p. 194; Garner, *supra* note 17, p. 67; Padelford, *supra* note 16, p. 586; Jessup, *supra* note 17, p. 265.

¹⁹ Garner, *supra* note 17, p. 70; Farer, *supra* note 16, pp. 511-512; Luard, *supra* note 17, pp. 1009-1010; Q. Wright, *United States Intervention in the Lebanon*, 53 *American Journal of International Law* 112 (1959), p. 122; Oglesby, *supra* note 17, p. 32; Doswald-Beck, *supra* note 5, pp. 196-197. According to her, an insurgency must fulfil the following four criteria in order to achieve "belligerent" status: "1) existence of a civil war ... ; 2) occupation and ... administration of a substantial part of national territory by insurgents; 3) observance of the rules of warfare ... 4)...practical necessity for third states to define their attitude" (she is here relying on Oppenheim's definition); R. Higgins, *Intervention and International Law* in H. Bull (ed.), *Intervention in World Politics*, Clarendon Press, Oxford: 1984, Ch. 3, p. 40 (requirements 1 and 2, but she adds the requirement of an "organized fighting unit"); M. Krauss, *Internal Conflicts and Foreign States: In Search of the State of Law*, 5 *Yale Studies in World Public Order* 173 (1978-1979), pp. 187-190; relying on Section 8 of the 1900 *Règlement* passed by the *Institut de Droit International*. He concurs with requirements 2

Rights and Duties of States in Event of Civil Strife, concluded in 1928 and applicable in the Americas.²⁰

Nevertheless, while this view of the right of intervention was widely-held, it was not without controversy among international law scholars even during its heyday. Most notably Stowell in 1921, and Hall in 1924, advocated a policy of non-intervention in civil wars and argued that intervening on either side was illegal.²¹

While Hall and Stowell were expressing a minority view at the time, the major powers' policies during the Spanish Civil War (1936-1939) did demonstrate a growing ambivalence on the part of foreign states insofar as intervening in civil wars was concerned.²² Although the Spanish Republican Government was recognized as the legitimate government of Spain, there was a consensus that outside powers should not intervene on either side in the government's fight against the fascist rebellion. This policy, semi-officially adopted by all the major powers, is often referred to as the *Spanish Non-intervention Agreement*.²³

In practice, however, it is undeniable that this policy was not adhered to. The Soviet Union and, to some extent France, tried to aid the Spanish Government, while Germany and Italy intervened massively on the fascist side.²⁴ It must also be kept in mind that the policy of non-intervention was mainly an attempt to avoid a general European war; it was not motivated by a desire to uphold international law.²⁵ Indeed the agreement proved to be very controversial among international

and 3; Jessup, *supra* note 17, pp. 270-273 (demanding "a very considerable degree of organization and stability", and that the insurgents are "contending on more or less equal terms" with the government's forces).

²⁰ Article 1 (the text of the treaty is available at: <http://www.oas.org/juridico/english/treaties/a-27.html>, accessed December 12, 2011).

²¹ E. C. Stowell, *Intervention in International Law*, John Byrne & Co., Washington, D.C: 1921, pp. 330-340; W. E. Hall, *A Treatise on International Law* (8th ed.), The Clarendon Press, Oxford: 1924, p. 347 (§ 94).

²² Moore, *supra* note 17, p. 194.

²³ The so-called "Spanish Non-intervention Agreement" was not a formal convention, but was based on an exchange of notes between, in the end, twenty-seven different states. It was initiated by an exchange of notes between France and Britain in August 1936. These notes resulted in the "International Committee for the Application of the Agreement regarding Non-intervention in Spain," set up in September 1936. The Committee was responsible for the supervision of the agreement's implementation; Padelford, *supra* note 16, pp. 579-582; Jessup, *supra* note 17, pp. 268-270; Friedman, *supra* note 17, pp. 70, 72; Wright, *supra* note 19, p. 122.

²⁴ Friedman, *supra* note 17, pp. 70, 72; Luard, *supra* note 17, p. 1010; Wright, *supra* note 19, p. 122; Garner, *supra* note 17, pp. 66-67, 68.

²⁵ *Eden Hard At Work to Stave Off A War; Clash of Powers Now Over Spain Would Dash His Hopes of Mending European Quarrels in Fall*, Ferdinand Kuhn Jr., The New York Times, 23.08.1936, E4; Wright, *supra* note 19, p. 122; Padelford, *supra* note 16, p. 578; Jessup, *supra* note 17, pp. 265-266.

lawyers, with some explicitly arguing it was not only novel, but actually illegal under international law for states to agree to ignore a recognized government's request for assistance in a civil war or, even worse, to prohibit individuals from exporting arms to that government.²⁶ Even some of the states officially participating in the *Non-intervention Agreement* acknowledged that it was a "breach of principles of international law."²⁷

Nevertheless, the very fact that the major powers of the day obviously did believe that it was justifiable to ignore the government's pleas for support in its civil war – despite the fact that the opposing Spanish fascists never gained "belligerent status" – can be viewed as the beginning of a change in attitude towards the automatic primacy accorded to recognized governments in civil wars.

2.1.2. Post-WW II developments

Following WW II, the right of intervention in a civil war at the request of a government became increasingly controversial. This was due to a variety of changing international conditions.

2.1.2.1. Non-application of the old rules

For one thing, it was becoming increasingly evident that the old principle that rebellions were to be ignored until they had achieved "belligerent status" existed only on paper.²⁸ No rebellion since the US Civil War (1861-1865) had ever been granted "belligerent status," even though a number of rebellions

²⁶ Brownlie, *supra* note 17, p. 324. He points out that the Spanish and Mexican governments "challenged" the international legality of the agreement (fn. 5); E. Borchard, 'Neutrality' and Civil Wars, 31 American Journal of International Law 304 (1937), pp. 305-306; Garner, *supra* note 17, pp. 66-71; he does not express an opinion, but raises doubts as to the foreign powers' attitude towards the recognized Spanish government; Padelford, *supra* note 16, p. 586, states that "to apply to unrecognized and irresponsible rebels the same principles that are applicable to sovereign states and established governments is to encourage rebellion and disorder and to weaken public law and authority. The law can not [sic] long afford to do this."

²⁷ Soviet representative Litvinov at the 17th Ordinary Session of the Assembly at the League of Nations (September 1936). On that occasion the Portuguese and, of course, the Spanish representatives also claimed the accord to be in violation of international law, although the Soviet and Portuguese representatives went on to justify this violation as a necessity, given the international situation; Padelford, *supra* note 16, pp. 581, 585, 586 (incl. fn. 21 and 22).

²⁸ Doswald-Beck, *supra* note 5, p. 197; Higgins, *supra* note 19, pp. 41-42; Friedman, *supra* note 17, pp. 72-73; Oglesby, *supra* note 17, p. 32; Krauss, *supra* note 19, pp. 203-204; he also acknowledges this argument, but poses the question whether states' behaviour during some crises (such as the Spanish Civil War) did not imply implicit recognition of the

had ended in a change of government (Spain being one of the notable examples).²⁹ It was (and is) therefore questionable whether the rules on insurgencies and belligerency can still be viewed as part of customary international law.³⁰

2.1.2.2. Recognition of governments

More importantly, however, changing attitudes towards the status and legitimacy of a state's government served to undermine the value of a governmental request for outside intervention in a civil war. The recognition of governments as legitimate representatives of states became heavily politicized in some cases, and increasingly pragmatic in others. This undermined the relevance of formal recognition by other states when attempting to judge a government's legitimacy.

On the one hand, the USA for many decades refused to accept the *de facto* situation in China and did not recognize Mao Tse Tung's government as the representative of China. Instead it recognized the Taiwanese government, based on its more convenient ideological outlook, even though there was no doubt that the Taiwanese government was in control of only the small island of Taiwan, and that there was no realistic prospect of a change in that situation in the future.³¹

On the other hand, states generally tended to adopt an increasingly pragmatic evaluation of who was in *de facto* control of the state concerned when deciding whom to deal with, seemingly thereby willing to deal even with foreign-imposed governments.³² Not only were the Soviet-imposed communist governments in Eastern Europe universally recognized, but such recognition was even accorded to the Hungarian government imposed by the Soviet Union following the failure of the uprising in 1956, albeit only after a few years time.³³

The recognition of a government therefore either deteriorated into a mere political statement without any relation to the facts, or became so "realist" that

rebels as belligerents. As also acknowledged by him, state behaviour has, however, been notably erratic as far as the treatment of insurgents is concerned, so that assuming a "confirmation by implication" of a rule not invoked seems problematic.

²⁹ Doswald-Beck, *supra* note 5, p. 197; A. S. Hershey, *The Essentials of International Public Law and Organization* (2nd ed.), The Macmillan Company, New York: 1927, pp. 206-207. The last example he can find is the recognition, in 1861, of "the Southern Confederacy" during the American Civil War, although he claims the USA was also close to recognizing the belligerent status of rebels in Cuba in 1869 and 1896, but in the end refrained from doing so.

³⁰ Doswald-Beck, *supra* note 5, p. 197.

³¹ Wright, *supra* note 19, pp. 120-121; Friedman, *supra* note 17, p. 71; Doswald-Beck, *supra* note 5, pp. 197-198. Although not referring to China, she offers numerous other examples, such as the rapid recognition of the Adoula government in the Congo in 1961, despite the fact it had no proper control over the country.

³² Doswald-Beck, *supra* note 5, pp. 194-195.

³³ *Ibidem*, p. 195.

some recognized governments could hardly claim to be legitimate in any other way, apart from relying on geo-politics.³⁴ By 1980 many governments, including the UK's, had consequently decided to abandon the custom of formally recognizing other governments.³⁵

The increasing tendency to adopt a "realist" approach to foreign governments and to judge them on the basis of their *de facto* control of the state meant that Hall's view, that a government that required outside support to stay in power should not be supported, gained more coinage. After all, a government requiring foreign intervention against its own people was *not* in control.³⁶

2.1.2.3. Decolonisation, self-determination, and non-interference

The de-colonisation process was also raising doubts about the right of a colonial government to call in foreign assistance in an attempt to quash a nationalist movement fighting for self-determination, thereby further undermining the deference granted to "governments".³⁷ Furthermore, following the Universal Declaration of Human Rights and the increasing attention paid to human rights, a government's treatment of its own citizens began to be taken into account in assessing possible interventions.³⁸

Doubts began to emerge whether a racist or tyrannical regime – even if in *de facto* control – should be accorded with any kind of recognition.³⁹ This development was to extend so far that by the 1970s, the UN General Assembly recognised some national liberation movements, instead of repressive governments, as the legitimate representatives of specific states.⁴⁰

³⁴ Farer, *supra* note 16, p. 526.

³⁵ Doswald-Beck, *supra* note 5, pp. 194-195.

³⁶ *Ibidem*, p. 196; J. A. Perkins, *The Right of Counterintervention*, 17 Georgia Journal of International & Comparative Law 171 (1987), pp. 190-191; Farer, *supra* note 17, pp. 272-273; Krauss, *supra* note 19, pp. 209-210.

³⁷ Doswald-Beck, *supra* note 5, pp. 200-201. She also, however, notes the limited acceptance of the principle of self-determination when it conflicts with the *uti posseditis* principle (pp. 202-203).

³⁸ Schwenninger, *supra* note 17, p. 429.

³⁹ *Ibidem*, p. 428; Doswald-Beck, *supra* note 5, pp. 195, 197 (obvious examples being the non-recognition of Rhodesia and its government following its unilateral declaration of independence, and the non-recognition of South Africa's control over Namibia (South-West Africa)).

⁴⁰ Resolution 2918 (1972) referring to the national liberation movements of Angola, Guinea-Bissau, Cape Verde and Mozambique; Resolution 3111 (1973) referring to Namibia; Resolution 3113 (1973) referring once more to the Portuguese colonies; Resolution 3115 (1973) referring to Rhodesia; Resolution 3151 G (1973) referring to South Africa.

This international fluidity led to a situation in which there was no consensus on what the international law rules were concerning interventions in civil war, because many areas of the law were still in a state of flux and had not yet been developed sufficiently.⁴¹ There were those who vehemently argued in favour of retaining the traditional legal rules, and those who strongly opposed just that. Nor did prevailing state practice provide any clear guidelines, as specific interventions in a civil war were routinely based on other, additional justifications.

On the other hand, only a short time after WW II regional treaties were concluded that did explicitly outlaw any external interference in the internal affairs of another country, such as the OAS Charter⁴² and the Warsaw Pact.⁴³

These regionally-adopted principles of non-intervention were to develop into a general principle of international law at a universal level that came to be viewed as applicable to civil war situations as well. Two almost simultaneous and arguably contradictory developments enabled this to happen.

On the one hand, under the influence of the negotiations which were to lead in 1966 to the conclusion of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESR), it became increasingly unacceptable to argue that it was legitimate to intervene in an internal conflict in order to help an authoritarian government suppress a revolting population.⁴⁴ This led to the widespread realization that distinctions had to be made between different kinds of government, so that the whole rigid concept of intervention in an internal conflict simply at the request of the recognized government became untenable.

On the other hand, these developments in the sphere of civil and political rights, and more generally in the field of human rights, took place against the backdrop of the de-colonisation process. Many new states, which had only just joined the United Nations, were extremely anxious to safeguard their new status as independent states against any attempt of encroachment.⁴⁵

⁴¹ Friedman, *supra* note 17, pp. 72-74; Luard, *supra* note 17, pp. 1010-1011; Brownlie, *supra* note 17, p. 327; Farer, *supra* note 17, pp. 273-274. Writing in 1967, he describes the legal situation regarding interventions in civil wars as the "normless present".

⁴² Article 19 (the OAS Charter was concluded in 1948; 119 UNTS 3).

⁴³ Article 8; The Warsaw Security Pact (1955), Treaty of Friendship, Cooperation and Mutual Assistance; 219 UNTS 2962.

⁴⁴ J. Rohlik, *Some Remarks on Self-Defense and Intervention: A Reaction to Reading Law and Civil War in the Modern World*, 6 Georgia Journal of International & Comparative Law 395 (1976), pp. 409-411.

⁴⁵ Doswald-Beck, *supra* note 5, pp. 209-211, 252; Perkins, *supra* note 36, p. 189; Krauss, *supra* note 19, pp. 212-213.

The principle of self-determination, included in Article 1(2) of the UN Charter, was the obvious anchor for securing, in international law, the developing states' new-found independence and freedom from external interference.⁴⁶ In this struggle, the newly independent states were massively supported by the Soviet Union, which was also anxious to strengthen the concept of self-determination, a concept outlined in some detail in Lenin's *Decree on Peace* of October 26, 1917.⁴⁷ The subsequent progression of the principle of self-determination into a right of self-determination was confirmed by the two covenants, the ICCPR and the ICESR,⁴⁸ whose common Article 1 states:

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

This was a confirmation of the view already taken by the General Assembly in its 1960 Resolution on the Granting of Independence to Colonial Countries and Peoples.⁴⁹

It may be argued that as of the mid-1960s these twin developments led the UN General Assembly to pass numerous resolutions, by large majorities, in which the principle of non-interference in the domestic affairs of other states was frequently reiterated.⁵⁰ Although such prohibitions, as far as civil wars were concerned, were often directed at the foreign support of rebel groups, the principle of non-interference also came to be increasingly seen as a general rule, which could readily be interpreted as also prohibiting military interventions *on behalf of* beleaguered governments. Deciding who should govern was increasingly seen as a facet of a people's right of self-determination; a decision to be arrived at, if necessary, even by civil war.⁵¹

⁴⁶ Schwenninger, *supra* note 17, pp. 428-429; Rohlik, *supra* note 44, p. 406; Perkins, *supra* note 36, p. 185; Moore, *supra* note 17, pp. 195, 196.

⁴⁷ *Decree on Peace*; delivered at the *Second All-Russia Congress of Soviets of Workers' and Soldiers' Deputies*, 26 October 1917 and published by Izvestiia, 27.10.1917; this decree can be found at: <http://www.historyguide.org/europe/decree.html> and <http://www.firstworldwar.com/source/decreeonpeace.htm> both last accessed December 1, 2011.

⁴⁸ Ross, *supra* note 1, p. 96.

⁴⁹ GA Resolution 1514 (1960), Article 2; E. Klein, *Nationale Befreiungskämpfe und Dekolonisierungs-Politik der Vereinten Nationen: Zu einigen völkerrechtlichen Tendenzen* (Wars of National Liberation and the United Nations' Policy of Decolonisation: Some of the tendencies in international law), *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 618 (1976), p. 641.

⁵⁰ Schwenninger, *supra* note 17, pp. 428-429; Higgins, *supra* note 19, p. 37.

⁵¹ O. Schachter, *The Right of States To Use Armed Force*, 82 Michigan Law Review 1620 (1983-1984), p. 1645; Rohlik, *supra* note 44, pp. 409-411.

In 1965 the General Assembly passed, by a 109:0:1 vote, the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty. It stated, *inter alia*, that “no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State.”⁵² These sentiments were reaffirmed in the 1970 General Assembly’s Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States, which was passed without a vote.⁵³

Although the Resolution as such was not legally binding, the fact it was passed by consensus, and explicitly referred to international law allows for the conclusion that the states viewed the content of the Declaration as being reflective of their interpretation of the international law.⁵⁴ In its 1986 judgment in the *Nicaragua Case* the ICJ confirmed that the principle of non-intervention had become “part of customary international law.”⁵⁵

By the 1970s, the majority view held that customary international law required states to refrain from intervening in other states’ civil wars, whether at the request of the rebels, or at the request of the government.⁵⁶ This outcome

⁵² GA Resolution 2131 (XX) (1965). It should, however, be noted that the US representative stated that the USA regarded Resolution 2131 as a “statement of attitude and policy ... *not* as a declaration or elaboration of the law governing non-intervention” (emphasis added); Robert Rosenstock, *The Declaration of Principles of International Law Concerning Friendly Relations: A Survey*, 65 American Journal of International Law 713 (1971), p. 727.

⁵³ GA Resolution 2625 (XXV) (1970): “Every state has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another state or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force.”

⁵⁴ This is also confirmed by the US attitude. While the US Representative had declared that Resolution 2131 (1965) was a mere policy statement, not a statement of law, he had explicitly mentioned the *Declaration* – finally passed in 1970, but being drafted since 1964 – as having “the precise job of enunciating that law” as far as non-intervention was concerned. Rosenstock, *supra* note 52, pp. 714-715, 726-729; Perkins, *supra* note 36, pp. 186, 188; P. A. Pentz, *The Mujahidin Middleman: Pakistan’s Role in the Afghan Crisis and the International Rule of Non-Intervention*, 6 Dickinson Journal of International Law 377 (1987-1988), pp. 385-387.

⁵⁵ ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, Judgement (Merits), ICJ Reports 1986, 14, paras. 202, 205.

⁵⁶ Pentz, *supra* note 54, 387-390; Perkins, *supra* note 36, pp. 183-195; Doswald-Beck, *supra* note 5, pp. 250-252, esp. 252; L. B. Sohn, *Gradations of Intervention in Internal Conflict*, 13 Georgia Journal of International & Comparative Law 225 (1983), pp., 226, 227; Schwenninger, *supra* note 17, p. 429, who even claims that a “clear international consensus ... against outside interference” had emerged; Ch. Gray, *International Law and the Use of Force* (3rd ed.), Oxford University Press, Oxford: 2008, p. 81, similarly argues that this position

was, firstly, the result of de-emphasizing the government's role in international law under the weight of human rights considerations; and, secondly, the consequence of the right of self-determination, which was viewed as granting to the people the sole right to decide who should govern them, if necessary even by civil war.

Against the above background it must be pointed out that although the principle of non-intervention had by the 1970s become the majority view, it was not uncontroversial, nor was its practical application easy.⁵⁷

There were some who argued that the principle of non-intervention was a misnomer, and that its adoption was actually an intervention *per se*. Taken to its extremes, a policy of non-intervention would not only be impracticable, but also oblige a state to end bilateral assistance programmes in support of another state if it were possible to argue that maintaining them would lend support to the government's struggle against rebels.⁵⁸ On the other hand, reducing such programmes would seriously weaken any government dependent on them and therefore

was "generally agreed." See also R. Fisher, *Intervention: Three Problems of Policy and Law*, reprinted in R. A. Falk (ed.), *The Vietnam War and International Law*, Princeton University Press, Princeton: 1968, pp. 137, 140, 145; J. Quigley, *The Reagan Administration's Legacy to International Law*, 2 Temple International & Comparative Law Journal 199 (1987-1988), p. 204; D. G. Partan, *Legal Aspects of the Vietnam Conflict*, reprinted in R. A. Falk (ed.), *The Vietnam War and International Law*, Princeton University Press, Princeton: 1968, p. 227; and Schachter, *supra* note 51, p. 1641, who obviously views this rule as uncontroversial. Rohlik, *supra* note 44, pp. 406-407; Wright, *supra* note 19, pp. 119-121. Wright claims that the rule of non-intervention in civil wars was already the "predominant view" when he was writing in 1959; Oglesby, *supra* note 17, pp. 38-39, 41, writing in 1970, claims however that a new norm in favour of "bloc intervention" may be developing; Moore, *supra* note 17, p. 199; it should, however, be pointed out that although Moore supports this majority view the – according to him – permissible exceptions are quite generous, mostly coinciding with US policies. Friedman, *supra* note 17, pp. 72-74, only claims however that, in international law, it is no longer possible to differentiate between support of a government and support of rebels, his implication being that neither are any longer properly regulated by international law; Luard, *supra* note 17, p. 1011, seems to agree with Friedman.

⁵⁷ Rostow, *supra* note 8, p. 223. Rostow, writing in 1980-1981, simply states, for example, that "international law always has recognized one State's right to appeal to another for military assistance against revolution"; Joyner/Grimaldi, *supra* note 15, pp. 642-643, 644; M. J. Matheson, *Practical Considerations for the Development of Legal Standards for Intervention*, 13 Georgia Journal of International & Comparative Law 205 (1983); R. Ullman, *Reflections on Intervention*, 52 Revista Juridica Universidad de Puerto Rico 127 (1983), pp. 130-131; writing in 1983, he argues that the traditional rules of international law as far as interventions are concerned still apply; Krauss, *supra* note 19, pp. 218-219.

⁵⁸ Perkins, *supra* note 36, pp. 195-196; Farer, *supra* note 17, pp. 274-275; and *supra* note 16, pp. 530-531; Moore, *supra* note 17, p. 195.

offer indirect assistance to the rebels.⁵⁹ “Non-intervention” was therefore in truth “intervention” in another state’s internal upheavals.⁶⁰ Furthermore, other states would always intervene when it was in their interests to do so.⁶¹

This view resulted in some actually putting forward the argument that customary international law should be adapted in such a way so as to generally allow outside intervention in a civil war as long as it was ensured that the conflict remained an internal one and was not orchestrated from abroad.⁶²

Despite the fact that some of these objections constituted valid criticisms of the principle of non-intervention in a civil war, advocates of the majority view correctly counter-posed that it was possible to differentiate between the continuation of bilateral aid programmes – compatible with a policy of non-intervention – and active support of the governmental side in an internal conflict.⁶³ As far as military cooperation programmes were concerned, however, once civil war had erupted the suspension of weapons deliveries and military advice was always possible and justified.⁶⁴

Furthermore, insofar as intervention in a civil war is understood as military support of one side in a conflict – which is the topic of this article – the principle of non-intervention does not impact on the maintenance of non-military bilateral cooperation or aid programmes.

2.1.2.4. State practice

As early as the late 1950s state practice also began to reflect doubts about the pre-WW II rules on intervention. Interventions in internal conflicts were increasingly depicted as reactions to prior foreign interference by others.⁶⁵

⁵⁹ Perkins, *supra* note 36, pp. 195-196; Matheson, *supra* note 57, p. 206; Moore, *supra* note 17, p. 195.

⁶⁰ J. J. Lador-Lederer, *Intervention – A Historical Stocktaking*, 29 Nordisk Tidsskrift Int’l Ret. 127 (1959), pp. 128, 131; Matheson, *supra* note 57, pp. 206-207; Ullman, *supra* note 57, pp. 133-134, puts forward a related argument by claiming that a rule of non-intervention would aid repressive regimes and undermine human rights. His argument, however, seems contradictory, given the fact that he argues that the traditional rules in favour of supporting governments in civil wars still apply, but then criticizes the rule of non-intervention on the basis that it aids repressive incumbents.

⁶¹ Lador-Lederer, *supra* note 60, p. 136; Farer, *supra* note 17, pp. 274-275.

⁶² Farer, *supra* note 17, pp. 275-279, esp. 276 (his “threshold” is the prohibition of foreign involvement in actual combat); and *supra* note 16, pp. 532-540; Krauss, *supra* note 19, pp. 220-221.

⁶³ Perkins, *supra* note 36, pp. 196-197.

⁶⁴ *Ibidem*.

⁶⁵ Lador-Lederer, *supra* note 60, pp. 132-133; Brownlie, *supra* note 17, pp. 325-327.

The Soviet intervention in Hungary in 1956,⁶⁶ as well as the 1958 US/British interventions in Lebanon and Jordan⁶⁷ in favour of the respective governments were justified on the basis of previous foreign support of the rebels. Nonetheless, the interventions received little international support.⁶⁸

Similarly, when the United States invaded the Dominican Republic in 1965,⁶⁹ it was mentioned that a request for assistance had been received from a government official,⁷⁰ but that request was initially claimed to have related only to the protection of US nationals there.⁷¹ Later, when that justification became untenable due to the large number of American troops deployed in the country, the right to collective self-defence was invoked, also on behalf of the OAS,⁷² against Cuban and Soviet attempts to install a communist government. When justifying the invasion to the American public, President Johnson actually confirmed the thesis that – except for communist takeovers – “revolution in any country is a matter for that country to deal with.”⁷³ Apart from the UK and China (still represented by Taiwan) no UN state officially supported the US intervention on legal grounds.⁷⁴ When the USA decided to intervene in the civil war in Vietnam in the 1960s,

⁶⁶ *Declaration by the Soviet Government on the Principles of Development and further Friendship and Cooperation between the Soviet Union and Other Socialist States*, October 30, 1956; available at: <http://www.fordham.edu/halsall/mod/1956soviet-coop1.html> last accessed October 26, 2011; Rostow, *supra* note 8, pp. 224-225, 227-228; R. F. Turner, *Soviet Attitudes on the Permissibility of the Use of Force in International Relations*, in J. Norton Moore, R. F. Turner (eds.), *International Law and the Brezhnev Doctrine*, University Press of America, Inc., Lanham: 1987, pp. 89-90; Doswald-Beck, *supra* note 5, pp. 223-224; K. Rider Schmeltzer, *Soviet and American Attitudes Toward Intervention: The Dominican Republic, Hungary and Czechoslovakia*, 11 *Virginia Journal of International Law* 97 (1970-1971), p. 112.

⁶⁷ President Eisenhower, *A Message to Congress*, July 15, 1958; Wright, *supra* note 19, p. 112.

⁶⁸ GA Resolution 1004 (1956); the resolution was passed by 50:15:8 votes (condemning the Soviet invasion of Hungary). As far as the British/US interventions are concerned, see: Doswald-Beck, *supra* note 5, pp. 216-217; Wright, *supra* note 19, pp. 114; Gray, *supra* note 56, pp. 95, 174, 176.

⁶⁹ In 1963 a military junta had deposed the democratically elected government of the Dominican Republic. In April 1965 that junta was itself overthrown by supporters of the former President; civil war erupted.

⁷⁰ Doswald-Beck, *supra* note 5, pp. 213, 226-230; it should, however, be pointed out that the validity of any request by Dominican authorities was very much in doubt. In the Security Council debate the US delegate claimed a request had been received by “Dominican law enforcement and military officials”; Sohn, *supra* note 56, p. 227.

⁷¹ Doswald-Beck, *supra* note 5, p. 227; Schmeltzer, *supra* note 66, p. 105.

⁷² The OAS passed a resolution confirming the American view after the invasion had taken place (at its Tenth Meeting of Consultation); Schmeltzer, *supra* note 66, p. 106.

⁷³ President Johnson, *Address to the Nation*, May 2, 1965; quoted by Quigley, *supra* note 56, p. 202.

⁷⁴ Doswald-Beck, *supra* note 5, pp. 228-229.

at the official request of the South Vietnamese government, it again invoked Article 51 of the UN Charter.⁷⁵

States' tendency to justify their interventions in other states' internal conflicts on the basis of Article 51 of the UN Charter, rather than relying on the government's request for assistance, continued in the 1970s and 1980s. Angola justified Cuba's support in its battle against internal rebels as collective self-defence, due to South Africa's prior support of UNITA. Libya's attempt to justify its repeated interventions between 1981 and 1984 in Chad's civil war on the basis of the Chad government's request was condemned by the OAU.⁷⁶ Meanwhile France, which later also intervened in Chad, at all times claimed its troops would only fight Libyan troops, not the indigenous rebels,⁷⁷ a distinction compatible with Article 51 of the UN Charter, but not with the traditional legal right of intervening in a civil war at a government's request.⁷⁸

2.1.2.5. Conclusions to section 2.1.2

The events just outlined indicate that by the early 1970s a formal request by the recognized government of a state was no longer deemed sufficient to justify an outside intervention in civil war situations. States felt it necessary to provide additional grounds in their legal justifications, even where the existence of a valid invitation by a foreign government was not in doubt.⁷⁹ Intervening states unfailingly cited prior foreign support of rebels and invoked Article 51 of the UN Charter. State practice therefore appears to confirm the existence of the general rule of non-interference in purely internal civil wars in customary international law.⁸⁰

In consequence of the above trends, the British Foreign Office issued the following legal advice in 1984:

⁷⁵ *The Legality of United States Participation in the Defense of Viet-Nam*, 04/03/1966; 54 Department of State Bulletin, 1966, p. 474; reprinted in 60 American Journal of International Law 565 (1966).

⁷⁶ Doswald-Beck, *supra* note 5, pp. 220-221; Gray, *supra* note 56, p. 96.

⁷⁷ Doswald-Beck, *supra* note 5, p. 221.

⁷⁸ *Ibidem*; Gray, *supra* note 56, pp. 96-98, 167.

⁷⁹ Doswald-Beck, *supra* note 5, p. 214; Lador-Lederer, *supra* note 60, pp. 132-133.

⁸⁰ Doswald-Beck, *supra* note 5, pp. 251-252; Gray, *supra* note 56, pp. 81, 85-88, points out that another popular way for states to intervene in internal conflicts is by disputing the existence of a civil war (prohibiting intervention) and claiming that there was simply "domestic unrest below that threshold". States can then justify aiding the respective government in restoring order (she provides a number of examples). This state practice, described by Gray, further confirms the existence, in international law, of the prohibition of intervention in a civil war, even at the government's request. As is mentioned in the conclusion of this article, this reflects the policy adopted by Saudi Arabia when intervening in Bahrain in early 2011.

International law does, however, place two major restrictions on the lawfulness of states providing outside assistance to other states. One is that any form of interference or assistance is prohibited ... when a civil war is taking place and control of the state's territory is divided between warring parties.⁸¹

2.1.2.6. Afghanistan

By December 1979, the Soviet Union could no longer claim to be legally entitled to intervene in the Afghan civil war simply by virtue of the request of the Afghan Government. Although the Soviet Union's official justification may have been acceptable under customary international law prior to WW II, developments since then had first raised doubts regarding such arguments and, by the 1970s, led to the majority view that any intervention in a purely internal civil war was illegal.

This conclusion is confirmed by the attitude of both the Soviet Foreign Secretary and the Soviet Prime Minister: they had both, in March 1979, internally deemed a Soviet intervention in Afghanistan's civil war at that government's request to be illegal under international law. Foreign Secretary Gromyko offered the following legal assessment:

I completely support Comrade Andropov's proposal to rule out such a measure as the deployment of our troops into Afghanistan...we must keep in mind that from a legal point of view too we would not be justified in sending troops. According to the UN Charter a country can appeal for assistance, and we could send troops, in case it is subject to external aggression. Afghanistan has not been subject to any aggression. This is an internal affair, a revolutionary internal conflict, a battle of one group of the population against another.⁸²

Also, the Soviet Union's invasion was widely and overwhelmingly condemned by other states.⁸³ The General Assembly, in its Resolution on Afghanistan, chose to re-affirm the principle of non-intervention:

⁸¹ *Is intervention ever justified?*, British Foreign Office, Foreign Policy Document No. 148 of July 1984; extracts reprinted in 57 *British Yearbook of International Law* 614 (1986), p. 616.

⁸² Soviet Foreign Secretary Andrej Gromyko (at 14); Soviet Prime Minister Kosygin reported to the Politburo that he had replied to Taraki's request for a Soviet intervention in March 1979 by telling him that such a move "would be direct aggression on the part of the U.S.S.R. against Afghanistan" (at 19); *Meeting of the Politburo of the Central Committee of the Communist Party of the Soviet Union*, March 17-18, 1979 (Source: Storage Center for Contemporary Documentation (TsKhSD), Moscow; Fond 89, Perechen 25, Document 1, Listy 1, pp. 12-25); The National Security Archive, *Volume II: Afghanistan: Lessons from the Last War, The Soviet Experience in Afghanistan: Russian Documents and Memoirs*, Document 1, available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB57/soviet2.html> last accessed 01/12/2011.

⁸³ GA Resolution ES-6/2 (1980), passed in a 104:18:18 vote.

... Reaffirming the inalienable right of all peoples to determine their own future and to choose their own form of government free from outside interference...

Recognizing the urgent need for immediate termination of foreign armed intervention in Afghanistan so as to enable its people to determine their own destiny without outside interference or coercion...

1. Reaffirms that respect for the sovereignty, territorial integrity and political independence of every State is a fundamental principle of the Charter of the United Nations, any violation of which under any pretext is contrary to its aims and purposes;

2. Strongly deplores the recent armed intervention in Afghanistan, which is inconsistent with this principle...

4. Calls for the immediate, unconditional and total withdrawal of the foreign troops from Afghanistan in order to enable its people to determine their own form of government and choose their economic, political and social systems free from outside intervention, subversion, coercion or constraint of any kind whatsoever..⁸⁴

Many states that condemned the Soviet invasion did not discuss in detail the – disputed – validity of the Afghan government's request,⁸⁵ but stressed that the USSR had intervened in an internal conflict which should be resolved by the Afghan people.⁸⁶ Venezuela's representative spoke for many states when he stated that the conflict in Afghanistan was "part of an internal process to determine the political future of the country and should not be interfered with by external actions of the type denounced here."⁸⁷

Thus the Soviet invasion of Afghanistan and the international reaction to it actually confirmed the prohibition in customary international law of intervention in civil wars on either side.

⁸⁴ GA Resolution ES-6/2 (1980).

⁸⁵ The question as to whether there had been a valid Afghan request prior to the Soviet invasion will be discussed later; doubts were certainly raised at the UN, Matsson, *supra* note 8, p. 87.

⁸⁶ Japan, Egypt, Norway, the Netherlands, Jamaica, Zambia, Yugoslavia, Tunisia, Australia, West Germany, Senegal, Sweden, Nigeria, Bangladesh, Austria, Ivory Coast, Bahrain, Oman, Morocco. In addition further states made the same point, but also disputed the Afghan government's request: Pakistan, Singapore, Spain, Liberia, Portugal, Panama and France.

⁸⁷ UN Doc. S/PV.2188 (1980).

2.2. Right of counter-intervention

Based on the alleged intervention by other states, including the USA, Pakistan and Iran, in Afghanistan's civil war,⁸⁸ the Soviet Union could argue that it was not asserting the right of intervening in a civil war at the request of the government but, owing to the prior foreign interventions on behalf of the rebels, was claiming a right of counter-intervention in support of the Afghan government.

Even among those supportive of the majority view outlined above regarding the unlawfulness of intervening in a civil war on either side, there are those who argue that customary international law does entitle foreign states to claim a right of counter-intervention when prior foreign intervention in a conflict has taken place.⁸⁹

This is not a convincing view. In contrast to what its supporters argue, state practice does not confirm that a right of counter-intervention exists in customary international law. Never has a state officially relied on such a justification.⁹⁰

⁸⁸ Z. Brzezinski, Carter's National Security Advisor at the time of the Soviet invasion of Afghanistan; see: *Oui, la CIA est entrée en Afghanistan avant les Russes...* (Yes, the CIA did enter Afghanistan before the Russians did...); Interview given to Vincent Jauvert, *Le Nouvel Observateur*, 15.01.1998; an English translation is available at: <http://www.globalresearch.ca/articles/BRZ110A.html> accessed October 26, 2011; R. M. Gates, *From the Shadows, The Ultimate Insider's Story of Five Presidents and How They Won the Cold War*, Simon & Schuster Paperbacks, New York: 1996 (this edition: 2006), pp. 143-149; the recent US Defence Secretary was Deputy Director of the CIA at the time. He points out that the CIA was looking at options for granting such support as of early 1979, and confirms that US President Carter authorized covert funding of the mujahedeen in July 1979; Loyn, *supra* note 11, p. 191 (although he claims US support of the mujahedeen was only initiated in 1980); Doswald-Beck, *supra* note 5, p. 232.

⁸⁹ Schachter, *supra* note 51, pp. 1641-1644; Perkins, *supra* note 36, pp. 171-183, 197-205; Gray, *supra* note 56, pp. 81, 92; Sohn, *supra* note 56, pp. 229-230; Partan, *supra* note 56, pp. 228-229; although he acknowledges that it would be the "better result" to view intervention and counter-intervention as unlawful, he believes counter-intervention to be permissible self-defence under the UN Charter (without explaining this assertion) – L. N. Cutler, *The Right to Intervene*, 64 *Foreign Affairs* 96 (1985-1986), pp. 102, 106-111. He, however, limits the right of counter-intervention to supporting the "democratic side" in a civil war (whether that would be the rebel or governmental side). Besides being wholly impractical (who would be able to judge the democratic credentials of the respective rivals, especially on the insurgent side?), it seems obvious that this theory, outlined by Cutler in 1985, was meant to justify multiple American interventions, while condemning similar Soviet actions. This becomes evident when he claims US support of the Afghan rebels to be justified although "their commitment to ... democratic government ... may require further demonstration" (at p. 108). There is also no evidence of state practice or *opinio juris* in support of Cutler's argument.

⁹⁰ Gray, *supra* note 56, pp. 92-98, seems to disagree. However, she is only able to name two examples where she explicitly claims that intervention in a civil war took place without the interventionist claiming to be acting under Article 51, and neither is convincing. As far

When a state has intervened in a civil war-like situation, and justified this on the basis of prior foreign intervention, that state has invariably relied on Article 51 of the UN Charter and claimed a right of collective self-defence against external aggression.⁹¹ This was also the line the Soviet Union took in Afghanistan, as will be explained shortly.⁹² State practice therefore indicates that a customary right of counter-intervention, distinct from Article 51, does not exist in international law.

A right of counter-intervention would in practice result in nothing but a return to the traditional law rules in favour of intervention in support of a government, as state practice confirms.⁹³ As already outlined above, states have instead

as the 1974 Turkish intervention in Cyprus in response to the prior Greek intervention is concerned, it is uncertain whether the situation in Cyprus could at that time be described as a "civil war". Furthermore, Turkey – in its justification – did not rely on a right of counter-intervention, but on rights allegedly granted to it in the 1960 *Treaty of Guarantee*. Also, as Gray herself acknowledges, the action was condemned in a 117:0 vote in the General Assembly (Resolution 3213 (1974), despite the prior Greek intervention not being in serious doubt. The second example concerns the repeated French and Libyan interventions in Chad, in relation to which she claims that both states sometimes referred to Article 51, but only referred to prior foreign involvement in the civil war there. However, since both states did intermittently invoke Article 51, it seems a rather daring assumption to conclude they did not do so when *not* explicitly mentioning the Article. Furthermore Libya's intermittent reliance on the government of Chad's invitation was not accepted by the OAU.

⁹¹ Lador-Lederer, *supra* note 60, pp. 132-133; Doswald-Beck, *supra* note 5, pp. 214-216; UK as regards Jordan (1958); USA, as regards its intervention in Lebanon (1958), which was explicitly supported by France insofar as legal justification is concerned; Gray, *supra* note 56, pp. 95, 96-98, 167, 168-169; UK as regards Jordan (1958); USA as regards Lebanon (1958), and Vietnam (as of 1961); USSR as regards Hungary (1956) and Czechoslovakia (1968); Angola in relation to the presence of Cuban troops there (as of 1975); and – intermittently – France and Libya as regards Chad (1981-1984). As far as the US involvement in Vietnam, and its reliance on Article 51 are concerned, see also: *The Legality of United States Participation in the Defense of Viet-Nam*, 04.03.1966; 54 Department of State Bulletin, 1966, p. 474; Wright, *supra* note 19, pp. 112-113; Friedman, *supra* note 17, p. 71; Schachter, *supra* note 51, pp. 1641-1644. Schachter argues that a right of counter-intervention exists. He then, however, argues that prior foreign intervention might justify any counter-intervention on the basis of "collective self-defence" (at p. 1642), and confirms the USA relied on Article 51 as far as Nicaragua was concerned (at p. 1643). No examples of state practice confirming a "right of counter-intervention", distinct from Article 51, are given; Sohn, *supra* note 56, pp. 229-230, seems to view the right of counter-intervention not as a distinct right, but as collective self-defence under Article 51.

⁹² Gray, *supra* note 56, p. 167.

⁹³ Joyner/Grimaldi, *supra* note 15, pp. 647-649, spell out this consequence. They claim that a right of counter-intervention, based on prior foreign involvement in a civil war, exists, but then go on to point out that "counter-interventionary aid to insurgents" can never be legal under any circumstances; Gray, *supra* note 56, p. 92, makes a similar point; Perkins, *supra* note 36, pp. 221-224, disagrees, and argues that "illegal intervention in support of a government" justifies "counter-intervention in support of insurgents". However, he fails to provide any examples of state practice or accepted *opinio juris* in support of his argument.

relied on Article 51 of the UN Charter when they have intervened, and claimed prior foreign involvement. It also follows that no state has ever intervened on behalf of rebel groups and *legally* justified this on the basis of prior foreign support of *the government*, nor does it seem possible to make such a claim. Thus a right of counter-intervention would grant the government the kind of supremacy in a civil war that the principle of non-interference was meant to eradicate.

As stated above, when states have in practice resorted to supporting rebel movements, they have never justified their actions on the basis of a foreign state's support of a government. Most often such support for rebels has been offered only covertly, in an attempt to avoid having to provide a legal justification at all.⁹⁴ When that could not be avoided, because the evidence was overwhelming, either individual or collective self-defence on behalf of third states was invoked, or in the case of intervention by socialist states, the right to support national liberation movements.

For example, when the USA intervened on behalf of the Nicaraguan Contra rebels in the 1980s, this was officially justified as collective self-defence in support of El Salvador and Honduras against Nicaraguan support for local rebels.⁹⁵ Politically speaking, the Reagan Administration did refer to the Soviet and Cuban support of the Nicaraguan Government, but this argument was never used in a legal context.⁹⁶

Similarly, South Africa justified its massive interference, in the mid-1970s, in Angola's and Mozambique's civil wars, and its support of the opposition there (UNITA and RENAMO), on the basis of self-defence. The support afforded to the two governments by Cuba and the Soviet Union was not part of South Africa's legal arguments.⁹⁷

There is therefore no compelling evidence of a customary international law right of counter-intervention, distinct from Article 51, nor should there be.

Notwithstanding these arguments, even supporters of the existence a right of counter-intervention could not overcome the factual obstacles against the assumption of such a right on the part of the Soviets in the Afghan situation. Although it is clear that there was some external, mainly Pakistani and Iranian, but also – by December 1979 – some American support of the Afghan rebels, there is

⁹⁴ Gray, *supra* note 56, p. 106.

⁹⁵ A. C. Arend, *International Law and the Recourse to Force: A Shift In Paradigms*, 27 Stanford Journal of International Law 1 (1990-1991), p. 13; Quigley, *supra* note 56, p. 202; Schachter, *supra* note 51, p. 1643; R. A. Falk, *Intervention and National Liberation*, in H. Bull (ed.), *Intervention in World Politics*, Clarendon Press, Oxford: 1984, Ch. 8, pp. 119-133, 125-126; Gray, *supra* note 56, pp. 76, 106.

⁹⁶ Schachter, *supra* note 51, pp. 1642, 1643; Gray, *supra* note 56, p. 76.

⁹⁷ Gray, *supra* note 56, pp. 107-110.

no doubt that any such support was still very limited, and certainly could not in any way be deemed to have matched the Soviet support of the Afghan government prior to the invasion. Furthermore, even the internal Soviet analysis came to the conclusion that the uprising was of indigenous origin and not orchestrated from abroad.⁹⁸ Lastly, the massive Soviet invasion of Afghanistan could certainly not be claimed to be proportional in relation to any external aid the Afghan rebels were receiving.⁹⁹

The Afghanistan situation thus serves as an example of the lack of logic in the position of those academics who reject a right of intervention in accordance with customary international law, while accepting a right of counter-intervention. Were the Pakistanis, Iranians and Americans acting on the basis of a right of counter-intervention due to the prior massive Soviet support of the Afghan government, or were the Soviets entitled to intervene precisely because of that prior external intervention on behalf of the rebels? The Afghan situation clearly underlines the impracticability of assuming a right of counter-intervention.

It must therefore be concluded that the Soviet Union could not have claimed to be acting in accordance with a customary international law right of counter-intervention, as such a right did not exist. Even had such a right existed, the actual facts would not have justified Soviet actions. This latter point is confirmed by the fact that, despite the extensive discussions in the Soviet Politburo in March 1979 regarding the external support for the rebels,¹⁰⁰ Foreign Secretary Gromyko and

⁹⁸ Soviet Foreign Secretary Gromyko, *see* note 82; in a "Report" to the Central Committee of the Soviet Communist Party, of April 1, 1979, Gromyko, Andropov, Ustinov and Ponomarev concluded that the anti-government "performances" were of a "predominately internal character" ; reprinted (incl. German translation) in P. Allan et al. (eds.), *supra* note 7, pp. 91, 99; Politburo Member Andrej Kirilenko (at pp. 4, 9-10), Prime Minister Kosygin (at pp. 6, 11, 14), Chief of the KGB Andropov (at p. 14) at the *Meeting of the Politburo of the Central Committee of the Communist Party of the Soviet Union*, March 17-18, 1979 (Source: Storage Center for Contemporary Documentation (TsKhSD), Moscow; Fond 89, Perechen 25, Document 1, Listy 1, pp. 12-25); The National Security Archive, *Volume II: Afghanistan: Lessons from the Last War, The Soviet Experience in Afghanistan: Russian Documents and Memoirs*, Document 1; available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB57/soviet2.html> last accessed December 1, 2011; Loyn, *supra* note 11, 186.

⁹⁹ As far as the requirement of "proportionality" is concerned if a "right of counter-intervention" is accepted, *see*: Schachter, *supra* note 51, p. 1644; also Partan, *supra* note 56, pp. 228-229.

¹⁰⁰ Soviet Foreign Secretary Gromyko declared that the events in Herat were "being directed by the hand of the U.S.A." (at p. 17); *Meeting of the Politburo of the Central Committee of the Communist Party of the Soviet Union*, March 17-18, 1979 (Source: Storage Center for Contemporary Documentation (TsKhSD), Moscow; Fond 89, Perechen 25, Document 1, Listy 1, pp. 12-25); The National Security Archive, *Volume II: Afghanistan: Lessons from the Last War, The Soviet Experience in Afghanistan: Russian Documents and Memoirs*, Document 1; available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB57/soviet2.html> last accessed December 1, 2011.

Prime Minister Kosygin nevertheless believed a Soviet invasion at the Afghan government's request to be illegal under international law.¹⁰¹

2.3. Collective self-defence

In its justification of the invasion the Soviet Union claimed it was acting in accordance with Article 51 of the UN Charter, allowing for collective self-defence, and Article 4 of the Afghan-Soviet Treaty of Friendship, which stated:

The High Contracting Parties, acting in the spirit of the traditions of friendship and good-neighbourliness and in the spirit of the Charter of the United Nations, shall consult with each other and shall, by agreement, take the necessary steps to safeguard the security, independence and territorial integrity of the two countries.

2.3.1. "Armed attack" on the USSR

Any use of force in self-defence can only be justified on the basis of an ongoing armed attack on the state concerned. The Soviet Union at no point explicitly claimed that an armed attack on the Soviet Union was taking place.

In various Soviet statements there are, however, indications that the USSR's invasion of Afghanistan was of a defensive nature in order to protect its own borders. It was sometimes claimed that the external support of the Afghan rebels was directed against the Soviet Union and threatened the security and stability of its borders.¹⁰²

Leaving aside obvious strategic goals there is, however, no evidence or indication that Pakistani, Iranian, or US support for the Afghan rebels was in any way directed against the Soviet Union, or its borders, nor could the facts on the ground give rise to any interpretation which could justify the assumption that an "armed attack" on it was taking place. In fact, prior to the Soviet Union's invasion, there were no incidents directed against Soviet territory.

¹⁰¹ Soviet Prime Minister Kosygin (at p. 19); Foreign Secretary Andrej Gromyko (at p. 14); *Meeting of the Politburo of the Central Committee of the Communist Party of the Soviet Union*, March 17-18, 1979 (Source: Storage Center for Contemporary Documentation (TsKhSD), Moscow; Fond 89, Perechen 25, Document 1, Listy 1, pp. 12-25); The National Security Archive, *Volume II: Afghanistan: Lessons from the Last War, The Soviet Experience in Afghanistan: Russian Documents and Memoirs*, Document 1; available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB57/soviet2.html> last accessed December 1, 2011.

¹⁰² This view is, for example, supported by Julius Mader. Writing for the GDR military publishers in 1988, he claims the US involvement in Afghanistan was only a cover for organizing an attack on the Soviet Union which was the true goal of the Americans (*CIA-Operation Hindu-Kush* (CIA-Operation Hindu-Kush), Militärpolitik aktuell, Militärverlag der Deutschen Demokratischen Republik, Berlin: 1988, p. 12).

Only if it were accepted that an attack on a state's strategic interests justified the use of force in self-defence could the Soviet Union possibly have claimed that external support for the Afghan rebels was harming its vital interests. However, there is no doubt that such an expansive view of the right of self-defence is overwhelmingly rejected.

Having said that, there are certainly elements of such "sphere of interest" thinking in international geopolitics. They were evident in the Soviet Union's justifications of its invasions in Hungary and Czechoslovakia. The repeated references to the "commonwealth of socialist states," where foreign interference would not be tolerated, constituted a vital element of the Brezhnev Doctrine and points in that direction.¹⁰³ The USA, too, tended to claim a right to protect its strategic interests by force if necessary. In 1823 US President Monroe had announced the so-called Monroe Doctrine:

That we should consider any attempt on the part of the allied powers, to extend their system to any portion of this hemisphere as dangerous to our peace and security... that we could not view any interposition for the purpose of oppressing or controlling in any manner their destiny by any European Power, in any other light than as an unfriendly disposition towards the United States.

The Johnson Doctrine of 1965¹⁰⁴ and the Carter Doctrine of 1980 (in reaction to the Soviet invasion of Afghanistan) are further notable examples of that American attitude, which seems to delineate the world according to "spheres of interest".¹⁰⁵ In his State of the Union Address Carter had declared:

Let our position be absolutely clear: An attempt by any outside force to gain control of the Persian Gulf region will be regarded as an assault on the vital interests of the United States of America, and such an assault will be repelled by any means necessary, including military force.¹⁰⁶

However, it has never been seriously argued that these political statements by US Presidents reflected international law, or provided any kind of legal justification

¹⁰³ Schmeltzer, *supra* note 66, pp. 115-116; Luard, *supra* note 17, pp. 1007-1008, 1014-1015.

¹⁰⁴ In his Address to the Nation on May 2, 1965, Johnson declared – in respect of the American invasion of the Dominican Republic – that: "Revolution in any country is a matter for that country to deal with. It becomes a matter calling for hemispheric action only ... when the object is the establishment of a communist dictatorship."; Quigley, *supra* note 56, p. 202.

¹⁰⁵ Schwenninger, *supra* note 17, pp. 423, 431; Oglesby, *supra* note 17, p. 38.

¹⁰⁶ *State of the Union Address 1980* by President Jimmy Carter, 23/01/1980; available at: <http://www.jimmycarterlibrary.gov/documents/speeches/su80jec.phtml> accessed October 26, 2011.

for the use of force under Article 51 of the UN Charter.¹⁰⁷ The Soviet Union would undoubtedly have been the main opponent of any attempt by the USA to modify international law in order to accommodate these doctrines.

The Soviet Union therefore could not claim to have been the object of an “armed attack.”

2.3.2. Meaning of “collective self-defence”

The meaning of “collective self-defence” under Article 51 of the UN Charter has not been without controversy. Bowett held the view that Article 51 only granted states the right to use force in “collective” self-defence when each of the acting states could individually lay claim to a right of self-defence.¹⁰⁸

Bowett’s argument was founded on his basic view that the UN Charter could only limit, but not create, states’ rights in international law.¹⁰⁹ If states solely coming to the aid of a state that invoked the right of self-defence could not themselves claim to be acting in self-defence, they could only justify their actions on the basis of protecting international peace.¹¹⁰ The UN Charter, however, had outlawed any unilateral assessment by one state of whether another state’s claim of self-defence was justified.¹¹¹ Collective self-defence under Article 51 therefore, according to Bowett, was intended to merely grant those states that had themselves been attacked the right to act in concert when acting in self-defence.¹¹²

This view of collective self-defence has, however, been overwhelmingly rejected and has not been confirmed by state practice.¹¹³ Bowett’s main legal argument fails to convince. The right to use force – individual or collective – in self-defence under Article 51 can only be invoked until such a time as “the Security

¹⁰⁷ Schmeltzer, *supra* note 66, pp. 119-120; Schwenninger, *supra* note 17, p. 431; Joyner/Grimaldi, *supra* note 15, pp. 659, 668-670; Rohlik, *supra* note 44, p. 402; Friedman, *supra* note 17, pp. 69-70; Wright, *supra* note 19, p. 117.

¹⁰⁸ D. W. Bowett, *Collective Self-Defence under the Charter of the United Nations*, 32 British Yearbook of International Law 130 (1955-1956), pp. 139-140.

¹⁰⁹ *Ibidem*, pp. 131-132.

¹¹⁰ *Ibidem*, p. 137.

¹¹¹ *Ibidem*, pp. 138-141.

¹¹² *Ibidem*. There is an indication that there is still some support for Bowett’s view of collective self-defence: see ICJ *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, (*Nicaragua v. USA*), Judgement (Merits), ICJ Reports 1986, pp. 14, 105. In the Dissenting Opinion of Judge Jennings, p. 545, he states: “But there is another objection to this way of looking at collective self-defence... The assisting State surely must, by going to the victim State’s assistance, be also, and in addition to other requirements, in some measure defending itself. There should even in ‘collective self-defence’ be some real element of self involved with the notion of defence.”

¹¹³ Schachter, *supra* note 51, pp. 1638-1639; Rohlik, *supra* note 44, pp. 423-424; Wright, *supra* note 19, pp. 118-119; Perkins, *supra* note 36, pp. 206-207.

Council has taken measures necessary to maintain international peace and security”, so there is no danger of it replacing the UN’s responsibility for international peace. The right to use force – individual or collective – in self-defence is limited to the time span necessary for the UN’s collective security system to be able to intercede. The way Article 51 is phrased (“individual or collective self-defence ... if an armed attack occurs against *a* Member of the United Nations” (emphasis added)) provides another indication that “collective” self-defence is also possible even if only one member state has been attacked.

State practice also confirms the view that collective self-defence is justified under Article 51 when other states come to the aid of a state that has suffered an armed attack.¹¹⁴ Mutual defence treaties, like the Rio Treaty,¹¹⁵ the NATO Treaty¹¹⁶ or the Warsaw Pact,¹¹⁷ regularly assume(d) that an attack on one member state of the organisation was sufficient to justify the use of force in self-defence by all member states against the aggressor.¹¹⁸ Furthermore, states that have in the past invoked a right of collective self-defence have rarely, if ever, themselves been the object of an armed attack, but instead have claimed they were aiding another state in its defence against external aggression.¹¹⁹

It must therefore be assumed that collective self-defence under Article 51 allows a state that has not been attacked to use force in the defence of an attacked state, insofar as the other criteria of the Article have been met, and until such time as the Security Council acts.

2.3.3. “Armed attack” on Afghanistan

For the Soviet Union to successfully claim that its invasion of Afghanistan was an act of collective self-defence on behalf of Afghanistan, there would have had to have been an armed attack on that state.

However, there is no evidence of an armed attack on Afghanistan. Even though there is evidence of foreign support for the Afghan rebels, there is absolutely no indication that foreign troops had entered the country prior to the Soviet invasion. The external support that was forthcoming was mainly material support (money and probably weapons) and, especially in the case of Pakistan,

¹¹⁴ Schachter, *supra* note 51, p. 1639; Rohlik, *supra* note 44, pp. 423-424; Wright, *supra* note 19, pp. 118-119.

¹¹⁵ Article 3 (1), Inter-American Treaty of Reciprocal Assistance (1947), 21 UNTS 324.

¹¹⁶ Article 5, The North Atlantic Treaty (1949), 34 UNTS 241.

¹¹⁷ Article 4, Treaty of Friendship, Co-operation and Mutual Assistance (1955), 219 UNTS p. 2962.

¹¹⁸ Schachter, *supra* note 51, p. 1639.

¹¹⁹ *Ibidem*; Rohlik, *supra* note 44, pp. 423-424.

the provision of shelter for rebels and connivance with and support of their insurgent activities in Afghanistan.

Despite this external support there is no doubt that the insurgency in Afghanistan had indigenous origins and was mainly organized by Afghans living in Afghanistan. In internal discussions this was also acknowledged by the Soviet leaders who, in March 1979, came to the conclusion the Soviets could not intervene in Afghanistan because the uprising involved one part of the population fighting against another.¹²⁰

The ICJ in the *Nicaragua Case* has confirmed that material support of indigenous rebels by other states does not amount to an “armed attack” so long as that support is not so far-reaching so as to justify treating the rebel groups as an extended arm of the foreign state.¹²¹ It cannot seriously be argued that Pakistani, Iranian, and American support ever attained that level.¹²²

The Soviet claim that foreign support for the rebels amounted to an “aggression”, as defined in Article 3 g of the 1974 GA Resolution on the Definition of Aggression,¹²³ is unmerited. The decision whether an “armed attack” has occurred necessitates an independent evaluation.¹²⁴

¹²⁰ Chief of the KGB Andropov declared: “To deploy our troops would mean to wage war against the people, to crush the people, to shoot at the people. We will look like aggressors, and we cannot permit that to occur;” (at p. 21); a sentiment echoed by Soviet Foreign Secretary Gromyko (page 14), at the *Meeting of the Politburo of the Central Committee of the Communist Party of the Soviet Union*, March 17-18, 1979 (Source: Storage Center for Contemporary Documentation (TsKhSD), Moscow; Fond 89, Perechen 25, Document 1, Listy 1, pp. 12-25); The National Security Archive, *Volume II: Afghanistan: Lessons from the Last War, The Soviet Experience in Afghanistan: Russian Documents and Memoirs*, Document 1; available at: <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB57/soviet2.html> last accessed December 1, 2011.

¹²¹ ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, Judgement (Merits), ICJ Reports 1986, 14, para. 195; the ICJ declared (emphasis by author): “But the Court does *not* believe that the concept of ‘armed attack’ includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support. Such assistance may be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other States”; T. J. Farer, *Drawing the Right Line*, 81 *American Journal of International Law* 112 (1987), p. 113; Perkins, *supra* note 36, pp. 207-208; Gray, *supra* note 56, pp. 174-177.

¹²² However, subsequent to the Soviet invasion, there were efforts to create the impression that the rebellion in Afghanistan was completely orchestrated from abroad: Mader, *supra* note 102, writing for the GDR military publishers in 1988, for example, goes to extraordinary lengths to try and prove that the “counter-revolution” was organized by the USA, Pakistan, Iran, the UK, some Arab states and Western Germany, with only a few thousand Afghans actually supporting the rebellion (at pp. 5-6, 17-19, 29-39, 41-53, 68-75).

¹²³ GA Resolution 3314 (1974).

¹²⁴ Article 6 of the *Definition of Aggression* (GA Resolution 3314 (1974); Matsson, *supra* note 8, p. 89).

Without an “armed attack” on Afghanistan, the Soviet Union could not claim to be acting in “collective” self-defence under Article 51 of the UN Charter.¹²⁵ As the civil war obviously was an internal uprising, the USSR also could not rely on Article 4 of the Afghan-Soviet Treaty of Friendship, as it is crystal clear that support given under Article 4 could only be justified against external threats.¹²⁶ This is confirmed by Article 1 of the Treaty, which states:

The High Contracting Parties solemnly declare their determination to consolidate and deepen the unshakable friendship between the two countries and to develop co-operation in all fields on the basis of equality of rights, *respect for national sovereignty and territorial integrity and non-interference in each other's internal affairs*.¹²⁷

Besides which, any use of force authorized by a bilateral treaty but in violation of the UN Charter would be invalid under Article 103 of the Charter. This could not have been intended by the two states, for in its Preamble the Afghan-Soviet Treaty confirms the parties’ “fidelity to the purposes and principles of the Charter of the United Nations.”

2.4. Factual problems

In addition to having proved that the Soviet Union’s official justifications were unconvincing, it must be pointed out that the Soviet arguments had another weakness: the lack of a valid request by the Afghan government for its own removal from office.

It goes without saying that an intervention (or counter-intervention) in a civil war at a government’s request requires just such a request.¹²⁸ This also applies to collective self-defence. A state cannot defend another state against an armed attack against that state’s wishes.¹²⁹ Although disputed by some international lawyers, this view has been confirmed by the ICJ in the *Nicaragua*¹³⁰ and the

¹²⁵ Matsson, *supra* note 8, p. 90; Behrens, *supra* note 14, p. 67; Berner, *supra* note 14, p. 324; U. Ulfkotte, *Kontinuität und Wandel amerikanischer und sowjetischer Politik in Nah- und Mittelost 1967 bis 1980* (Continuity and change in American and Soviet policy in the Near and Middle East 1967 to 1980), Schäuble Verlag, Rheinfelden: 1988, pp. 321-322.

¹²⁶ Turner, *supra* note 66, p. 106; Berner, *supra* note 14, p. 324.

¹²⁷ Emphasis by author.

¹²⁸ Rohlik, *supra* note 44, p. 426.

¹²⁹ *Ibidem*; Wright, *supra* note 19, pp. 118-119; Turner, *supra* note 66, p. 106; Gray, *supra* note 56, pp. 184-187; a point also made by Mader (writing for the GDR military publishers), *supra* note 102, p. 6; he explicitly claims the Soviet Union’s actions were justified on the basis of collective self-defence following “eleven” requests by the Afghan government.

¹³⁰ ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, para. 199.

*Oil Platforms*¹³¹ Cases, and by state practice.¹³² In 1956 Norway, a NATO member, informed the Soviet Union that American troops could only defend the country at its request. Similarly the Soviet Union, when invoking the Warsaw Pact to justify its invasion of Hungary, acknowledged the necessity of a prior request by the Hungarian government.¹³³ As far as the Americas are concerned, the 1947 Inter-American Treaty of Reciprocal Assistance explicitly requires the “request of the State or States directly attacked” before other member states can resort to defensive actions.¹³⁴

The contrary arguments are that Article 51 of the UN Charter, and most regional security treaties, do not *explicitly* mention a state’s request as a prerequisite, and/or that such a requirement is “formalistic”.¹³⁵ These arguments are far short of convincing. Just as a sovereign state can decide to merge with another state, it can also decide not to defend itself against an armed attack. Allowing another state to intervene, notwithstanding the lack of a request, would not only severely undermine the attacked state’s sovereignty, but would in fact lead to the supremacy of the will of the intervening state’s government over that of the attacked state’s government – a clearly unacceptable state of affairs given the principle of sovereign equality. Therefore collective self-defence can only be justified when the intervening state has been asked for support by the attacked state.

¹³¹ ICJ, *Case Concerning Oil Platforms (Iran v. USA)*, Judgement, ICJ Reports 2003, p. 161, para. 51.

¹³² Gray, *supra* note 56, pp. 186-187.

¹³³ Wright, *supra* note 19, pp. 118-119.

¹³⁴ Article 3 (2) Inter-American Treaty of Reciprocal Assistance (1947), 21 UNTS 324.

¹³⁵ F. Kirgis, *The Jurisprudence of the Court in the Nicaragua Decision*, 81 American Society of International Law Proceedings 258 (1987), p. 258; he suggests the requirement of a request was introduced by the ICJ because the majority of judges had not been convinced by their own arguments regarding the phrase “armed attack”; J. N. Moore, *The Nicaragua Case and the Deterioration of World Order*, 81 American Journal of International Law 151 (1987), p. 155; he describes the ICJ’s view as “formalistic”; ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, p. 14, para. 105; Dissenting Opinion Judge Jennings, paras. 544-545; he describes the court’s view, regarding the necessity of a request by the victim state, as perhaps “sometimes unrealistic”; he does, however, not dispute that the “victim State must both be in real need of assistance and must want it”; Judge Schwebel makes a similar point in his Dissenting Opinion, at para. 191; he states, in relation to the majority view: “and the only kind of request for assistance that appears to count is one formally and publicly made. But where is it written that, where one State covertly promotes the subversion of another by multiple means tantamount to an armed attack, the latter may not informally and quietly seek foreign assistance?”; Judges Jennings’s and Schwebel’s readings of the ICJ’s judgement seem to reflect an exaggerated interpretation of the court’s “request” requirement, especially as the – additional – requirements Judge Schwebel complains about were not mentioned by the ICJ; see also: Gray, *supra* note 56, pp. 185-186.

The Soviet invasion of Afghanistan, however, is unlikely to have been preceded by a valid request by the recognized Afghan government.¹³⁶ Amin had taken power as President of Afghanistan in September 1979, a state of affairs officially recognized by the Soviet Union.¹³⁷ Although there had been previous Afghan requests for a Soviet intervention by both Taraki and Amin, the Soviets never produced a coherent version of events to substantiate their claim of a similar request in December 1979.¹³⁸ It should, however, be noted that the former British Ambassador to Moscow, Braithwaite, claims that Amin had asked for the dispatch of Soviet troops “up to the very last minute”, that he had been informed of the Soviet troop deployment commencing in late December 1979 and was, in fact, in a “state of euphoria” at the prospect.¹³⁹

The first (and so far only) official request that became known to the outside world, however, was the request by the newly installed President Karmal, which was broadcasted on December 28, 1979.¹⁴⁰ At that time the Soviet invasion had been ongoing for a couple of days.¹⁴¹ The Americans claimed that Karmal's request had, in fact, been broadcast from a Soviet Central Asian republic, indicating that Karmal had not yet even returned from his Soviet exile at the time of his request.¹⁴²

¹³⁶ Reisman/Silk, *supra* note 11, pp. 481-483, 485-486; Behrens, *supra* note 14, p. 66.

¹³⁷ Reisman/Silk, *supra* note 11, pp. 470-471.

¹³⁸ A. von Borcke, *Die sowjetische Interventionsentscheidung: Eine Fallstudie zum Verhältnis sowjetischer Außen- und Innenpolitik* (The Soviet decision to intervene: a case study on the relationship between Soviet domestic and foreign policy), in H. Vogel (ed.), *Die sowjetische Intervention in Afghanistan, Entstehung und Hintergründe einer weltpolitischen Krise*, Nomos Verlagsgesellschaft, Baden-Baden: 1980, p. 136; Berner, *supra* note 14, pp. 324-326, lists all the different versions of events provided to the media by Soviet and Afghan officials as far as the Afghan request is concerned and concludes that the claim the Afghan government had requested the Soviet invasion was “absurd”.

¹³⁹ R. Braithwaite, *Afgantsy, The Russians in Afghanistan 1979-1989*, Profile Books, London: 2011, pp. 82, 87, 95; Braithwaite also points out that Afghan troops did not at any stage fight the Soviet troops once the invasion commenced, and that the Afghan population initially welcomed the Soviet invasion (pp. 88, 107-108).

¹⁴⁰ The request, broadcast by Kabul radio on December 28, 1979, was reprinted in the *Pravda* edition of December 29 and in the East German daily Neues Deutschland of December 29, 1979 (German translation); both can be found in Bucherer-Dietschi et al. (eds.), *supra* note 8, pp. 244, 245.

¹⁴¹ The exact dates vary from author to author; Loyn, *supra* note 11, p. 189 (invasion December 22; Afghan request December 27); Rostow, *supra* note 8, 237 (invasion December 27; Afghan request December 28); W. M. Reisman, *The Resistance in Afghanistan Is Engaged In a War of National Liberation*, 81 American Journal of International Law 906 (1987), p. 906 (invasion December 24; Afghan request December 27).

¹⁴² Reisman, *supra* note 141, p. 906; and Reisman/Silk, *supra* note 11, p. 472; Matsson, *supra* note 8, p. 87; Cynkin, *supra* note 1, p. 278; Pentz, *supra* note 54, p. 380; Maley, *supra* note 2, p. 30; Hyman, *supra* note 1, p. 165.

The Soviet version of events is further undermined by the fact that there was some heavy fighting around the presidential palace in Kabul once the Soviets had entered the capital, a fact which does not fit easily with a government requesting just such an intervention.¹⁴³ The fact that President Amin was killed during the Soviet invasion, apparently by Soviet troops,¹⁴⁴ and that he was later accused of having been a CIA-agent by both the Soviet press¹⁴⁵ and the new Afghan government¹⁴⁶ robs the Soviet claim of an Afghan governmental request for the Soviet invasion of credibility.¹⁴⁷ Even taking into account Braithwaite's contrary assertions with regard to Amin's request for Soviet intervention, it can be safely assumed he did not request his own removal from office by force.

There remains, however, one further possible legal justification for the Soviet invasion – one that did not require the Afghan government's consent: the Brezhnev Doctrine. Although the Soviet Union did not refer to it at the UN, the Brezhnev Doctrine was referred to in socialist countries, especially in the media there, as a possible justification of Soviet actions in Afghanistan.¹⁴⁸ The understanding of international law, as expressed in the Brezhnev Doctrine, will thus be briefly examined.

¹⁴³ Loyn, *supra* note 11, p. 189; Reisman, *supra* note 141, p. 906; and Reisman/Silk, *supra* note 11, pp. 472, 482; Blum, *supra* note 13, p. 342; J. N. Moore, *The 'Brezhnev Doctrine' And the Radical Regime Assault on the Legal Order*, in J. N. Moore, R. F. Turner (eds.), *International Law and the Brezhnev Doctrine*, University Press of America, Inc., Lanham: 1987, p. 23; Turner, *supra* note 66, p. 104.

¹⁴⁴ Loyn, *supra* note 11, p. 189; Rostow, *supra* note 8, p. 237; Reisman, *supra* note 141, p. 906; and Reisman/Silk, *supra* note 11, p. 474; Blum, *supra* note 13, p. 342; Rasanayagam, *supra* note 2, p. 91; Maley, *supra* note 2, p. 30; Moore, *supra* note 143, p. 23; Ulfkotte, *supra* note 125, 315; Gates, *supra* note 88, p. 133.

¹⁴⁵ In an article entitled *Karmal Babraks's appeal* in the *Pravda* edition of December 30, 1979, Amin was accused of having been a "spy for American imperialism"; a German translation was published in the East German daily *Neues Deutschland* of December 30, 1979; both reprinted in P. Bucherer-Dietschi et al. (eds.), *supra* note 8, pp. 249-252; Doswald-Beck, *supra* note 5, p. 231; Lenczowski, *supra* note 13, pp. 314, 318; Blum, *supra* note 13, pp. 342-343.

¹⁴⁶ Pentz, *supra* note 54, p. 380; von Borcke, *supra* note 138, p. 137; Berner, *supra* note 14, pp. 345, 348, 361-362.

¹⁴⁷ R. Amer, *The United Nations' Reactions To Foreign Military Interventions*, 31 *Journal of Peace Research* 425 (1994), p. 438; Matsson, *supra* note 8, pp. 85, 87-88; Behrens, *supra* note 14, p. 66; Linde, *supra* note 3, p. 86; O. Roy, *The Lessons of the Soviet/Afghan War*, Adelphi Papers 259, The International Institute for Strategic Studies, London: 1991, p. 14.

¹⁴⁸ Loyn, *supra* note 11, p. 190.

2.5. The Brezhnev Doctrine

2.5.1. Explanation of the concept

Although there were continuous efforts at developing and justifying a socialist version of international law, the main impetus for the claim that a separate, socialist international law existed in practice arose out of the Warsaw Pact invasion of Czechoslovakia in 1968.¹⁴⁹

The Soviet Union had at first reverted to the familiar claim of a governmental request, based as usual on allegations of foreign support for the counter-revolutionaries. However, firm letters to the UN by the Czech Parliament's President, by various MPs, and by some government ministers to the effect that there had been no such request, required the adoption of a different line of argument.¹⁵⁰

Although neither developed nor dogmatically justified by Brezhnev, the then Soviet General Secretary was the first major Soviet politician to officially outline the main arguments justifying the intervention in Czechoslovakia on the basis of the defence of socialism. His speech at the Fifth Congress of the Polish United Workers' Party on November 12, 1968, led to the identification of this line of argument with his person; hence the "Brezhnev Doctrine". Brezhnev's decisive statement was:

When internal and external forces hostile to socialism attempt to steer the development of a socialist country toward the restoration of a capitalist order, when a threat to the socialist cause arises in that country – a threat to the security of the socialist commonwealth in general – this then becomes not only a problem for the people of that country, but a common problem, a matter for concern, for all the socialist countries.¹⁵¹

¹⁴⁹ J. N. Hazard, *Renewed Emphasis Upon A Socialist International Law*, 65 American Journal of International Law 142 (1971), pp. 142-143.

¹⁵⁰ *Declaration of the Presidium of the Central Committee of the Czechoslovakian Communist Party*, 21/08/1968; English translation available at 7 International Legal Materials, 1968, p. 1285; the Czechoslovak Ambassador to the UN declared before the Security Council: "We categorically request the immediate withdrawal of the armed forces of the five Warsaw Pact states"; he was later backed up at the UN by the Czechoslovak Foreign Secretary who replied to Soviet claims of a governmental request: "No such demand was ever made"; quoted in *Words, words, words ... The United Nations and the 1968 invasion*, D. Vaughan, Czech Radio; available at: <http://www.radio.cz/en/article/112945> last accessed October 26, 2011; Schmeltzer, *supra* note 66, pp. 117-119; W.E. Butler, "Socialist International Law" or "Socialist Principles Of International Relations"?, 65 American Journal of International Law 796 (1971), p. 798; Oglesby, *supra* note 17, p. 37; Turner, *supra* note 66, pp. 96-97.

¹⁵¹ Leonid Brezhnev, as quoted by Schmeltzer, *supra* note 66, pp. 103-104; L. Romaniecki, *Sources of the Brezhnev Doctrine of Limited Sovereignty and Intervention*, 5 Israel Law Review 527 (1970), p. 528; Turner, *supra* note 66, pp. 83, 102.

According to the Brezhnev Doctrine, Soviet attitudes to international law were based primarily on the concept of “peaceful coexistence”, a principle supposedly reflected in the Preamble and Article 1 of the UN Charter.¹⁵² “General” international law, as it developed after 1945, was “of a general democratic character”, as it had resulted from the cooperation of capitalist and socialist states.¹⁵³ As such, “general” international law served to preserve the principle of “peaceful coexistence” between otherwise antagonistic states.¹⁵⁴

Besides this “general” international law there was a separate, regional or “local” international law that only applied to the relations between those states belonging to a specific group implicitly recognized under “general” international law.¹⁵⁵ Capitalist states were thus able to conclude treaties between each other, not based on “general” international law, but on capitalist, bourgeois values.¹⁵⁶ The same therefore applied to socialist states, which had the right to conclude treaties based on their shared socialist values.¹⁵⁷

Relations between socialist states were consequently governed by their regional socialist international law, with “general” international law being primarily applicable only in their relations with capitalist states.¹⁵⁸ “Local” socialist international law was based on the concept of socialist or proletarian interna-

¹⁵² G. E. Glos, *The Theory and Practice of Soviet International Law*, 16 *International Lawyer* 279 (1982), p. 283; Schmeltzer, *supra* note 66, p. 100; Ch. Osakwe, *Socialist International Law Revisited*, 66 *American Journal of International Law* 596 (1972), p. 597; Hazard, *supra* note 149, p. 144; V. Pechota, *The Contemporary Marxist Theory of International Law*, 75 *American Society of International Law Proceedings* 149 (1981), p. 153; Rostow, *supra* note 8, pp. 219-220, 229-230; Matsson, *supra* note 8, p. 91; Turner, *supra* note 66, pp. 45, 49-56; Turner also outlines the historical development of the concept based on Lenin's and Stalin's support of it.

¹⁵³ Pechota, *supra* note 152, pp. 150, 152 (quote); W. W. Kulski, *The Soviet Interpretation of International Law*, 49 *American Journal of International Law* 518 (1955), p. 519; G. I. Tunkin, *The Contemporary Soviet Theory of International Law*, 31 *Current Legal Problems* 177 (1978), pp. 185-187; Turner, *supra* note 66, p. 45.

¹⁵⁴ Glos, *supra* note 152, p. 283; Romaniecki, *supra* note 151, pp. 533-534; Kulski, *supra* note 153, p. 526; Turner, *supra* note 66, p. 45; Rostow, *supra* note 8, p. 234; however, the era of “peaceful coexistence” in international law was supposed to be only temporary, valid until the time had come when socialism triumphed worldwide; Tunkin, *supra* note 153, pp. 180, 184, 187, describes “contemporary international law” as the “law of the period of transition from capitalism to socialism”.

¹⁵⁵ Butler, *supra* note 150, p. 799; Osakwe, *supra* note 152, p. 597; Rostow, *supra* note 8, p. 218; Matsson, *supra* note 8, p. 91; Turner, *supra* note 66, pp. 47-48.

¹⁵⁶ Tunkin, *supra* note 153, pp. 180, 182, 186.

¹⁵⁷ Romaniecki, *supra* note 151, pp. 535, 540; Kulski, *supra* note 153, p. 521; Rostow, *supra* note 8, p. 234; Matsson, *supra* note 8, pp. 90-91; Tunkin, *supra* note 153, pp. 182, 186; Turner, *supra* note 66, p. 47.

¹⁵⁸ Turner, *supra* note 66, pp. 45, 88.

tionism.¹⁵⁹ This meant socialist states could cooperate much more closely and aid each other much more effectively than would have been possible under “general” international law.¹⁶⁰ Socialist states therefore had to come to the aid of the proletariat of a socialist society embroiled in a struggle against counter-revolutionary forces.¹⁶¹

An intervention based on the necessity of defending a socialist state's proletariat against counter-revolutionary forces did not necessarily require that state's government's request, especially in cases where the government concerned was itself guilty of counter-revolutionary tendencies (as was the case in Czechoslovakia in 1968).¹⁶² The other socialist state's sovereignty, however, is not violated, because in socialist states “the people”, not the government, were the sovereign.¹⁶³ These arguments are sometimes also referred to as the concept of “limited sovereignty”,¹⁶⁴ or as the principle of “socialist self-determination.”¹⁶⁵

Applied to Afghanistan the Brezhnev Doctrine could be argued to justify the Soviet invasion on the basis of defending the achievements of the Afghan proletariat against counter-revolutionary forces, such as the “reactionary” imams and the Afghan President (and alleged CIA-Agent) Amin.

2.5.2. Compatibility with international law

There can be no doubt that the “Brezhnev Doctrine” as outlined above was not compatible with the UN Charter. The use of force in support of the “international proletariat” could not be reconciled with the ban on the use of force (Article 2(4), which is generally viewed as being of a *jus cogens* nature, and certainly not with the right of self-defence under Article 51.¹⁶⁶ Furthermore, the 1968 invasion of

¹⁵⁹ Hazard, *supra* note 149, p. 145; Matsson, *supra* note 8, p. 91; Moore, *supra* note 143, pp. 14, 17; Turner, *supra* note 66, pp. 45, 81.

¹⁶⁰ Glos, *supra* note 152, pp. 293-294; Butler, *supra* note 150, p. 799; Osakwe, *supra* note 152, pp. 597-598; Hazard, *supra* note 149, pp. 144-145; Pechota, *supra* note 152, p. 154; Moore, *supra* note 143, pp. 15-17; H. Dahm, *Afghanistan als Lehrstück der politischen und militärischen Doktrin Sowjetrußlands* (Afghanistan as a prime example of Soviet Russia's political and military doctrine), in H. Vogel (ed.), *Die sowjetische Intervention in Afghanistan, Entstehung und Hintergründe einer weltpolitischen Krise*, Nomos Verlagsgesellschaft, Baden-Baden: 1980, pp. 200-201, 206-209.

¹⁶¹ Schmeltzer, *supra* note 66, p. 104; Butler, *supra* note 150, pp. 796-797; Osakwe, *supra* note 152, p. 598; Hazard, *supra* note 149, p. 145; Pechota, *supra* note 152, p. 154; Matsson, *supra* note 8, p. 92; Moore, *supra* note 143, p. 14; Dahm, *supra* note 160, pp. 200-201, 206-209.

¹⁶² Pechota, *supra* note 152, p. 154; Dahm, *supra* note 160, pp. 206-209, 211, 221.

¹⁶³ Turner, *supra* note 66, pp. 85-87; Dahm, *supra* note 160, pp. 200-201, 206-209, 221.

¹⁶⁴ Romaniecki, *supra* note 151, p. 527.

¹⁶⁵ Moore, *supra* note 143, p. 9.

¹⁶⁶ Butler, *supra* note 150, pp. 799-800; Romaniecki, *supra* note 151, p. 538; Rostow, *supra* note 8, pp. 236, 240-241; Moore, *supra* note 17, p. 197; and *supra* note 143, p. 18.

Czechoslovakia clearly demonstrates that the use of force amounted to a complete rejection of the concepts of sovereign equality and political independence (Article 2(1), as the intervention took place not only against the “counter-revolutionary” government’s wishes but, most likely, against the wishes of the vast majority of Czechoslovakians, thereby violating their right of self-determination.¹⁶⁷

The differentiation between “local” and “general” international law made by the Soviet jurists was also untenable.¹⁶⁸ The UN Charter provides that any regional agreement contrary to it cannot be applied (Article 103). This is confirmed by the fact that the principles on which the Brezhnev Doctrine was based cannot be found in any of the treaties concluded between the socialist states, which contradicts the notion that a “local” international law had developed. Treaties concluded between the Soviet Union and other socialist states, such as the Warsaw Pact and various treaties of friendship, including the Afghan-Soviet Treaty of December 1978,¹⁶⁹ in fact routinely and explicitly referred to the UN Charter.¹⁷⁰

Outside of the socialist bloc the Brezhnev Doctrine was therefore overwhelmingly rejected, and not only by the “western” but also by the non-aligned states.¹⁷¹ The fact that the Johnson Doctrine of 1965¹⁷² was a reverse mirror image of the Brezhnev Doctrine did, of course, not serve to diminish the undoubted illegality of both.¹⁷³

The Soviet invasion cannot therefore be justified under international law on the basis of the Brezhnev Doctrine.

¹⁶⁷ Schmeltzer, *supra* note 66, p. 104; Romaniacki, *supra* note 151, pp. 538-539; Rostow, *supra* note 8, p. 210; Moore, *supra* note 143, p. 18; Turner, *supra* note 66, p. 86.

¹⁶⁸ Butler, *supra* note 150, pp. 799-800.

¹⁶⁹ The Preamble of the Afghan-Soviet Treaty of Friendship states, *inter alia*, that the two states were “reaffirming their fidelity to the purposes and principles of the Charter of the United Nations” (the text of the treaty is available at: http://untreaty.un.org/unts/60001_120000/2/16/00002763.pdf accessed December 12, 2011).

¹⁷⁰ As far as the Warsaw Pact (1955) is concerned, the Preamble stated that the state parties were “guided by the objects and principles” of the UN Charter. For the text of the Warsaw Pact, see: 219 UNTS 2962; Butler, *supra* note 150, p. 798; Romaniacki, *supra* note 151, p. 533.

¹⁷¹ A draft resolution condemning the Soviet/Warsaw Pact invasion of Czechoslovakia in 1968 was defeated in the Security Council by a Soviet veto (10:2:3 votes).

¹⁷² In his Address to the Nation on May 2, 1965, Johnson declared – in respect of the American invasion of the Dominican Republic – that: “Revolution in any country is a matter for that country to deal with. It becomes a matter calling for hemispheric action only ... when the object is the establishment of a communist dictatorship.”; Quigley, *supra* note 56, p. 202.

¹⁷³ Joyner/Grimaldi, *supra* note 15, p. 679; Oglesby, *supra* note 17, p. 38.

2.5.3. Application to Afghanistan

Advocates of the Brezhnev Doctrine had still another problem: the doctrine was not applicable to Afghanistan.

The whole concept of the Brezhnev Doctrine was based on the premise that a “local” international law had developed, which applied only between the socialist states, i.e. the states belonging to the socialist bloc. It was generally agreed that the concept was therefore only to apply within the Warsaw Pact.¹⁷⁴

Afghanistan, however, despite being under communist rule, had always been non-aligned, and was not a member of the socialist bloc. In fact, Article 5 of the Afghan-Soviet Treaty of Friendship explicitly stated:

The Union of Soviet Socialist Republics respects the policy of nonalignment pursued by the Democratic Republic of Afghanistan, that policy being an important factor for the maintenance of international peace and security.

In one of the first moves to calm international outrage after the invasion, the Soviet Union consequently guaranteed Afghanistan's status as member of the non-aligned movement.¹⁷⁵

By invading Afghanistan the Soviet Union had thus undoubtedly committed a serious violation of Article 2 (4) UN Charter, and violated Article 1 of the Afghan-Soviet Treaty of Friendship as well.¹⁷⁶

¹⁷⁴ D. Binder, *Brezhnev Doctrine Said to be Extended*, The New York Times, 10.02.1980, p. 10; Rostow, *supra* note 8, p. 233; he also quotes from a letter sent by the Soviet Politburo to the Central Committee of the Czech Communist Party of July 15, 1968, pointing out that “the frontiers of the socialist world have moved to the centre of Europe, to the Elbe and the Bohemian Forest. And we shall never agree to these historic gains of socialism and the independence and security of our peoples being placed in jeopardy”; Matsson, *supra* note 8, pp. 91-95; Turner, *supra* note 66, pp. 107-113; von Borcke, *supra* note 138, p. 128.

¹⁷⁵ Turner, *supra* note 66, p. 107.

¹⁷⁶ Matsson, *supra* note 8, p. 95; J. N. Moore, *Panel One: General Discussion*, 13 Georgia Journal of International & Comparative Law 231 (1983), p. 236; Behrens, *supra* note 14, p. 67.

3. FOREIGN SUPPORT FOR THE AFGHAN MUJAHEDDEEN IN THEIR FIGHT AGAINST THE SOVIETS

3.1. Background

The Afghan rebels had always received some support from abroad in their attempt to topple the Afghan government. Notably Iran¹⁷⁷ and Pakistan¹⁷⁸ became involved early on.

The main driving force behind the support of the Afghan rebels was, however, the USA, without which the massive Pakistani intervention would have been unthinkable.¹⁷⁹ Even prior to the Soviet invasion, the Carter Administration had decided to support the mujahedeen.¹⁸⁰ In July 1979 Carter had signed an Executive Order authorizing covert support which, according to the sources available, consisted mainly of “non-military” aid.¹⁸¹ Following the Soviet invasion, that support escalated on a yearly basis.¹⁸² In January 1980 Carter authorized the covert supply of weapons.¹⁸³

¹⁷⁷ Loyn, *supra* note 11, p. 191; Galster, *supra* note 2, p. 23; Roy, *supra* note 147, pp. 42-43.

¹⁷⁸ Loyn, *supra* note 11, p. 191; Z. Khalilzad, *The War in Afghanistan*, 41 *International Journal* 271 (1985-1986), pp. 290-291; Cynkin, *supra* note 1, p. 289 (although he, somewhat improbably, claims the Pakistanis were “hesitant” in their support); Galster, *supra* note 2, p. 15; Rasanayagam, *supra* note 2, pp. 107-108; Maley, *supra* note 2, pp. 56-58; Roy, *supra* note 147, pp. 39-42.

¹⁷⁹ Cynkin, *supra* note 1, p. 288; Gates, *supra* note 88, pp. 131-134, 146-147; the recent US Defence Secretary was Deputy Director of the CIA at the time. He claims that it was the Pakistanis, especially President Zia ul-Haq, who were putting pressure on the Americans to support the mujahedeen, even prior to the Soviet invasion.

¹⁸⁰ Blum, *supra* note 13, p. 344; Galster, *supra* note 2, pp. 10-11 (he claims the USA started meeting the rebels as of April 1979, following a decision made by Brzezinski to that effect); Rasanayagam, *supra* note 2, p. 83; Maley, *supra* note 2, p. 66.

¹⁸¹ Z. Brzezinski, Carter’s National Security Advisor at the time of the Soviet invasion of Afghanistan, *Oui, la CIA est entrée en Afghanistan avant les Russes...* (Yes, the CIA did enter Afghanistan before the Russians did...); Interview given to Vincent Jauvert, *Le Nouvel Observateur*, 15/01/1998; an English translation is available at: <http://www.globalresearch.ca/articles/BRZ110A.html> accessed October 26, 2011; Gates, *supra* note 88, pp. 143-149; the recent US Defence Secretary was Deputy Director of the CIA at the time; he points out that the CIA was looking at options of granting such support already in early 1979, and confirms that US President Carter authorized covert funding of the mujahedeen in July 1979. Apparently, only support for “insurgent propaganda” and other “non-military” support were authorized. He does, however, acknowledge that there was pressure within the US Administration to provide more support; Blum, *supra* note 13, p. 344; Galster, *supra* note 2, p. 14.

¹⁸² Loyn, *supra* note 11, p. 191 (who, however, claims that the USA only supported the mujahedeen as of 1980); Gates, *supra* note 88, pp. 251-252, 319-321.

¹⁸³ A. J. Kuperman, *The Stinger Missile and U.S. Intervention in Afghanistan*, 114 *Political Science Quarterly* 219 (1999), p. 221; Cynkin, *supra* note 1, p. 288; Rasanayagam, *supra* note 2, p. 104; Maley, *supra* note 2, p. 66.

Carter's policy was continued and reinforced by the Reagan Administration.¹⁸⁴ As far as Afghanistan was concerned, NSDD 75 (1983) outlined US policy as follows:

The U.S. objective is to keep maximum pressure on Moscow for withdrawal and to ensure the Soviets' political, military, and other costs remain high while the occupation continues.¹⁸⁵

This policy seems to have been stepped up considerably following NSDD 166 (1985), entitled "US Policy, Programs, And Strategy in Afghanistan", a document which has still not been de-classified. According to most accounts NSDD 166 authorized support for the Afghan rebels "by all means available".¹⁸⁶

In any case, the – sometimes surprisingly reluctant¹⁸⁷ – Reagan Administration provided the CIA with ever more resources to finance the mujahedeen,¹⁸⁸ often egged on by Congress,¹⁸⁹ itself heavily influenced by Congressman Charlie Wilson.¹⁹⁰ Although everybody knew the USA was supporting the rebels, all aid was provided by the CIA in the context of a "covert operation."¹⁹¹

By 1987 US aid had increased to at least \$600 million/year,¹⁹² an escalation topped by the fact that in 1986 the Reagan Administration – again under pressure

¹⁸⁴ Blum, *supra* note 13, p. 345; Cynkin, *supra* note 1, p. 288.

¹⁸⁵ *National Security Decision Directive* No. 75 of January 17, 1983, pp. 1-9, 4; available at: <http://www.fas.org/irp/offdocs/nsdd/nsdd-075.htm> last accessed December 1, 2011.

¹⁸⁶ Kuperman, *supra* note 183, pp. 227, 243; Rasanayagam, *supra* note 2, p. 116; Malley, *supra* note 2, p. 67; Roy, *supra* note 147, p. 35; Gates, *supra* note 88, pp. 348-349, being the CIA Deputy Director at the time, describes NSDD 166 as setting "forth a new American objective in Afghanistan: to win. To push the Soviets out."

¹⁸⁷ Kuperman, *supra* note 183, pp. 222-225, 228-230, 234-235; Galster, *supra* note 2, p. 16; Roy, *supra* note 147, pp. 34-36; Gates, Deputy Director of the CIA at the time, confirms that the CIA had opposed delivering Stinger missiles until "late 1985" (*supra* note 88, p. 349).

¹⁸⁸ Loyn, *supra* note 11, pp. 195-196; Roy, *supra* note 147, pp. 34-36.

¹⁸⁹ Loyn, *supra* note 11, pp. 196-198; Kuperman, *supra* note 183, pp. 226-227; Blum, *supra* note 13, p. 345; Galster, *supra* note 2, pp. 1-2, 16; Rasanayagam, *supra* note 2, p. 105; Roy, *supra* note 147, pp. 34-36; Gates, *supra* note 88, pp. 320-321.

¹⁹⁰ An interesting account of Charlie Wilson's exploits for the mujahedeen is provided in George Crile's book *Charlie Wilson's War*, Atlantic Books, London: 2002; Charlie Wilson's pivotal role is also confirmed by the Deputy Director of the CIA at the time (Gates, (*supra* note 88, pp. 320-321).

¹⁹¹ Blum, *supra* note 13, p. 345; Galster, *supra* note 2, pp. 1-2.

¹⁹² Gates, *supra* note 88, pp. 251-252, 319-321, 349; then Deputy Director of the CIA, provides the following data: 1981-1983 \$ 60 million/year; \$ 100 million in 1984; \$ 250-300 million in 1985, and \$ 375-425 million in 1986; Loyn, *supra* note 11, pp. 204, 219 (altogether \$3 billion; at the end aid to the Afghan rebels amounted to 75 % of the CIA budget); Kuperman, *supra* note 183, pp. 227-228; Blum, *supra* note 13, p. 345; Galster, *supra* note 2, p. 18.

from Congress – had agreed to provide the mujahedeen with Stinger missiles in order to shoot down Russian helicopters.¹⁹³ This was remarkable because up until then the USA had insisted on official “deniability”, i.e. assuring that none of the weapons delivered could be traced back to the USA.¹⁹⁴ As far as the Stinger missiles were concerned, it was obvious that only the USA could have provided them, so this decision marked a new departure in US support of the mujahedeen.¹⁹⁵ This massive US support for the Afghan rebels was made even more significant by the fact that Saudi Arabia and the Gulf states had pledged to match the US contribution dollar for dollar.¹⁹⁶

Although this article concentrates on US support for the mujahedeen, it obviously follows from the above that many other states became involved on the side of the mujahedeen as well. Egypt contributed by supplying Soviet-made weapons, which they had received during their once-close alliance with the USSR.¹⁹⁷ Western allies of the USA, mainly the UK,¹⁹⁸ also participated in supporting the Afghan “freedom fighters”.¹⁹⁹

Saudi Arabia and the Gulf states not only provided massive financial support, but also knowingly tolerated the fact that some of their own citizens went to Afghanistan to fight the Soviets.²⁰⁰ Among them was the Saudi Arabian Osama bin Laden, who would later organize the terrorist organization Al-Qaeda, which was to go on to infamously launch the outrageous terrorist attacks on the USA in September 2001. His status, at the time of these terrorist attacks, as a “guest” of the Afghan Taliban government would lead, in 2001, to Operation *Enduring Freedom* and the current conflict in Afghanistan.

¹⁹³ Kuperman, *supra* note 183, pp. 219, 232, 234-235; Khalilzad, *supra* note 178, p. 290; Galster, *supra* note 2, p. 18; Loyn, *supra* note 11, p. 204 (although he dates the delivery of Stinger missiles to 1985); Rasanayagam, *supra* note 2, p. 116; Maley, *supra* note 2, p. 67.

¹⁹⁴ Kuperman, *supra* note 183, pp. 222-223; Galster, *supra* note 2, p. 18; Roy, *supra* note 147, p. 35.

¹⁹⁵ Kuperman, *supra* note 183, p. 234; Roy, *supra* note 147, pp. 35-36.

¹⁹⁶ Loyn, *supra* note 11, p. 204; Khalilzad, *supra* note 178, pp. 291-292; Kuperman, *supra* note 183, p. 228; Cynkin, *supra* note 1, pp. 279, 282, 288-289; Galster, *supra* note 2, pp. 22-23; Rasanayagam, *supra* note 2, p. 106; Maley, *supra* note 2, p. 68; Mader, *supra* note 102, p. 43; Gates, *supra* note 88, pp. 320-321.

¹⁹⁷ Cynkin, *supra* note 1, p. 288; Maley, *supra* note 2, p. 68.

¹⁹⁸ Loyn, *supra* note 11, pp. 198-199; Maley, *supra* note 2, pp. 67-68; Mader, *supra* note 102, p. 29.

¹⁹⁹ Ross, *supra* note 1, p. 103.

²⁰⁰ Roy, *supra* note 147, pp. 43-44; Gates, *supra* note 88, p. 349.

3.2. The legality of US support for the rebels

As has already been pointed out, many other states also became involved in the effort to support the rebels, none more so than Pakistan. Nonetheless concentration on the efforts of the USA seems justified, because the massive escalation in outside involvement and support for the mujahedeen would have been unthinkable without the USA's leadership.

Any examination of the legality of the US involvement in Afghanistan is complicated by the fact that its nature as a "covert operation" meant that no official legal justification was ever proffered. Issuing such a justification would obviously have countermanded the attempt to preserve the "deniability" of US actions.

Nevertheless, as the following discussion will demonstrate, there are only a limited number of justifications the USA could have resorted to. Without any justification the massive involvement of the USA in Afghan affairs would clearly constitute an illegal intervention in that state's internal affairs, a violation of the principle of non-interference in another state's civil war, and thereby a violation of Afghanistan's sovereignty.²⁰¹

3.2.1. US support for the mujahedeen: July 1979 – December 1979

Insofar as any material assistance was given to the mujahedeen prior to the Soviet invasion, in accordance with Carter's Executive Order of July 1979, this was clearly illegal under international law. It should be noted that this assistance programme went beyond maintaining pre-existing relations – it was a novel policy of support for a faction in a civil war trying to depose that state's government.

Despite the clear legal situation Ross, in an article,²⁰² seems to be making an attempt to argue that the Soviets had been violating the Afghans' right of self-determination prior to the Soviet invasion, thereby presumably, by implication, providing a justification for US support for the Afghan rebels *prior* to that date.²⁰³ This line of reasoning is based on the assumption that the communist Afghan

²⁰¹ ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA)*, paras. 195, 241; in para. 241 the ICJ stated: "The Court considers that in international law, if one State, with a view to the coercion of another State, supports and assists armed bands in that State whose purpose is to overthrow the government of that State, that amounts to an intervention by the one State in the internal affairs of the other, whether or not the political objective of the State giving such support and assistance is equally far-reaching"; Sohn, *supra* note 56, p. 227 (general principle); Pentz, *supra* note 54, pp. 385-390 (dealing with the legality of the Pakistani support of the Afghan rebels).

²⁰² Ross, *supra* note 1, pp. 92-116.

²⁰³ Ross does also not reach a definite conclusion as to whether he agrees with this line of argument; external support of the Afghan rebels is only mentioned in one paragraph (*Ibidem*, p. 103).

governments prior to the invasion were mere “puppet” governments, guided by the Soviets, so that Afghan resistance *prior* to the Soviet invasion (including external support) could consequently be justified on the basis of the right of self-determination.²⁰⁴

Such an argument fails to convince and must be rejected. The basis of Ross’ argument is flawed. While discussing the “puppet” nature of the communist Afghan governments, and without providing any relevant evidence for his far-reaching claims,²⁰⁵ he himself asserts that the Afghan Amin government, the last communist government before the Soviets invaded, had “incurred the wrath of the Soviets”,²⁰⁶ a turn of events hardly reconcilable with the notion of a “puppet government”. Ross also admits that the assumption that the Soviets had violated “Afghan self-determination” prior to the invasion “runs the risk of expanding the self-determination doctrine to a point where it loses meaning”.²⁰⁷ There is nothing to add to this prescient observation.

Afghanistan at that stage was in the throes of civil war. Based on the majority view outlined above regarding foreign intervention, i.e. that customary international law prohibits any intervention in a civil war, the provision of aid to the rebels against the Afghan government – which at that time was recognized by the USA – was a violation of international law. Supporting the rebels against an indigenous government could not even be reconciled with traditional, pre-WW II customary international law, which also prohibited such support. No justification based on a right of “pro-democratic” intervention can be put forward either, since that theory had not been seriously developed yet in 1979 (leaving aside the fact that the mujahedeen’s democratic credentials were non-existent, as subsequent events have demonstrated).

Thus it can be seen that supporting the rebels prior to the Soviet invasion was clearly an illegal intervention in the Afghan civil war.

3.2.2. US support for the mujahedeen subsequent to the Soviet invasion

3.2.2.1. Collective self-defence

Having established that the Soviet invasion of Afghanistan was illegal and a clear violation of Article 2(4) of the UN Charter, it follows that Afghanistan had suffered an “armed attack” by the Soviet Union. Could the USA therefore

²⁰⁴ *Ibidem*, pp. 106-109.

²⁰⁵ *Ibidem*, pp. 107-108.

²⁰⁶ *Ibidem*, p. 101.

²⁰⁷ *Ibidem*, p. 109.

claim to be acting in collective self-defence when aiding the Afghan mujahedeen in fighting against the Soviet invaders?

Although at first glance this is a seemingly attractive proposition, any reliance on Article 51 of the UN Charter by the USA lacks one decisive criterion: there was no valid request by an appropriate Afghan body for US aid against the Soviets. As has already been discussed it is overwhelmingly agreed upon that a state claiming to be acting in collective self-defence of another state, without having been attacked itself, must have received a request by the attacked state for any use of force to be justified, a view confirmed by the ICJ.

The USA could not claim to have received such a request. Neither the previous Afghan government under President Amin, nor the new Afghan government under President Karmal issued such a request. Nor was there any Afghan government-in-exile which was recognized by the USA and could have asked for support. As far as the mujahedeen were concerned, there was no uniform organization which spoke on behalf of all of them.²⁰⁸ Even Pakistan recognized seven different rebel groups, and there were many more,²⁰⁹ and relations between some of these groups were “characterized by conflict, including actual warfare.”²¹⁰

Furthermore, although the USA had refused to recognize the new Karmal government, diplomatic relations had been maintained, and the new government continued to represent Afghanistan internationally.²¹¹ In fact, immediately after

²⁰⁸ Doswald-Beck, *supra* note 5, p. 243; Khalilzad, *supra* note 178, pp. 285-289; Cynkin, *supra* note 1, pp. 278-282; Galster, *supra* note 2, p. 20; Maley, *supra* note 2, pp. 48-49, 52-54; he points out that even in 1992, after the communist government had collapsed, “there was no unified group or party capable of exercising legitimate rule throughout Afghanistan’s territory”; Roy, *supra* note 147, pp. 35-36, states that, despite financial incentives from the USA to “establish a unified political entity that could challenge the legitimacy of the Kabul regime,” – “the Mujahedin gave little indication of organizing themselves”; A. Hyman, *Afghan Resistance: Danger from Disunity*, Conflict Studies No. 161, The Institute for the Study of Conflict, London: 1984, pp. 22-24; Gates, *supra* note 88, p. 348.

²⁰⁹ Doswald-Beck, *supra* note 5, p. 206, claims there were 37 different rebel groups fighting the Afghan government.

²¹⁰ Khalilzad, *supra* note 178, p. 288 (quote); Gates, *supra* note 88, p. 348; the recent US Defence Secretary and Deputy Director of the CIA at the time, states, referring to the Afghan mujahedeen: “No one should have had any illusions about these people coming together politically, before or after a Soviet defeat. Certainly no one at the CIA had such fantasies”; Ross, *supra* note 1, p. 102; Cynkin, *supra* note 1, 282, 298; Galster, *supra* note 2, p. 20; Rasanayagam, *supra* note 2, pp. 110, 120.

²¹¹ Amer, *supra* note 147, p. 431; Khalilzad, *supra* note 178, p. 289; he also describes a failed attempt by the mujahedeen in 1985, to take Afghanistan’s seat at the UN (p. 286); the confusion within the Reagan Administration as far as the treatment of the Afghan government and the rebels are concerned is evidenced by various contradictory news reports: *Reagan Bars Ties to Afghan Rebels*, Bernard Gwertzman, The New York Times, 17.06.1986, p. 7;

the invasion, on January 11, 1980, the Credentials Committee at the UN explicitly approved the credentials of the new Afghan government's representative in a resolution supported, notably, by the USA.²¹² Even as late as 1989 the US government was still contemplating whether it would be advisable to shift official recognition to the mujahedeen, an indication that even at this late stage in the Afghan conflict it did not recognize the mujahedeen's authority to speak for the state of Afghanistan.²¹³ The US Special Envoy to the mujahedeen, Peter Tomsen, has referred to the mujahedeen "government" – the AIG, which was set up in the late 1980s – as a "Potemkin Government", and it was only recognized by four states, the USA not being among them.²¹⁴

International reaction to the new Afghan government under Karmal was therefore markedly different from what it had been towards the Vietnamese-installed Cambodian government in 1979,²¹⁵ or the Soviet-installed government in Hungary in 1956.²¹⁶ It must therefore be concluded that President Karmal's government was, while disapproved of, not rejected outright as rightful international

US May Establish Afghan Rebel Ties, Richard Halloran, *The New York Times*, 18.06.1986, p. 8; *Afghan Rebels Get Support from U.S. For A Government*, Robert Pear, *The New York Times*, 06.05.1988; available at: <http://www.nytimes.com/1988/05/06/world/afghan-rebels-get-support-from-us-for-a-government.html?scp=1&sq=afghan+rebels&st=nyt> last accessed December 1, 2011.

²¹² *Yearbook of the United Nations for the Year 1980*, p. 320.

²¹³ *U.S. Considering Diplomatic Shift on Afghanistan*, Elaine Sciolino, *The New York Times*, 19.03.1989; she points out that the "Bush Administration" was "considering a formal break in relations with the Soviet-backed Afghan Government" but was "not ready to recognize the rebel government in exile"; available at: <http://www.nytimes.com/1989/03/19/world/us-considering-diplomatic-shift-on-afghanistan.html?scp=2&sq=elaine+sciolino&st=nyt> last accessed December 1, 2011; in a further article (*Bush Names Envoy to Afghan Rebels*, *The New York Times*, 06.04.1989) a few weeks later, Elaine Sciolino explains that despite sending "a special envoy to the American-backed Afghan rebels" the State Department had decided to "stop short of formal recognition of the Afghan government-in-exile"; available at: <http://www.nytimes.com/1989/04/06/world/bush-names-envoy-to-afghan-rebels.html?scp=1&sq=afghan+rebels&st=nyt> last accessed December 1, 2011; Roy, *supra* note 147, p. 35, points out that only in 1989, after much US pressure, did the mujahedeen manage to establish a "bureaucratic, corrupt and inefficient monster", the AIG.

²¹⁴ P. Tomsen, *The Wars of Afghanistan, Messianic Terrorism, Tribal Conflicts, and the Failures of Great Powers*, Public Affairs, Philadelphia: 2011, pp. 257, 261, 289, 293 (quote), p. 320; Maley, *supra* note 2, pp. 125-126; Maley points out that even Pakistan abstained when the "Interim Government" – ultimately successfully – attempted to gain Afghanistan's seat at the OIC. No such success was forthcoming at the UN.

²¹⁵ Amer, *supra* note 147, p. 431.

²¹⁶ Doswald-Beck, *supra* note 5, p. 195 (Hungary was not represented at the UN between 1957-1963; the new Cambodian government's credentials were repeatedly rejected by the UN as of 1979).

representative of Afghanistan.²¹⁷ This is also confirmed by the fact that the Geneva Peace Accords of 1988 were agreed to without the rebels' participation.²¹⁸

Thus the USA could not plausibly claim to have received a valid request for support against the Soviets by an authoritative organ that represented the state of Afghanistan. The massive US support of the mujahedeen therefore cannot be justified by the invocation of Article 51.²¹⁹

3.2.2.2. Counter-intervention

The USA could possibly claim that, based on the Soviet invasion of Afghanistan in support of the communist government against the Afghan rebels, it was exercising its customary international law right of counter-intervention by its massive support for the rebels.

It has, however, already been explained that a right of counter-intervention does not exist in customary international law, and certainly not in support of rebels, and that this should remain so.²²⁰ As no state has ever explicitly referred to its "right of counter-intervention" it seems unlikely the USA would have relied on such a justification anyway.

3.2.2.3. Wars of National Liberation

Reisman has argued that US support of the mujahedeen was justified by the concept of "wars of national liberation".²²¹ Afghanistan was subject to Sovi-

²¹⁷ Maley, *supra* note 2, p. 65, disapprovingly quotes UN Secretary General Pérez de Cuéllar as refusing to negotiate with the Afghan rebels as it was against the UN's "philosophy to be in touch with the enemies of governments."; Khalilzad, *supra* note 178, p. 289, although deploring the situation, acknowledges that the Afghan government had achieved a "degree of international acceptance" and was often treated as the "legitimate authority" in the western media; Blum, *supra* note 13, p. 347, accuses the USA of acting "as if the Afghanistan army and government" ... "with a large following of people" ... "didn't exist."

²¹⁸ The Geneva Peace Accords were negotiated between Afghanistan and Pakistan, with the USA and the USSR acting as guarantors.

²¹⁹ Moore, *supra* note 176, p. 236, disagrees with this assertion: according to him support of the "Afghan people" was justified under Article 51. Unfortunately, he offers no arguments in support of this categorical statement.

²²⁰ Pentz, *supra* note 54, pp. 394-395, 400-401, disagrees; he argues that Pakistani assistance to the Afghan rebels was justified on the basis of the right of counter-intervention following Soviet support of the Afghan government. Besides claiming that the existence of such a rule was "generally agreed", he provides no evidence of its actual existence.

²²¹ Reisman, *supra* note 141, pp. 906-909; Ross, *supra* note 1, pp. 105-107, who may be supportive of this argument. He cites Reisman's article without commenting on it, but does go on to examine whether the Afghan resistance was based on a right of self-determination *prior* to the Soviet invasion (the argument being that the communist government was a puppet government). On this topic, too, his conclusions seem uncertain, so that it is difficult to ascertain his views.

et “alien domination”,²²² so the US was legally entitled to support the people of Afghanistan in their struggle against foreign suppression by delivering weapons and other aid.²²³ According to him, the mujahedeen, supported by the vast majority of the Afghan people, constituted a national liberation movement.

Reisman goes on to accuse the General Assembly of having failed to have “used the proper language” by not clearly establishing that the mujahedeen were engaged in a war of national liberation,²²⁴ thereby “depriving the Afghan resistance, as well as those third states supporting it, of substantial international authority.”²²⁵ This raises the question whether the General Assembly had – as Reisman implies – failed in its duty towards Afghanistan, or whether the norm Reisman seems to be relying on perhaps does not exist in customary international law.

The concept of “wars of national liberation” was developed mainly by newly independent former colonies in cooperation with socialist states, originally against stiff western opposition.²²⁶ Developing countries and the socialist states repeatedly argued that a people which was subject to colonisation had the right to rise up and rid itself of the colonizer, by force if necessary.²²⁷ They argued that such an armed struggle was justified and compatible with international law, especially the right of self-determination, and could therefore be actively supported by other states, even including military aid.²²⁸ The right of self-determination, as embodied in Articles 1, 55, 56, 73, and 76 UN of the Charter, as well as the Declaration on the Granting of Independence to Colonial Countries and Peoples,²²⁹ was viewed as granting non-self-governing peoples the right to immediate and full independence.²³⁰

²²² Definition of Aggression, Article 7, GA Resolution 3314 (1974).

²²³ Reisman, *supra* note 141, pp. 907-909; Reisman’s arguments seem to be supported by Quigley, *supra* note 56, pp. 209-210.

²²⁴ Reisman, *supra* note 141, p. 909.

²²⁵ Reisman, *supra* note 141, p. 907; he goes on to state that a General Assembly Resolution was necessary to “*underline the lawfulness* of third-party support” of the mujahedeen (at p. 909; emphasis by author).

²²⁶ Romaniecki, *supra* note 151, p. 537; Rostow, *supra* note 8, p. 215; H. Trofimenko (a Soviet expert on Soviet-American relations), *The Third World And The U.S.-Soviet Competition: A Soviet View*, 59 Foreign Affairs 1021 (1980-1981), pp. 1022, 1028, 1034-1035; Friedman, *supra* note 17, p. 72; Oglesby, *supra* note 17, pp. 39-40; Dahm, *supra* note 160, pp. 186, 189-191; Berner, *supra* note 14, p. 328.

²²⁷ Rostow, *supra* note 8, p. 229; Trofimenko, *supra* note 226, p. 1028; Gray, *supra* note 56, pp. 59-60.

²²⁸ Oglesby, *supra* note 17, pp. 39-40; Gray, *supra* note 56, p. 60.

²²⁹ GA Resolution 1514 (1960).

²³⁰ Schmeltzer, *supra* note 66, pp. 99-100; Rosenstock, *supra* note 52, p. 730.

Resolution 1514 had, however, only mentioned a dependent people's entitlement to "exercise *peacefully* and freely their right to complete independence,"²³¹ a sentiment repeated in the preamble of resolution 1654.²³²

The developing and socialist states nevertheless maintained that the use of force by national liberation movements was justified.²³³ It was argued that colonialism was to be viewed as perpetual use of force or an enduring act of aggression by the colonizer from the moment the territory was seized. Therefore the use of force by the colonized against the colonizers was justifiable as self-defence under Article 51²³⁴ and other states supporting such national liberation movements were merely exercising collective self-defence.²³⁵ Such support was thus not an illegal intervention in the internal affairs of another state, but was, to the contrary, entirely compatible with the UN Charter.²³⁶ This argument was based squarely on the right of self-determination, and arguably strengthened by the fact that the General Assembly had recognized various national liberation movements as the authoritative representatives of their respective states.²³⁷

Another line of argument was that the ban on the use of force in Article 2 (4) did not apply to wars of national liberation, as national liberation movements using force to realize their right to self-determination were acting strictly in accordance with the UN's basic principles.²³⁸

²³¹ GA Resolution 1514 (1960), Article 4.

²³² GA Resolution 1654 (1961).

²³³ Arend, *supra* note 95, pp. 10-12; Falk, *supra* note 95, pp. 119, 123; Turner, *supra* note 66, pp. 56-71; Dahm, *supra* note 160, p. 186; Berner, *supra* note 14, p. 328; Gray, *supra* note 56, p. 60.

²³⁴ Klein, *supra* note 49, pp. 633, 644-649; Rosenstock, *supra* note 52, p. 730; R. E. Gorelick, *Wars of National Liberation: Jus Ad Bellum*, 11 Case Western Reserve Journal of International Law 71 (1979), pp. 74, 76-77, 77-80; Krauss, *supra* note 19, p. 227; Turner, *supra* note 66, pp. 64-65; S. M. Schwebel, *Wars of Liberation – As Fought in U.N. Organs*, in J. N. Moore (ed.), *Law and Civil War in the Modern World*, The John Hopkins University Press, Baltimore: 1974, Ch. 17, p. 447; as he points out this argument was part of India's justification of its 1961 invasion of Goa, which at time was still a Portuguese colony. This reasoning was explicitly rejected by the USA's UN Ambassador during the subsequent debates.

²³⁵ Rosenstock, *supra* note 52, p. 730; Gorelick, *supra* note 234, p. 76.

²³⁶ Schmeltzer, *supra* note 66, pp. 99-100; Rosenstock, *supra* note 52, p. 730; Gorelick, *supra* note 234, p. 74.

²³⁷ Resolution 2918 (1972) referring to the national liberation movements of Angola, Guinea-Bissau, Cape Verde and Mozambique; Resolution 3111 (1973) referring to Namibia; Resolution 3113 (1973) referring once more to the Portuguese colonies; Resolution 3115 (1973) referring to Rhodesia; Resolution 3151 G (1973) referring to South Africa.

²³⁸ Gorelick, *supra* note 234, pp. 80-83; Krauss, *supra* note 19, p. 227; Turner, *supra* note 66, pp. 65-66; Gray, *supra* note 56, p. 61; Schwebel, *supra* note 234, pp. 450-451.

These arguments met with strong resistance on the part of the western states.²³⁹ They insisted that the UN Charter was applicable, and that the right of self-determination could not in any way circumvent or limit the ban on the use of force in Article 2 (4).²⁴⁰ Therefore they opposed attempts to explicitly legalize the use of force by national liberation movements and, even more so, attempts to legitimize external support for a military campaign.²⁴¹ Many western states viewed the term “war of national liberation” as merely an attempt by the socialist states to disguise their true intentions of installing communist regimes in the Third World.²⁴² Discussing Vietnam, for example, US Vice-President Humphrey declared in 1965:

South Viet Nam is the testing ground for the so-called ‘war of national liberation’ – a contest in which totalitarians believe they can baffle and defeat not only the forces of the Republic of South Viet Nam but also the forces of the most advanced of all nations. In South Viet Nam our adversaries seek to demonstrate decisively that arrogant militancy – and not peaceful coexistence – is the path to eventual Communist triumph.²⁴³

Nevertheless, the socialist and developing states managed to secure some successes at the General Assembly. While Resolution 1514 had already demanded that “all armed action or repressive measures of all kinds directed *against* dependent peoples shall cease”,²⁴⁴ it was in Resolution 2105 that the “legitimacy of the *struggle* by the peoples under colonial rule to exercise their right to self-determination and independence” was recognized, and that the provision of “material and moral assistance” to such “national liberation movements” was explicitly

²³⁹ Rosenstock, *supra* note 52, pp. 719-720, describes western resistance even against the inclusion, in the 1970 Declaration on Friendly Relations (GA Resolution 2625), of the “prohibition of the use of force against dependent people”; Falk, *supra* note 95, pp. 123-124, 128-129; Gorelick, *supra* note 234, pp. 74-75, 76-77, 80, 82; Krauss, *supra* note 19, p. 227; Gray, *supra* note 56, p. 60; Schwebel, *supra* note 234, p. 447.

²⁴⁰ Klein, *supra* note 49, p. 633; Rohlik, *supra* note 44, pp. 400, 407-409; Moore, *supra* note 17, p. 196; Gorelick, *supra* note 234, pp. 75-76, 80, 82; Schwebel, *supra* note 234, p. 447, points out that the USA’s UN Ambassador Adlai Stevenson rejected India’s justification of its invasion of the Portuguese colony of Goa in 1961 on that basis during the UN debates.

²⁴¹ Oglesby, *supra* note 17, pp. 39-40; Moore, *supra* note 17, p. 196; Gorelick, *supra* note 234, pp. 75-76, 80, 82.

²⁴² Falk, *supra* note 95, p. 123; Moore, *supra* note 143, p. 3.

²⁴³ Hubert Humphrey, US Vice President, at the 1965 Annual *National Governors’ Association Meeting*; *Memorable Quotes*; available at: <http://www.nga.org/cms/home/about/nga-annual--winter-meetings/page-nga-annual-meetings/col2-content/main-content-list/1965-nga-annual-meeting.html> accessed October 26, 2011.

²⁴⁴ GA Resolution 1514 (1960), Article 4.

welcomed.²⁴⁵ This had been a compromise phrase, which tried to paper over the difference in attitude between western states on the one hand, and socialist and developing states on the other towards the legitimacy of the use of force by liberation movements. The question whether the “struggle” may be conducted by force was deliberately left unanswered.²⁴⁶

Finally, by the 1970s the socialist and developing states managed to achieve majorities for resolutions that explicitly allowed the use of force on the part of liberation movements. After Resolution 2621 (1970) referred to the “inherent right of colonial peoples to struggle by all necessary means at their disposal”, Resolutions 3070 (1973) and 3246 (1974) declared “armed struggle” to be a legitimate way for liberation movements to proceed.²⁴⁷

This seemingly startling success in establishing far-reaching rights for national liberation movements had, however, one serious defect: they were not supported by the western states, which either abstained or voted against the resolutions legitimizing the use of force.²⁴⁸ As General Assembly Resolutions have no legally binding character, they are dependent on near-unanimous votes of acceptance in order for states to be able to claim them to be reflective of universal *opinio juris*. The determined and consistent resistance by western states to the concept of wars of national liberation meant that the GA Resolutions were therefore not sufficient evidence of wide-spread *opinio juris*. Western opposition in fact proved the opposite, namely that the principles put forward by developing and socialist states were not viewed as reflective of customary international law by the developed states.²⁴⁹

As had already been the case during the debates on the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter,²⁵⁰ this became evident once more in the discussions leading up to the passage, in December 1974, of the Definition of Aggression by the General Assembly.²⁵¹ Socialist and developing states realized that western opposition to the concept of wars of national liberation movements

²⁴⁵ GA Resolution 2105 (1965), Article 10.

²⁴⁶ Klein, *supra* note 49, p. 625; Gray, *supra* note 56, p. 60; Schwebel, *supra* note 234, pp. 453-454.

²⁴⁷ GA Resolution 2621 (1970), Article 2; Resolution 3070 (1973), Article 2; Resolution 3246 (1974), Article 3.

²⁴⁸ Klein, *supra* note 49, p. 632; Rohlik, *supra* note 44, pp. 407-409; Gorelick, *supra* note 234, p. 83; Gray, *supra* note 56, p. 62; Schwebel, *supra* note 234, pp. 448-457.

²⁴⁹ Rohlik, *supra* note 44, pp. 407-409; Gorelick, *supra* note 234, p. 83; Schwebel, *supra* note 234, pp. 454-456.

²⁵⁰ GA Resolution 2625 (1970).

²⁵¹ GA Resolution 3314 (1974); Rosenstock, *supra* note 52, pp. 731-732 (referring to near identical discussions surrounding the passage of Resolution 2625 (1970); Krauss, *supra* note 19, pp. 227-228; Schwebel, *supra* note 234, pp. 448-454, 456; Schwebel outlines

had to be placated if the Definition of Aggression was to achieve a status that justified the claim it was reflective of customary international law. While western states were not able to achieve their goal of completely deleting any reference to liberation movements, socialist and developing states also had to agree that any reference to the use of force by liberation movements be removed.²⁵² As a result, Resolution 3314 in the end returned to the compromise phrase of 1965, whereby the right of people to “struggle” for independence and to receive support in that endeavour was recognized.²⁵³

Subsequent discussions demonstrated that this was interpreted in widely differing ways by various states: while western states vehemently argued that it remained impermissible to aid liberation movements militarily, developing and socialist states took the opposite view.²⁵⁴ Thus the discussions subsequent to the Resolution again serve to demonstrate that one section of the community of states, the western states, consistently argued that military aid to liberation movements was illegal.²⁵⁵ This consistent western opposition, led by the USA, meant that no norm in customary international law allowing military support of national liberation movements was ever created.²⁵⁶ As US Representative Gimer had already stated before the Legal Committee of the General Assembly in 1970, during a debate on the Declaration on Friendly Relations:

We agree, as the U.K. said, that states are not entitled ‘under the Charter, to intervene by giving military support or armed assistance in non-self-governing territories or elsewhere. The support ... states were entitled to give to peoples deprived of self-determination was ... limited to such support as was in

the relevant discussions on Resolution 2625 (1970) in detail, but also refers to the nearly identical discussions surrounding the passage of Resolution 3314 (1974); Rohlik, *supra* note 44, pp. 411-412; Gorelick, *supra* note 234, pp. 76, 83-84; Gray, *supra* note 56, pp. 60-62.

²⁵² Klein, *supra* note 49, pp. 632-633.

²⁵³ GA Resolution 3314 (1974), Definition of Aggression, Article 7.

²⁵⁴ Klein, *supra* note 49, p. 633; Rohlik, *supra* note 44, pp. 411-412; Gray, *supra* note 56, pp. 60-62; Rosenstock, *supra* note 52, pp. 731-732 (referring to nearly identical discussions surrounding the passage of Resolution 2625 (1970)). The compromise achieved was that a people subject to “forcible action” in its fight for self-determination was “entitled to seek and to receive support in accordance with the purposes and principles of the Charter”. The enduring disagreement as far as the interpretation of this phrase was concerned remained, namely, whether such support could go beyond political and moral support (western states) and include military aid (socialist and many developing states); Gorelick, *supra* note 234, pp. 85-87; Schwebel, *supra* note 234, pp. 453-454, 456.

²⁵⁵ Klein, *supra* note 49, pp. 651-652; Schwebel, *supra* note 234, pp. 450-451, 453, 454-455.

²⁵⁶ Rosenstock, *supra* note 52, p. 733; Rohlik, *supra* note 44, pp. 407-409, 411-412; Gorelick, *supra* note 234, pp. 83, 87 (referring in particular to US opposition), pp. 92-93; Krauss, *supra* note 19, p. 230; Schwebel, *supra* note 234, pp. 448-457.

accordance with the purposes and principles of the charter and was therefore controlled by the overriding duty to maintain international peace and security.’ In short, the declaration does not constitute a licence for gun-running ...²⁵⁷

As a consequence of the above, it must be concluded that while the General Assembly cannot be said to have failed in its duty towards the Afghan mujahedeen, its Resolutions provide no support for a USA claim that its massive support of the mujahedeen with weapons and money was based on a legally recognized right to militarily support national liberation movements.

Reisman also severely undermines his own argument when he states that a declaration by the General Assembly that the mujahedeen’s struggle was a “war of national liberation” might cause western states to look at the concept more favourably.²⁵⁸ This is an implicit confirmation that the norm Reisman seeks to rely on to justify US support of the mujahedeen did not exist.

Therefore it must be concluded that the right of self-determination, in combination with the concept of wars of national liberation, does not confer any right on states to militarily support such liberation movements. As a consequence, the USA could not successfully invoke such a right.

There is thus little doubt that the US support of the mujahedeen prior to the Soviet invasion violated the customary international law principle of non-intervention in a civil war; the intervention amounted to an unjustified interference in another state’s internal affairs.²⁵⁹ The massive and decisive US support of the mujahedeen following the Soviet invasion was illegal under international law. The USA could not claim to be acting in collective self-defence, since it had received no valid Afghan request to that effect. It could also not rely on a right of counter-intervention, nor on a right of military support of national liberation movements, as neither had become part of customary international law.

The USA and its allies also chose to ignore General Assembly Resolution ES-6/2, which “appealed”

... to all States to respect the sovereignty, territorial integrity, political independence and non-aligned character of Afghanistan and to refrain from any interference in the internal affairs of that country.²⁶⁰

²⁵⁷ Statement by Mr. Gimer, US Alternate Representative to the UN General Assembly, before Committee VI (Legal), Declaration on Principles of Friendly Relations, September 24, 1970; 63 Department of State Bulletin, 1970, pp. 623-627, 626.

²⁵⁸ Reisman, *supra* note 141, p. 909.

²⁵⁹ Gray, *supra* note 56, p. 106, describes the USA’s massive support for opposition groups in Angola, Cambodia, Nicaragua, and Afghanistan as coming “close to blatant disregard, if not rejection, of the legal principle of non-intervention.”

²⁶⁰ GA Resolution ES-6/2 (1980), para. 3.

CONCLUSIONS AND REMARKS ON THE “ARAB SPRING”

The illegal Soviet and (mainly) American interventions in Afghanistan’s civil war ended in disaster for both superpowers.

The Soviet Union paid heavily for its attack on Afghanistan. The invasion proved to be disastrous for Soviet foreign policy, as it led not only to swift, near universal condemnation by other states, but also cost the country a lot of its support among the non-aligned states. Furthermore, the war proved unpopular at home and was costly both in terms of lost lives and money.²⁶¹

As concerns the illegal American involvement, the result is hardly any better. Although some Americans, like Brzezinski,²⁶² claim that the Soviet defeat in Afghanistan was an important milestone in the downfall of communism, the price paid by the Americans was high. Muslim fanatics, violently opposed to America, democracy, and western values in general, some of whose Arab supporters would later return to kill thousands of civilians in New York, were heavily subsidized by American taxpayers. The contribution of the Soviet defeat in Afghanistan to the downfall of communism is, on the other hand, somewhat tenuous: given the severe economic crisis that had affected the socialist bloc by the mid-1980s, it seems likely the system would have crumbled without America’s heavy involvement in Afghanistan. The former British Prime Minister Tony Blair has concluded:

I examined how in Afghanistan we had supported what became the Taliban in order to stop the Russians, precisely in the name of managing the situation; ... and how in each case the consequence of such ‘realism’ had been simply to create a new, and potentially worse, source of instability.²⁶³

Afghanistan is thus a case study that serves to demonstrate the realism behind the international law prohibition against external interference in civil wars. For both protagonists, non-interference in Afghanistan’s civil war would have been the preferable, lower cost option in the long run.

More recently, interventions in the context of the “Arab Spring” have come under discussion. Although no final conclusions can yet be drawn as to the success

²⁶¹ Galster, *supra* note 2, p. 24; Kuperman, *supra* note 183, pp. 236, 239; Rasanayagam, *supra* note 2, p. 115; von Borcke, *supra* note 138, p. 169; Roy, *supra* note 147, p. 33.

²⁶² Z. Brzezinski, Carter’s National Security Advisor at the time of the Soviet invasion of Afghanistan, *Oui, la CIA est entrée en Afghanistan avant les Russes...* (Yes, the CIA did enter Afghanistan before the Russians did...); Interview given to Vincent Jauvert, *Le Nouvel Observateur*, 15.01.1998; an English translation is available at: <http://www.globalresearch.ca/articles/BRZ110A.html> accessed October 26, 2011

²⁶³ T. Blair, *A Journey*, Hutchinson, London: 2010, p. 369.

of these foreign interventions, the first tentative predictions on the outcome can be made. These suggest that, just as in Afghanistan, the foreign interventionists in the Arabic uprisings and/or civil wars may find it hard to realize their goals.

In March 2011 Saudi Arabia, with the support of other Gulf Cooperation Council member states, decided to intervene militarily in Bahrain's internal conflict. The Saudi government seemed to rely exclusively on the Bahraini government's request.²⁶⁴ The Bahrain government, without providing any evidence for its claim, also implicated Iranian involvement in the uprising. Many commentators have, however, suggested that the Bahraini reliance on foreign military support to suppress parts of its own population will most likely backfire.²⁶⁵ Not only was the move, as has been explained in this article, contrary to international law, but the crisis in Bahrain, caused by the wide-spread feeling among the Shiite majority of being discriminated against by the minority Sunni rulers, has not been and will not be resolved by foreign military intervention. The only likely result is a radicalisation of the opposition, which in the future may be more than willing to accept foreign support.

The decision by some NATO member states, to commence an air campaign in Libya, also received widespread publicity. Shocked by allegations that the Ghaddafi regime may be planning to bomb its rebelling citizens, the Security Council, acting under Chapter VII of the Charter, authorized the UN member states to "take all necessary measures... to protect civilians and civilian populated areas," and to impose a no-fly-zone.²⁶⁶ A bombing campaign, carried out mainly by NATO air forces, was initiated and lasted for six months. The Gaddafi regime was overthrown, and Gaddafi himself was captured and killed by the rebels.

This military intervention in Libya's civil war is controversial in many ways. Some have argued that the Security Council's premise, namely that Gaddafi was going to bomb his own population, was incorrect. In a detailed analysis of the situation in the North African country Hugh Roberts has argued that there is not a shred of objective evidence that would confirm this assertion. As he explains it,

²⁶⁴ *GCC troops dispatched to Bahrain to maintain order*, Al Arabiya News, 15.03.2011; available at: <http://www.alarabiya.net/articles/2011/03/14/141445.html> accessed November 28, 2011.

²⁶⁵ F. Zakaria, *A New Middle East*, TIME Magazine, 16.05.2011, p. 18; E. Bronner, *Security forces in Bahrain expel protesters from heart of the capital*, International Herald Tribune, 18.03.2011, pp. 1, 6; E. Bumiller, *Saudis and U.S. seek to dispel tensions*, International Herald Tribune, 07.04.2011, p. 6; P. Cockburn, *The divided Kingdom*, The Independent (Viewpaper), 08.08.2011, pp. 2-3; A. Shadid, *Bahrain emerges as cornerstone of counterrevolution*, International Herald Tribune, 16.09.2011, p. 5; Shadid concludes that the "harsh crackdown" had turned Bahrain "into a tinderbox."

²⁶⁶ UN Security Council Resolution 1973 (2011).

the situation in Libya was a typical civil war scenario, with each side – both the government and the rebel forces – resorting to military force. On February 21, 2011, international news stations informed viewers that the Gaddafi regime was “using its air force to slaughter peaceful demonstrators.” Roberts points out there was no evidence of this, and, according to Human Rights Watch, the total death toll in Libya between February 15 and February 21 was “only” 233, a lower number than during uprisings in Tunisia, Egypt, and Algeria, where western states felt no necessity to intervene forcefully.²⁶⁷

Furthermore, doubts have arisen as to the legality of this intervention under international law. Reinhard Merkel has argued that, although the UN was claiming that its only aim in Resolution 1973 was to protect civilians, in reality the world community was taking sides in a civil war. He therefore views Resolution 1973 as inconsistent in and of itself with international law, because it violated Libya’s sovereignty. In his view, only if events comparable to genocide, such in Rwanda in the early 1990s, were taking place, could a different assessment be justified.²⁶⁸

Even if, due to the Security Council’s wide discretion when acting under Chapter VII, Reinhard Merkel’s view may not be wholly convincing, there can be little doubt that the way some NATO states (with the support of token Arab forces) implemented Resolution 1973 was in violation of the resolution itself, and thus of international law.²⁶⁹ Far from simply protecting civilians in an ongoing civil war, the intervening states successfully engineered regime change by toppling Ghaddafi’s government, and thus forcefully took sides in an internal conflict. Such action was not justified by Resolution 1973.

²⁶⁷ H. Roberts, *Who said Gaddafi had to go?*, London Review of Books, 17.11.2011; available at: <http://www.lrb.co.uk/v33/n22/hugh-roberts/who-said-gaddafi-had-to-go/print> accessed November 29, 2011, pp. 1-21.

²⁶⁸ R. Merkel, *Völkerrecht contra Bürgerkrieg, Die Militärintervention gegen Gaddafi ist illegitim* (International Law v. Civil War, The military intervention against Gaddafi is not legitimate), Frankfurter Allgemeine Zeitung, 22.03.2011; available at: <http://www.faz.net/aktuell/feuilleton/voelkerrecht-contra-buergerkrieg-die-militaerintervention-gegen-gaddafi-ist-illegitim-1613317.html> accessed November 29, 2011, pp. 1-4.

²⁶⁹ *Putin attacks Britain and the US for ‘violating Libya resolution’*, Mary Dejevsky, The Independent, 12.11.2011; available at: <http://www.independent.co.uk/news/world/europe/putin-attacks-britain-and-us-for-violating-libya-resolution-6261163.html> accessed November 25, 2011; Putin accused the UK and the USA of “taking the side of one of the warring parties”, thereby “committing a crude violation of the UN resolution.”; *China expresses regret for military strike against Libya; AU [African Union] panel says it’s opposed to foreign military intervention in Libya*: media report; both xinhuanet.com; both 20.03.2011; available at: http://news.xinhuanet.com/english2010/china/2011-03/20/c_13788512.htm; http://news.xinhuanet.com/english2010/world/2011-03/20/c_13788058.htm both accessed December 1, 2011.

Arguments to the contrary, i.e. that the removal of Ghaddafi's regime was the only way to permanently protect civilians, fall short of being convincing. As Hugh Roberts has explained, this assertion is also unsupported by the evidence. In fact, it was Ghaddafi's regime that on four occasions offered a cease-fire, an offer the rebels repeatedly rejected. Furthermore, despite there being reports of atrocities being committed by rebel forces against civilians, there was not one report of intervention by the NATO states to protect those numerous civilians who still supported Ghaddafi. It became obvious that only those civilians who sided with NATO's view of the internal conflict deserved protection.²⁷⁰ Furthermore, before the Libyan government had time to respond to the UN Resolution, many western politicians, including British Defence Secretary Fox, were already calling for Ghaddafi's removal. There can thus be no doubt that the way the military intervention in Libya was conducted amounted to an illegal intervention in a civil war. Not Libyans, but western states decided who should rule that country in the future.

Although it is too early to predict the final outcome of this intervention, early indications are that western states were, once again, mistaken. There are reports of wide-spread human rights abuses under the new regime.²⁷¹ It remains unclear who actually rules Libya, and whether the new regime actually has majority support. Lastly, the chances for a democratic future for Libya are not promising. The decision by the new rulers to introduce the Sharia as basis of all law in Libya, without Libyans having had a chance to express their views on the matter, bodes ill as far as future democratic development is concerned. Thus the "liberation" of Libya may well end up resulting in nothing more than the replacement of one dictatorship by another.

The rule of non-intervention in a civil war has been developed because experience has shown that intervention on either side often, as in Afghanistan's case, leads to counter-interventions, which in turn can lead to international armed conflicts. Furthermore, a party to a civil war that cannot win on its own is unlikely to be able to provide stable government in the future, leading to never-ending interventions and possibly to further conflict as well. In Afghanistan, both its communist government as well as the disparate mujahedeen groups fighting against it have proved unable to govern without foreign support. Lastly, outside interventionists often do not understand the parties, or the policies they are supporting, because they are unaware of the internal political and cultural dynamics. In Afghanistan,

²⁷⁰ Roberts, *supra* note 267, pp. 1-21.

²⁷¹ *Revealed: Libya's new reign of terror; UN: abuses of human rights rife in lawless new Libya*; K. Sengupta, *The Independent*, 24.11.2011; pp. 1-3.

this was particularly evident in the American support of the most radical Muslim groups against the Soviets.

Unfortunately, politicians seem to be unwilling to heed these lessons. As recent events in Bahrain and Libya have demonstrated, the urge to intervene is strong, even though the outcome is at best uncertain, and most likely negative. International law could offer a more realistic guide to a successful foreign policy than the often irrational and unrealistic policies adopted by state leaders in violation of it. For both the USSR and the USA, the appropriate legal course of action, namely non-interference in Afghanistan's civil war, would have been the preferable, lower-cost option in the long run, as it would probably have been for the Afghans themselves as well. Sadly, it would not be surprising if the same conclusion will in the future have to be drawn in respect of Bahrain and Libya.

*Salvatore Fabio Nicolosi** ■

THE LAW OF MILITARY OCCUPATION AND THE ROLE OF DE JURE AND DE FACTO SOVEREIGNTY

Abstract

This article aims at defining the specific tenets of the doctrine of “military occupation” and assessing how it deals with the issue of “sovereignty,” looking at the problem from a historical perspective. Accordingly, after tracing the evolution of belligerent occupation as a legal institution of international law, attention is turned to the concepts of “effectiveness” and “temporariness” and the interplay between de jure and de facto sovereignty in the light of the “occupation zone model”, as it has been applied in the course of international practice.

Against this background the article discusses the hypothesis that the codification of the “laws of war” and evolution of the doctrine of military occupation as a temporary and limited regime, whose final aim is to restore legitimate sovereignty over the occupied territory, constitutes a paradigm which could and should apply to various unlawful territorial situations today which have arisen as a result of a misapplication of the law of military occupation.

INTRODUCTION

The reflections surrounding the 60th anniversary of the Geneva Conventions in 2009 have shed new light on the contentious application of international humanitarian law to the various crises affecting the international community.

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The acknowledgment that there is often a clash and contradiction between the law and politics is nowhere more clearly revealed than in the law of military occupation.¹

The present study aims at defining the specific tenets of “military occupation” and assessing how they deal with the issue of “sovereignty,” taking a historical perspective. In this light, the legal notion of belligerent occupation also encompasses the controversial question of the role of the concepts of *de jure* and *de facto* sovereignty in international law.

After sketching out the evolution of belligerent occupation as a legal institution in international law, attention will subsequently be paid to “effectiveness”, conceived of as a doctrine requiring a sequence of acts by an Occupant to validate its title to a territory. In this regard, it will be argued that traditional international law and classical scholarship have always considered “effectiveness” as a unique condition, characteristic of the phenomenon of occupation, emphasising the role of *de facto* sovereignty. However, it will be noted that the second tenet of military occupation, namely “temporariness”, has been recently recognised as being the foremost aspect of military occupation, reflecting the provisional nature of such an institution, which is meant to protect the *de jure* sovereignty of the occupied State.

Following this analysis, the article discusses the hypothesis that codification of the “laws of war” brought about a consolidation of the concept of military occupation as a temporary and limited regime. This conceptualisation, however, has suffered from a flagrant deviation in its practice in a number of 20th century conflicts. Many Occupying Powers have preferred to deny they are acting as “occupants”, supporting their actions through audacious theories based on the thesis of a legitimate territorial expansion over the occupied territories. This is the case in Israel’s current military occupation of Palestinian territories, which in this article is used as a key example of the difficulties involved in submitting a military occupation to the test of legality.

In the end, this study intends to demonstrate that only a truthful reconstruction of the doctrine of legitimate sovereignty, often misapplied in the chaos of war, can become the incubator for the swift realization of peace and security in many sensitive parts of the world.

¹ The most recent works on the law of belligerent occupation include: V. Koutroulis, *Le début et la fin de l'application du droit de l'occupation*, Pedone, Paris: 2010; Y. Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and Its Interaction with International Human Rights Law*, Nijhoff, Leiden: 2009; Y. Dinstein, *The International Law of Belligerent Occupation*, Cambridge University Press, Cambridge: 2009; R. Kolb, *Le droit de l'occupation militaire: perspectives historiques et enjeux juridiques actuels*, Bruylant, Bruxelles: 2009; P. M. R. Stirk, *The Politics of Military Occupation*, Edinburgh University Press, Edinburgh: 2009.

1. THE ROLE OF *DE JURE* AND *DE FACTO* SOVEREIGNTY IN THE EVOLUTION OF THE LAW OF BELLIGERENT OCCUPATION

The most recent crises appearing on the international chessboard have revived some classical concepts of International Humanitarian Law (IHL), such as the old-fashioned concept of belligerent occupation. Ignored for many years as being outdated, since the war in Iraq (2003–2004)² it has recently evolved to encompass a variety of situations entailing effective control over a territory. Traditionally conceived of as “the effective control of a power (be it one or more states or an international organization, such as the UN) over a territory to which that power has no sovereign title, without the volition of the sovereign of that territory,”³ the legal concept of belligerent occupation represents the classic type of military occupation.⁴ It has been evolving to include situations where control over the territory is not necessarily exercised by a hostile power, but may stem from a coalition of States, as in the case of Iraq, or from an international organization or the United Nations,⁵ as in the cases of Kosovo and Afghanistan. Actually,

² See, UNSC Res. 1483 (2003), *The Situation between Iraq and Kuwait*, UN Doc. S/RES/1483 (2003), 22 May 2003. Although it did so indirectly, the Security Council qualified the United States (US) and the United Kingdom (UK) as “Occupying Powers”, requiring them to abide by the international law of belligerent occupation. See, E. Benvenisti, *The Security Council and The Law on Occupation: Resolution 1483 on Iraq in Historical Perspective*, 1 Israel Defence Forces Law Review 1 (2003), p. 19. As regards the application of the international law of belligerent occupation to Iraq, see, among others: R. Buchan, *International Community and the Occupation of Iraq*, 12(1) Journal of Conflict & Security Law 37 (2007); C. McCarthy, *The Paradox of the International Law of Military Occupation: Sovereignty and the Reformation of Iraq*, 10(1) Journal of Conflict & Security Law 43 (2005); R. Wolfrum, *Iraq – From Belligerent Occupation to Iraqi Exercise of Sovereignty: Foreign Power versus International Community Interference*, 9 Max Planck Yearbook of United Nations Law 1 (2005).

³ E. Benvenisti, *The International Law of Occupation*, 2nd ed., Oxford University Press, Oxford: 2004, p. 4; Y. Ronen, *Illegal Occupation and its Consequences*, 41(1-2) Israel Law Review 201 (2008), p. 202, suggests expanding the operational meaning of occupation to also include “any internationally-recognized territorial title, such as lease, trusteeship, or in the past, mandate.”

⁴ See, A. Roberts, *What is a Military Occupation?*, 55 British Yearbook of International Law 249 (1984), p. 261. F. Capotorti, *L'occupazione nel diritto di guerra*, Jovene, Napoli: 1949, p. 694 ff, proposed the tripartite typology entailing belligerent occupations, non-belligerent occupations, and *quasi* belligerent occupations.

⁵ With reference to the similarity of belligerent occupation to some UN operations involving the deployment of international military forces throughout a territory, see the extensive treatment in S. Vité, *L'applicabilité du droit international de l'occupation militaire aux activités des organisations internationales*, 86 (853) International Review of the Red Cross 9 (2004).

international law and classical doctrine have always considered “effectiveness” as the unique condition characteristic of the phenomenon of occupation, conceived of as a prelude to a sequence of acts by an Occupying State to validate its title to an occupied territory. “Temporariness”, on the other hand, is conceived of as a “state of affairs, which may end as the fortunes of war change, or else will be transformed into some other status through negotiations conducted at or soon after the end of the war,”⁶ and has only lately been recognised as the foremost aspect of belligerent occupation.

The development of a proper legal system concerning the conditions and benchmarks for application of the law of military occupation has gradually affected international law since the 19th century, when it was first submitted to a codification. Broadly speaking, like other legal principles of international law, belligerent occupation is continuously in progress, evolving from its traditional primitive configuration and sensitive to various hypotheses for its further development from time to time as suggested by actual practice.

1.1. The concept of “effectiveness” and the origins of belligerent occupation

The concept of belligerent occupation, derived from the Latin expression “*occupatio bellica*”, evokes the primitive idea of exclusive possession, conceived of as one of the legal outcomes of a conflict. It traditionally emerged within the law of war as a practice related to the right of conquest over an enemy’s territory.⁷

As to the particular convergence between occupation by States and international territorial administration by international organizations, *see*, among others E. De Brabandere, *Post-conflict Administrations in International Law: International Territorial Administration, Transitional Authority and Foreign Occupation in Theory and Practice*, Martinus Nijhoff Publishers, Leiden: 2009; S. R. Ratner, *Foreign Occupation and International Territorial Administration: the Challenges of Convergences*, 16(4) *European Journal of International Law* 695 (2005).

⁶ A. Roberts, *Prolonged Military Occupation: the Israeli Occupied Territories since 1967*, 84(1) *American Journal of International Law* 44 (1990), p. 47; also published in a revised version in E. Playfair (ed.), *International Law and the Administration of Occupied Territories. Two Decades of Israeli Occupation of the West Bank and Gaza Strip*, Clarendon Press, Oxford: 2003, pp. 25-86. *See also*, A. Kozłowski, *The Legal Construct of Historic Title to Territory in International Law – An Overview*, 30 *Polish Yearbook of International Law* 61 (2010).

⁷ For more on the origins and the historical evolution of belligerent occupation *see*, among others: E. Benvenisti, *The Origins of the Concept of Belligerent Occupation*, 26(3) *Law and History Review* 621 (2008); N. Bhuta, *The Antinomies of Transformative Occupation*, 16(4) *European Journal of International Law* 721 (2005); P. Haggenmacher, *L’occupation militaire en droit international: genèse et profil d’une institution juridique*, 79 *Relations Internationales* 285 (1994), p. 287, who correctly reminds the reader of the Latin etymology of the term “occupation”, composed by the preposition *ob* and the verb *capere*, with the

Based on the quasi-factual medieval distinction between *imperium* and *dominium*, European practice between the 17th and 18th century recognized the exercise of an “effective” control over a territory as a sufficient element to achieve full sovereignty there over. Effectiveness can be considered as “a measure of the relationship and congruence between a rule or legal situation and social reality.” In other words, such a concept must “correspond to the material, factual element of law.”⁸

This earliest interpretation significantly transposed the legal concept of occupation to warfare situations, which were conceived as one means to acquire sovereignty over a territory. The concept of belligerent occupation entailed the application to warfare of the old theory of Latin occupation, which did not distinguish occupation from conquest and the consequent annexation, owing to the rationale that military operations have as a final result the possession of parts of a hostile territory and, under specific circumstances, even the whole territory. Hugo Grotius, for instance, in its masterpiece *De jure belli ac pacis* asserted that “some sovereigns hold their power by a plenary right of property; when for instance it comes into their possession by the right of lawful conquest, or when a people, to avoid greater evils, make an unqualified surrender of themselves and their rights into their hands.”⁹ Occupation in its primitive conception was thus effected through two elements, the first being the intention to take possession of the land, i.e. “*animus occupandi*”, and the second the exercise of authority via activities over the occupied land, i.e. “*corpus possessionis*”.¹⁰

This approach, which survived at least until the Treaty of Utrecht of 1713 and persisted in part until the early years of the 19th century, governed European practice, where occupation involved *ipso facto* the immediate transfer of sovereignty to the invading power. Thus, whether or not the occupation was supposed to entail subjugation, the occupying force, as conqueror, had the absolute power to “devastate the country, appropriate all public and private property, kill the people, or take them prisoners, or make them swear allegiance to himself and force them to fight in his army against their old sovereign.” The conqueror “could even before the war was decided dispose of the territory by annexing it or ceding it to a third State.”¹¹ Two blatant examples of this theory can be found in the early 19th century

comprehensive meaning of taking exclusive possession and, therefore, gaining an exclusive right. See also, D. Appel Graber, *The Development of the Law of Belligerent Occupation, 1863-1914: a Historical Survey*, Columbia University Press, New York: 1949.

⁸ E. Milano, *Unlawful Territorial Situations in International Law: Reconciling Effectiveness, Legality And Legitimacy*, Nijhoff, Leiden, Boston: 2006, p. 21 ff.

⁹ H. Grotius, *De jure belli ac pacis, Libri Tres* (1625), book I, ch. III, para. XI.

¹⁰ Milano, *supra* note 8, p. 81.

¹¹ Appel Graber, *supra* note 7, p. 13.

case law of the US Supreme Court, which granted to the Occupying Power full sovereignty over the occupied territory.¹²

From this perspective, it could be argued that the occupation of a territory involved State succession, defined as change or transfer of sovereignty over a territory, there being no significant difference at that time between *de facto* and *de jure* sovereignty. When the concept of occupation directly stemmed from the right to conquer a territory, the result was that effective *de facto* sovereignty constituted the occupying power's *de jure* sovereignty over the occupied territory as well.

Thus, until the Congress of Vienna (1814–1815), the concept of occupation under international law was juridically inoperative, and for a long time it failed to meet any specific definition which would have given it autonomy as a legal branch of law.¹³

1.2. The changing concept of belligerent occupation and the role of *de jure* sovereignty

While at the end of the 18th century the concept of belligerent occupation was still associated with the traditional practice of the right of conquest, legitimizing the conqueror's acquisition of a territory by the use of force and thereby expanding its sovereignty, by the beginning of the 19th century attempts to mitigate the classical formulation began to appear. Events in this area unfolded on two planes, represented on the one hand by the principle of humanity, based upon the new conception of war presaged by Rousseau,¹⁴ and on the other hand by the principle of nationality,¹⁵ which found support in the 1789 French Revolution.

The “founding father” of this new theoretical approach in the law was Emerich de Vattel, who moulded the modern concept of belligerent occupation and, while not yet distinguishing occupation from conquest, introduced the principle that the occupied population and their respective goods and property were

¹² Such an orientation was first announced in the 1819 decision in the case *U.S. v. Rice*, which position was later confirmed by the 1859 decision in the case *Fleming v. Page*.

¹³ In this respect, H. Lauterpacht (ed.), *Oppenheim's International Law: a Treatise*, Vol. I – *Peace*, 7th ed., Longman, London: 1963, p. 344, dates the first application of the expression “belligerent occupation” back to the Treatise by the German jurist August Wilhelm Heffter, *Das Europäische Völkerrecht* (1844).

¹⁴ Jean-Jacques Rousseau, in *Le contrat social* (1762) expounded the theory that war is a relationship between States, while men become enemies by chance, not because they are citizens of belligerent States, but because they are soldiers. This disavowed the predominant conception, extensively codified in the treatise by the Prussian general Carl von Clausewitz, *Vom Kriege* (*On War*, 1838), that war ought to be conceived as a struggle involving the entire populations of belligerent States.

¹⁵ See, Benvenisti, *supra* note 7, p. 622 ff.

entitled to legal protection.¹⁶ This theoretical construction concerning the protection of non-belligerents, the treatment of private property, legal seizures, and the general administration of an occupied territory, represents the axis around which, a century later, the law of belligerent occupation came to be codified within the framework of IHL.

It was only, however, at the end of the 19th century that the legal category of belligerent occupation began to constitute an autonomous legal doctrine. Henry Wager Halleck laid the groundwork in 1861 when he introduced the distinction between those rights stemming from a military occupation only, and those which would be recognised in the case of complete conquest.¹⁷ In contrast to *debellatio*, “*occupatio bellica* was viewed as an intermediate status between invasion and conquest,”¹⁸ characterized on the one hand by the maintenance of the constitutional and legal order in force in the occupied territory, and on the other hand by effective control exercised by the Occupying Power based upon its military capacity to exercise administrative functions rather than sovereign rights.¹⁹

At this point and from this perspective, a crucial distinction arises between *de facto* and *de jure* sovereignty, with only the latter constituting legal title to possess a territory. *De jure* sovereignty was conceived of as the right of a State to exclude incursions or actions by any other State in its own territory, by virtue of the circumstance that the sovereign State essentially and effectively exercises its authority over a definite territory. As a result “legal sovereignty implies that each State has the legal competence to, *inter alia*, participate in the international system on an equal footing with other states, conclude treaties on the basis of consent, exclude other states from interfering in its internal affairs, govern the affairs of its

¹⁶ See, E. de Vattel, *The Law of Nations or the Principles of Natural Law* (1758), in particular Book III, Ch. 13, para. 200, also available at: www.lonang.com/exlibris/vattel/vatt-313.htm (accessed February 20, 2012). In line with the theory expressed by Samuel von Pufendorf, *De Jure Naturae et Gentium, Libri Octo* (1688), de Vattel claimed (paras. 197–198) that only by a peace treaty closing the hostilities could the sovereign of an occupied territory cede its sovereign rights to the occupying power.

¹⁷ H. W. Halleck, *International Law; or, Rules Regulating the Intercourse of States in Peace and War*, 1861.

¹⁸ Bhuta, *supra* note 7, p. 726.

¹⁹ *Ibidem*. Contra, N. Haupais, *Les obligations de la puissance occupante au regard de la jurisprudence et de la pratique récentes*, 111(1) *Revue générale de droit international public* 117 (2007), p. 120, argues that “Le régime de l’occupation n’est pas défini par la mise en place d’une administration militaire, mais par le fait que l’armée ennemie ou ses suppléants sont en mesure de contrôler un territoire ... En ce sens, le régime juridique de l’occupation n’est porteur d’aucun droit d’organisation politique et administrative; seul peut être conçu un devoir d’exercer des fonctions d’autorité, dans le but de maintenir et de restaurer l’ordre public sur le territoire occupé.”

domestic territory, and control its borders.”²⁰ Max Huber, the sole arbitrator in the 1928 Award in the *Island of Palmas case* argued that “sovereignty in the relations between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.”²¹

In contrast, the essential condition to determine the existence of a military occupation may be identified as the effective exercise of a stable authority over an occupied territory. This approach has been recently confirmed by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in *Prosecutor v. Naletilić and Martinović*, where the Tribunal set forth guidelines to define the existence of a military occupation, including:

(a) the occupying power must be in a position to substitute its own authority for that of the occupied authorities, which must have been rendered incapable of functioning publicly; (b) the enemy’s forces have surrendered, been defeated or withdrawn... (c) the occupying power has a sufficient force present, or the capacity to send troops within a reasonable time to make the authority of the occupying power felt; (d) a temporary administration has been established over the territory; (e) the occupying power has issued and enforced directions to the civilian population.²²

Such a legal status entails the commitment to establish a “balance between the security interests of the Occupying Power and the presumed interests of the population of the occupied state by preserving the *status quo ante*.”²³ This new theory is based on a gradual development in international law through two complementary stages, characterized by the interaction of two principles: the inalienability of sovereignty, the title to which was delivered to the people by the French revolution, and the principle of sovereign equality among Nations, representing one of the pillars of international law. Earlier, the case law of the French Cour de Cassation in various decisions in the early years of the 19th century applied the theory that the occupation of a hostile territory, unlike annexation, does not involve a transfer of sovereignty. This orientation notably influenced the doctrine of the time, which started to pay more attention to the principle of preservation of sovereignty.²⁴

²⁰ R. H. Steinberg, *Who Is Sovereign?*, 40(2) Stanford Journal of International Law, 329 (2004), p. 329.

²¹ PCA, *Island of Palmas case (Netherlands v. USA)*, 4 April 1928, R.I.A.A., vol. II, p. 838

²² ICTY, *Prosecutor v. Naletilić and Martinović*, Trial Judgement, Trial Chamber I, 31 March 2003, IT-98-34-T, para. 214, available at: www.un.org/icty/cases-e/index-e.htm [hereinafter ICTY *Naletilić case*].

²³ Wolfrum, *supra* note 2, p. 8.

²⁴ As noted by Benvenisti, *supra* note 7, p. 624 ff., the French courts, in a decision of April 30, 1812, stated that the French authorities which occupied the Papal States had not abided by the legislation promulgated by the Kingdom of Naples, which had formerly

Therefore, it is possible to accept that the origin of the legal category of belligerent occupation dates back to the changes in the conduct of hostilities following the declaration of the French National Assembly of May 1790 to consider that all territories occupied by the French troops were not annexed to France, but rather that the French representatives had to act as “tutors” with limited powers. Restrictions on the Occupying Authorities directly stemmed from the principle of sovereign equality among States, which formed the foundation for the law of belligerent occupation. Just as the forces of occupation could not interfere with the private property of the occupied population, so too they could not interfere with the property of “Nation” itself, because it belongs to the people.

Later, the principle of the retention of *de jure* sovereignty by the occupied State and the exercise of only a *de facto* provisional authority by the Occupying Power was attested to by the 1925 historical Award in the *Affaire de la Dette Publique Ottomane*, where it was clearly stated that, whatever may be the possible effects of the regime of occupation over a territory, it cannot involve the transfer of sovereignty to the Occupying Power.²⁵

The theoretical doctrine developed between the 17th and 18th centuries not only contributed to defining the modern interpretation of the concept of belligerent occupation, but also made the international system receptive to the new discipline. Thus the current regulation in this area is the result of a slow and gradual process of normative sedimentation, hinged on the attempt to purge the legal basis of belligerent occupation from its confused and often conflicting ideological background.

occupied the same territories, because such a Kingdom did not gain any sovereignty over them. By another decision of January 22, 1818, the Cour de Cassation stated that the French occupation of Catalonia did not convert it into a French territory, an act which, as the Court noted, may only originate as a consequence of a public act of unification. The same approach, finally, was later followed in the decision of February 1, 1837, when, following the British occupation of Martinica, the Court stated “la suspension temporaire de la possession à la suite de l’occupation ne comporte pas l’invalidité de la législation française sur le territoire occupé,” an orientation confirmed again by the same Court in its decision of March 16, 1841, where it was stated that occupation by itself could not repeal the legislation in force in the occupied territory.

²⁵ See, *Affaire de la Dette publique ottomane*, Arbitral Award, 18 April 1925, R.I.A.A., vol. I, pp. 529–624, “quels que soient les effets de l’occupation d’un territoire par l’adversaire avant le rétablissement de la paix, il est certain qu’à elle seule cette occupation ne pouvait opérer juridiquement le transfert de souveraineté.”

2. THE CODIFICATION OF THE LAW OF MILITARY OCCUPATION AND THE QUESTION OF SOVEREIGNTY

Although international legal doctrine acknowledged the existence of the concept of belligerent occupation from the 16th century onward, the legal perspective failed to provide any early systematic appraisals of existing practice. This delay seems to stem from the circumstance that, in conformity with the progressive acceptance of the prohibition on the use of force, international law only relatively recently took into account the need to protect the population under occupation within the framework of IHL. Likewise, the question of preserving *de jure* sovereignty has subsequently become an overriding tenet of military occupation, thereafter considered as a temporary and provisional status based upon the exercise of *de facto* sovereignty by an Occupying power.

2.1. The early stage of codification

The first attempts to provide a written elaboration assigning a specific relevance to the category of belligerent occupation in the field of international practice corresponded to the general attempts to codify the rules of armed conflict. In particular, in 1863 during the American Civil War a set of 150 articles was published, titled “Instructions for the Government of Armies of the United States in the Field”, redacted by Francis Lieber, a German jurist who had emigrated to America, on the demand of the US President Abraham Lincoln, who subsequently approved the articles as General Order No. 100. The Lieber Code codified the customary rules which the armies in America and Europe conventionally abided by. It was promulgated as domestic law for the American army and represented the prototype for the military manuals which flourished in Europe between the 19th and 20th centuries.²⁶ These constituted a milestone for the later Hague conferences of codification. The Lieber Code codified the modern principle of temporariness of military occupation, and the section concerning military authority over a hostile territory was later incorporated in a “Projet d’une Déclaration internationale concernant les lois et coutumes de guerre”, which represented the very first international codification of the laws of war. It was approved on July 27, 1874 during an international conference held in Brussels, summoned on the initiative

²⁶ In this period the military manuals of many European countries were promulgated, in particular: the Netherlands (1871), France (1877), Serbia (1879), Spain (1882), Portugal (1890), and Italy (1896). See, Dinstein, *supra* note 1, p. 8 ff., see also, M. Zwanenburg, *The Law of Occupation Revisited: The Beginning of an Occupation*, 7 Yearbook of International Humanitarian Law 99 (2007), p. 101.

of the Russian Czar Alexander II.²⁷ Even though the Brussels Declaration was not incorporated in any conventional agreement or formal treaty, it marked a breakthrough in the legal development of belligerent occupation, appearing “more human and respected the rights of the peaceful population to a greater degree than the Lieber code.”²⁸ Further, with reference to the obligations of the occupying power, Article 2 acknowledged the role of *de facto* sovereignty as a substitute for a *de jure* sovereignty in abeyance, reading that “the authority of the legitimate Power being suspended and having in fact passed into the hands of the occupants, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety.”

The normative archetype of the Brussels Declaration was developed by the Institut de Droit International, which wished to support the editing of draft articles to be included in military manuals. The activity of the eminent Institute led to a two-fold outcome: the 1880 Manual of the Laws and Customs of War, which basically repeated and complemented the provisions of the Brussels Declaration;²⁹ and the *Projet de déclaration internationale relative aux occupations de territoires*, a document approved in Lausanne on 7 September 1888, listing, in just ten articles, a series of guarantees of protection for the fundamental rights of the occupied population, without however defining the institution of belligerent occupation.³⁰

²⁷ Delegates from the sixteen main European States participated in the Brussels Conference, to wit: Austria-Hungary, Belgium, Denmark, France, Germany, Britain, Greece, Italy, the Netherlands, Norway, Portugal, Russia, Spain, Sweden, Switzerland and Turkey. However, despite the success achieved in Brussels, the Declaration was never ratified. Nonetheless, it notably influenced the development of the next stage of codification of the law of war.

²⁸ Appel Graber, *supra* note 7, p. 26.

²⁹ Known as the “Oxford Manual”, from the name of the place where the special committee, entrusted by the Institut de Droit International during the Geneva Session of 1874 to elaborate the Draft, concluded its work. The Manual was not followed by any international agreement.

³⁰ This Declaration Relating to Occupied Territories stated that: “l’occupation d’un territoire à titre de souveraineté ne pourra être reconnue comme effective que si elle réunit les conditions suivantes: 1. La prise de possession d’un territoire enfermé dans certaines limites, faite au nom du gouvernement; 2. La notification officielle de la prise de possession”, also pointing out that “... La prise de possession s’accomplit par l’établissement d’un pouvoir local responsable, pourvu de moyens suffisants pour maintenir l’ordre et pour assurer l’exercice régulier de son autorité dans les limites du territoire occupé. Ces moyens pourront être empruntés à des institutions existantes dans le pays occupé,” while “La notification de la prise de possession se fait, soit par la publication, dans la forme qui, dans chaque Etat, est en usage pour la notification des actes officiels, soit par la voie diplomatique. Elle contiendra la détermination approximative des limites du territoire occupé.”

2.2. The law of military occupation from The Hague Regulations to the Geneva Conventions

The normative and methodological axis generated by the various attempts to codify the law of belligerent occupation and the law of war represented the antecedent to the two Hague codification conferences of 1899 and 1907 respectively. There the doctrine of belligerent occupation, following the development of the law of war, the limitation on the use of force, and rejection of the right of conquest,³¹ finally became positive international law, as codified in provisions under Section III of the Regulations, first annexed to The Hague Convention II of 1899 and later to The Hague Convention IV of 1907.³²

The relevance of the set of rules included in these international documents was later confirmed by the judgments issued by the International Military Tribunals of Nuremberg and Tokyo³³, and recently by ICJ³⁴ and ICTY.³⁵ Their continuing relevance stems from the declaratory effect of customary international law, and as a result from the subsequent *erga omnes* binding effectiveness, regardless of whether a State is or is not a High Contracting Party.

³¹ See, R. Giladi, *The Jus Ad Bellum/Jus In Bello Distinction and the Law of Occupation*, 41 (1-2) Israel Law Review 246 (2008), p. 273 ff.

³² See, Hague Convention (II) Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, July 29, 1899, entered into force on September 4, 1900; Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, October 18, 1907, entered into force on January 26, 1910 [hereinafter: Hague Convention IV Regulations]. The second Hague Conference of 1907 was summoned to revise the weak system elaborated during the earlier codification in 1899. This purpose resulted in the adoption of thirteen “Regulations”, regulating different aspects of the law of war, as well as the law of belligerent occupation. For further references see, among others, Dinstein, *supra* note 1, p. 5 ff.

³³ See, International Military Tribunal for Germany, *The Law Relating to War Crimes and Crimes Against Humanity (Judgement)*, included in the Avalon Project archive (www.avalon.law.yale.edu/imt/judlawre.asp), “the rules of the land warfare expressed in the Convention undoubtedly represented an advance over existing international law at the time of their adoption. But...by 1939 these rules laid down in the Convention were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war.”

³⁴ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*, 9 July 2004, para. 89, available at: www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm [hereinafter ICJ 2004 *Israeli Wall Advisory Opinion*]; *Case concerning Armed Activities on the Territory of the Congo (Congo v. Uganda) (Jurisdiction)*, 19 December 2005, para. 217, available at: www.icj-cij.org/docket/files/116/10455.pdf [hereinafter *Armed Activities in Congo*].

³⁵ ICTY, *The Prosecutor of The Tribunal v. Duško Tadić*, IT-94-I-T, Opinion and Judgement of Trial Chamber II, 7 May 1997, para. 580, available at: www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdf.

The 1907 Hague Regulations invigorated the two essential tenets of belligerent occupation, confirming its transitory nature which, albeit total, can involve neither the extinction of the occupied State nor the transfer of its sovereignty to the Occupying Power,³⁶ and the attribution of specific obligations to the Occupant. This provision was definitively included in Article 43 of the 1907 Hague Convention IV Regulations, considered the linchpin of the law of belligerent occupation, which imposes two diverse obligations on the Occupying Power: “to restore, and ensure, as far as possible, public order and safety” and to respect “unless absolutely prevented, the laws in force in the country.”³⁷

However, these obligations were not conceived of as absolute. The first one binds the Occupying Power’s executive and judicial branches to impose adequate measures to adhere to the former state of affairs, but only “as far as possible” and not unconditionally. The applicability of this obligation becomes problematic when an occupation is protracted, as in the case of Palestine, because it would mean freezing the economic, political, social and cultural organization of the “state” for an indefinite period.³⁸ The second obligation binds the Occupying Power’s legislative branch to desist from repealing or suspending the existing legislation, except in cases of necessity:³⁹ the sole justified derogation from the laws of the occupied state are those laws aimed at maintaining order and the security of the occupying troops, and furthermore any legislation promulgated by the Occupying Power in the name of necessity only applies insofar as a situation of occupation persists.⁴⁰ Because occupation is an outcome of a war, it cannot deal with general aspects of civil society. In fact,

³⁶ See the overall wording of Sec. III “On military authority over hostile territory” of Hague Convention IV Regulations. In this respect Article 42 defines a territory as being occupied “when it is actually placed under the authority of the hostile army”, specifying that “the occupation extends only to the territory where such authority has been established and can be exercised.”

³⁷ See, Hague Convention IV Regulations, Article 43, which contains in one article the two features included in Articles 43 and 44 respectively of the Oxford Manual. For a general outline of the Occupant’s obligations, see, Haupais, *supra* note 19, pp. 117–146; see also, K. Watkin, *Maintaining Law and Order during Occupation: Breaking the Normative Chains*, 41 (1-2) Israel Law Review 175 (2008), pp. 175–200; and M. Sassoli, *Legislation and Maintenance of Public Order and Civil Life by Occupying Powers*, 16(4) European Journal of International Law 661 (2005).

³⁸ Benvenisti, *supra* note 3, p. 12 ff.

³⁹ This is evident from the reference to Article 3 of the 1874 Brussels Declaration, reading “A cet effet, il maintiendra les lois qui étaient en vigueur dans le pays en temps de paix, et ne les modifiera, ne les suspendra ou ne les remplacera que s’il y a nécessité.”

⁴⁰ Y. Dinstein, *Legislation Under Article 43 of the Hague Regulations: Belligerent Occupation and Peace-building*, Occasional Papers Series, 1/2004, Harvard University Program on Humanitarian Policy and Conflict Research, available at: www.hpcrresearch.org/pdfs/OccasionalPaper1.pdf (accessed February 20, 2012).

any intervention in this field, such as alteration of the economic system, is likely to exceed the extremely temporary nature of belligerent occupation.

Although the 1907 Hague Convention IV Regulations represent a keystone for the law of belligerent occupation, their provisions seemed to be impermeable to human rights, which would not find a proper development until the Universal Declaration of Human Rights.⁴¹ In fact it was the horrible experiences of the two World Wars which highlighted the inadequacy of the 1907 Hague Convention IV Regulations to provide the occupied civil population with effective guarantees for the protection of their fundamental rights, since the Hague Convention provisions were mostly focused on safeguarding the occupied State's interests.⁴² Furthermore, the practice of military occupation during the Second World War also highlighted the fact that the Occupants failed to apply the 1907 Hague Convention IV Regulations over their occupied territories. This set of rules, in fact, was subject to different challenges,⁴³ because the balance between the Occupant's duty to fill the vacuum created by the ousting of the domestic government and the occupied population's duty to abide by the Occupant's provisional exercise of authority produced conflicts in numerous instances.

This twofold dimension of the law of military occupation, aimed both at preserving the sovereign rights of the occupied State which had provisionally lost control over its own territory, and protecting any person under the authority of the Occupying Power, represents the general design which inspired the four Geneva Conventions, elaborated by the International Committee of the Red Cross, which since 1934 had made a comprehensive attempt to revise the law of belligerent occupation. Among these international instruments, which moved from a phase concerned with the rights of sovereigns to a "humanitarian" phase, where "the belligerent occupant becomes a trustee of the population, charged to administer the territory in view of the interests of the inhabitants,"⁴⁴ Geneva Convention IV constitutes the real novelty, despite the fact that its universal application as customary international law has not been as widely accepted as was intended.⁴⁵

⁴¹ UNGA Res. 217 (III), UN Doc. A/Res/217, 10 December 1948.

⁴² This acknowledgement is confirmed by the detailed regulations, included in Articles 46–56 of the Hague Regulations, concerning the Occupant's obligations in the economic field. For a valuable analysis of these provisions, see, S. Silingardi, *Occupazione bellica e obblighi delle potenze occupanti nel campo economico*, 89(4) Rivista di Diritto Internazionale, 990 (2006), p. 990 ff.

⁴³ Benvenuti, *supra* note 3, p. 59 ff.

⁴⁴ M. Koskeniemi, *Occupied Zone – "A Zone of Reasonableness"*, 41(1-2) Israel Law Review 31 (2008), p. 31.

⁴⁵ This argument is particularly hard to uphold when the applicability of the Geneva Conventions as customary law concerns countries where treaties need the enactment of a domestic law in order to take effect. This is the case in Israel, which considers Geneva

Three relevant features can be considered to mark the difference between Geneva Convention IV and the former 1907 Hague Convention IV Regulations. The first relates to the overall focus of Geneva Convention IV,⁴⁶ which was primarily aimed at protecting the population under alien occupation, instead of the ousted regime's interests. A second difference concerns the plethora of duties imposed upon the Occupying Power, which "is no longer the disinterested watch guard, but instead a very involved regulator and provider."⁴⁷ The final difference lays in the lack of any reference in the Geneva Convention IV to the treatment of public property, even though an adequate protection for private property is provided for. Geneva Convention IV specifically prohibits the Occupant from destroying "real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations", unless such a destruction could be justified by military necessity.⁴⁸

On the whole, the overriding breakthrough accomplished with regard to the law of belligerent occupation relates to the changeover from a set of rule, based upon the general inhibiting principle under Article 43 of the 1907 Hague Convention IV Regulations, to a body of law emanating from the provisions of Article 47 of Geneva Convention IV, focused on the principle that "protected persons who are in occupied territory shall not be deprived, in any case or in any manner whatsoever, of the benefits of the [...] Convention." The same provision underscores the principle of the inalienability of *de jure* sovereignty through the use of force, which has constituted the cornerstone for further developments in the law of

Convention IV wholly conventional. For a more extensive treatment, see, T. Meron, *The Geneva Conventions as Customary Law*, 81(2) American Journal of International Law 348 (1987).

⁴⁶ Geneva Convention IV sets forth the law of belligerent occupation in two groups of articles, included in Part III - Status and treatment of protected persons, Sec. I - Provisions common to the territories of the parties to the conflict and to occupied territories (Articles 27–34), and Sec. III - Occupied territories (Articles 47–78). For a comprehensive commentary on the Convention, see J. Pictet (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, Vol. IV. ICRC, Geneva: 1958.

⁴⁷ Benvenisti, *supra* note 2, p. 31. According to Geneva Convention IV, the occupying authority is required to ensure the humane treatment of protected persons, and to "facilitate the proper working of all institutions devoted to the care and education of children" (Article 50); provide specific labour conditions (Articles 51–52); "ensure the food and medical supplies of the population" (Article 55); "ensure and maintain, with the cooperation of national and local authorities, the medical and hospital establishments and services, public health and hygiene in the occupied territory" (Article 56); "The Occupying Power shall permit ministers of religion to give spiritual assistance to the members of their religious communities" (Article 58); and "agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal" (Article 59).

⁴⁸ See, Geneva Convention IV, art. 53.

belligerent occupation, especially within the UN. While the UN Charter does not contain any specific provisions on belligerent occupation, it indirectly condemns the occupation of territories resulting from the use of force.⁴⁹ The resort to force, not based any longer on wars of conquest but on humanitarian interventions and struggles for self-determination, has become instead the *extrema ratio* to protect the most cherished values of the international community.⁵⁰

The most significant outcome of the course embarked on has been the approval of two Additional Protocols to the Geneva Conventions, whose Additional Protocol (I) and Relating to the Protection of Victims of International Armed Conflicts extends the law of occupation to “territories with a controversial international status.”⁵¹

3. THE INTERPLAY BETWEEN *DE JURE* AND *DE FACTO* SOVEREIGNTY IN THE OCCUPATION ZONE MODEL THROUGH THE LENS OF INTERNATIONAL PRACTICE

As has been demonstrated, the codification of the “laws of war” involved the consolidation of the doctrine of belligerent occupation into a temporary and limited regime. Nevertheless, the Hague and Geneva rules were not applied very stringently, and sometimes hardly at all, throughout the practice which reigned during the armed conflicts in the 20th century. Many occupying powers preferred to simply deny that they were acting as “occupants” in order to avoid having to abide by the obligations imposed by the law of military occupation. Such is the case as regards Israel’s military occupation of Palestinian territories, which will later used as a key example in order to submit the law of military occupation to the test of legality. But in addition to Israel, a number of territorial situations under a regime of occupation have demonstrated, in contemporary international law, echoes of the traditional antinomy between *de jure* and *de facto* sovereignty, creating interpretation problems over the legitimacy of different states of affairs and undermining some important values of international law, including the right to self-determination of peoples and other principles concerning the lawful means to acquire title to territory.⁵²

⁴⁹ See, UNGA Res. 2625 (1970), *Declaration on Principles of International Law on Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, UN Doc. A/5217, 24 October 1970.

⁵⁰ M. Maxine, *Humanitarian Intervention without Borders: Belligerent Occupation or Colonization?*, 25(1) *Houston Journal of International Law* 113 (2002), p. 113 ff.

⁵¹ Roberts, *supra* note 4, p. 254.

⁵² See, Milano, *supra* note 8, p. 42 ff.

Even in cases involving the territorial administration by international organizations, like in Afghanistan or Kosovo, where the question of sovereignty is not openly at issue (since the international mission has only a limited and functional sovereignty which can only complement and support the legitimate *de jure* sovereignty), the hypothesis of a State-Occupant is still problematic, since the co-existence of two sovereignties is imposed over the same territory. In fact, such cases highlight that in the development of international practice the Occupying power may fail to meet some legal obligations which arise when the effectiveness of its *de facto* sovereignty is used as a pretext impose its own *de jure* sovereignty, confusing the issue of the current state of legal title to the occupied territory.

3.1. *De jure* sovereignty “in abeyance” and the principle of self-determination of peoples

In accordance with the principle of sovereignty, the legal restrictions imposed on the Occupying Power by the law of belligerent occupation stem from the acknowledgment that it is up to the occupied society “to determine its own political, economic and social order, according to its own practices and procedures of governance, rather than having these kinds of decisions determined by a foreign power in the course of an occupation.”⁵³ The question of identifying a legitimate sovereign with the capacity to assert effective control is an overriding matter, representing the essence of the principle of self-determination. Under the administration of Iraq by the Coalition Provisional Authority (CPA), *de facto* sovereignty was exercised by a coalition led by the US and UK in order “to restore conditions of security and stability, to create conditions in which the Iraqi people can freely determine their own political future”⁵⁴ until June 2004, to be followed by the return of governmental functions to the Iraqi Interim Government.⁵⁵

De jure sovereignty in military occupation regimes finds its utmost legal basis in the principle of self-determination, the customary nature of which has been

⁵³ McCarthy, *supra* note 2, p. 47. As noted by J. Cardona Llorens, *Le principe du droit des peuples à disposer d’eux-mêmes et l’occupation étrangère*, in *Droit du pouvoir, pouvoir du droit. Mélanges offerts à Jean Salmon*, Bruylant, Bruxelles: 2007, p. 869, “la Puissance occupante ne peut cependant pas exercer arbitrairement ses compétences. Si tout État doit faire une utilisation ‘raisonnable’ et ‘utile’ de sa souveraineté territoriale, il est clair que, dans le cas d’une occupation, l’exercice de ces compétences par la puissance occupée doit être beaucoup plus limité.”

⁵⁴ Wolfrum, *supra* note 2, p. 20.

⁵⁵ UNSC Res. 1546 (2004), *The situation between Iraq and Kuwait*, 8 June 2004, UN Doc. S/RES/1546 (2004), in fact welcomed “... the end of the occupation and the assumption of full responsibility and authority by a fully sovereign and independent Interim Government of Iraq by 30 June 2004.”

recurrently confirmed by the International Court of Justice (ICJ).⁵⁶ Furthermore, in the Court's judgment on the case of East Timor it "indeed made it clear that the right of peoples to self-determination is today a right *erga omnes*."⁵⁷ From this perspective the principle imposes obligations "toward the international community as a whole" that, by nature, would constitute "the concern of all States." The Court designated these as *erga omnes* obligations, according to which, taking into consideration "the importance of the rights involved, all States can be held to have a legal interest in their protection."⁵⁸ Likewise, the peremptory value of the principle of self-determination can no longer be subject to dispute. *Jus cogens* is characterized as embodying the fundamental beliefs and values of the entire international community in terms of political and moral ethics. Thus, the principle of self-determination is not only an *erga omnes* obligation, but also a peremptory norm, with its *raison d'être* ensconced in the protection of the international community's fundamental interests, which are in turn protected by *jus cogens*.⁵⁹

The principle of self-determination works, in fact, as the "preservative" of *de jure* sovereignty which, during the period of military occupation, remains "in abeyance." Self-determination is the fulcrum for any claims to statehood for those peoples who, being subject to a regime of alien occupation, have a legitimate right to a given territory. This is a right that Palestine, for instance, has been always entitled to, as "the population... is fighting against the occupant in the exercise of their right of self-determination,"⁶⁰ fulfilling the conditions to be identified as a "people", such as a common historical tradition and territorial connection, and a cultural, racial and linguistic homogeneity, together with the consciousness and the willingness to be identified as a people.⁶¹ However, owing to the persisting

⁵⁶ ICJ, *Legal Consequences for States of the continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion), 21 June 1971, ICJ Reports 1971; *Western Sahara* (Advisory Opinion), 16 October 1975, ICJ Reports 1975.

⁵⁷ ICJ, *East Timor (Portugal v. Australia)*, 30 June 1995, ICJ Reports 1995, para. 29.

⁵⁸ ICJ, *Barcelona Traction Light and Power Co., Ltd.*, 5 February 1970, ICJ Reports 1970, para. 33.

⁵⁹ On the interplay between *erga omnes* obligations and *jus cogens*, see, P. Picone, *La distinzione tra norme internazionali di jus cogens e norme che producono obblighi erga omnes*, 91(1) Rivista di diritto internazionale 5 (2008), p. 7 ff.

⁶⁰ L. C. Green, *Is There a 'New' Law of Intervention and Occupation?*, 35 Israel Yearbook on Human Rights 71 (2005), p. 71 ff.

⁶¹ ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion), 9 July 2004, I.C.J. Reports 2004, [hereinafter "ICJ 2004, *Israeli Wall Advisory Opinion*"], at para. 118. As regards the concept of "people" cf., UNESCO-International Meeting of Experts on Further Study of the Concept of the Rights of Peoples, *Final Report and Recommendations*, Paris, 27–30 November 1989, SHS-89/CONF. 602/7, para. 22.

Israeli occupation and the subsequent lack of *de facto* independence and effective authority, the Palestinian right to sovereignty continues to linger in “a *de jure* suspension”, until such time as the twofold criterion of independence and effectiveness can be met.⁶² In other words, *de jure* sovereignty is vested in the Palestinian people, to be exercised once they achieve their independence. This was made clear by Judge McNair’s separate opinion in the *Western Sahara* case, explaining that “sovereignty over a mandated territory is in abeyance; if and when the inhabitants of the Territory obtain recognition as an independent state ... sovereignty will revive and rest in the new state.”⁶³

3.2. *De facto* sovereignty and the unlawfulness of occupation

As has been argued, “the main pillar of the law of belligerent occupation is embedded in the maxim that occupation does not affect sovereignty,” since “the displaced sovereign loses possession of the occupied territory *de facto* but it retains title *de jure*.”⁶⁴ The law of military occupation, in fact, is aimed at the restoration of the legitimate sovereignty over an occupied territory and population, and may not constitute a claim to title to obtain full sovereignty. However, not all territorial situations falling within the ambit of “an occupation zone model” contain a clear interplay between *de jure* and *de facto* sovereignty.

Unsurprisingly, the prolonged Israeli occupation is strongly illustrative of such a state of affairs.⁶⁵ In fact, there is no better example than the prolonged Israeli occupation for observing “that the law on occupations could be so used as to have the effect of leaving a whole population in legal and political limbo”,⁶⁶ meeting only the occupant’s own interests. Despite some eminent theories based upon the need to modernise the occupied territory,⁶⁷ under the current state of law

⁶² Ch. Bassiouni, *Self-determination and the Palestinians*, 65(4) American Journal of International Law 32 (1971), p. 32 ff.

⁶³ ICJ *Western Sahara Advisory Opinion*, para. 10.

⁶⁴ Dinstein, *supra* note 1, p. 49.

⁶⁵ For an extensive analysis of the historical territorial titles to Palestine, see, F.L.M. van De Craen, *The Territorial Title of the State of Israel to “Palestine”: An Appraisal in International Law*, 14 Revue Belge de Droit International 500 (1978-79), pp. 500–538; for updated references see, C. Hauswaldt, *Der Status von Palästina. Eine völkerrechtliche Untersuchung des territorialen Status*, Nomos, Baden-Baden: 2009.

⁶⁶ Roberts, *supra* note 6, p. 47 ff.

⁶⁷ *Ibidem*, where it is asserted that “while there may be some dangers in regarding ‘prolonged occupation’ as a special category, there are also very good reasons for doing so. During a long occupation, many practical problems may arise that do not admit of mere temporary solutions based on the idea of preserving the status quo ante: decisions may have to be taken about such matters as road construction, higher education, water use, electricity generation and integration into changing international markets. Such decisions, although they involve radical and lasting change, cannot be postponed indefinitely.”

it is not possible to convert a limited and provisional *de facto* occupation regime into full sovereignty over an occupied territory. The legal foundation of military occupation since its acceptance into contemporary international law has been aimed at protecting *de jure* sovereignty over a territory, conceived as the linchpin of the modern international community. Conversely, prolonged occupation and its maintenance in violation of international law can represent a specific ground for illegality, as it undermines the principles of inalienability of sovereignty and territorial integrity.⁶⁸

Thus, even though belligerent occupation represents a lawful branch of international law, the test of its legality can become crucial with reference to the peculiarity of some territorial situations, such as the long-lasting Israeli occupation over Palestine. In order to test its legality, assessments need to be made of its compliance with the two essential tenets of military occupation, i.e. the inalienability of the legitimate sovereignty over the occupied territory, and the temporariness of occupation. The prevailing doctrine has identified some legal standards to determine the unlawfulness of territorial situations involving infringement of the core principles of territorial integrity: the prohibition against the use of force as a means to acquire title to a territory; the principle of *uti possidetis juris*, for a long time considered as a stabiliser of international relations, positing that “new States will come to independence with the same boundaries that they had when they were administrative units within the territory or territories of one colonial power;”⁶⁹ and the aforementioned principle of self-determination.⁷⁰

With respect to the prohibition against the use of force as a means to acquire title to a territory in the event of military occupation, in the *Israeli Wall Advisory Opinion* the International Court of Justice reaffirmed the customary norm, stipulating that neither the acquisition of territory resulting from the threat or use of force nor any occupation of territory resulting from the threat or use of force in contravention of international law will be recognized as legal acquisition or occupation. The Court leaves no room for the replacement of the *de jure* Palestinian sovereignty in abeyance with Israeli *de facto* sovereignty.

⁶⁸ O. Ben-Naftali, A. M. Gross, K. Michaeli, *Illegal Occupation: Framing the Occupied Palestinian Territory*, 23 Berkeley Journal of International Law 559 (2005), p. 559, also published in V. Kattan (ed.), *The Palestine Question in International Law*, British Institute of International and Comparative Law, London: 2008. p. 575 ff.

⁶⁹ M. N. Shaw, *The Heritage of States: The Principle of Uti Possidetis Juris Today*, 67 British Yearbook of International Law 97 (1996), p. 97.

⁷⁰ See also: Milano, *supra* note 8, p. 101 ff.; J. Castellino, *Territorial Integrity and the ‘Right’ to Self-Determination: An Examination of the Conceptual Tools*, 33(2) Brooklyn Journal of International Law 503 (2008), p. 507 ff.

Nevertheless, despite the relevance of such norms, the UN has only in few cases straightforwardly declared an occupation to be illegal. The situation of Palestine appears symptomatic, as the Court in the 2004 *Israeli Wall Advisory Opinion* went only so far as to find that “the construction of the wall and its associated regime create a ‘fait accompli’ on the ground that could well become permanent, in which case... it would be tantamount to de facto annexation.”⁷¹ This conclusion leaves open to question a finding of an illegal occupation “in the event that a finding is made on a veiled annexation having taken place.”⁷²

Previously, in 1971, the ICJ Advisory Opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia* provided the correct guidelines for measuring the legality of South-African occupation, confirming that infringement of the principle of self-determination put the stamp of illegality on South Africa’s presence in Namibia, and that its status was that of an Occupant;⁷³ since that time the UN Security Council and General Assembly have referred to Namibia as “illegally occupied”, and to the situation as one of “illegal occupation”, although “as political organs, they were perhaps less restrained in their use of terminology than the Court.”⁷⁴ The case of Namibia persists as the sole court case, having regard to the issue of “illegal occupation,” with a legitimate *locus standi* in international law. Conversely, the ICJ 2004 *Israeli Wall Advisory Opinion* had little legal effect in this regard, being limited to a statement that in the construction of the wall the occupant, namely Israel, and its associated regime, are acting contrary to international law and “constitute breaches by Israel of various of its obligations under the applicable international humanitarian law and human rights instruments.”⁷⁵

Finally, the crucial contribution of the Geneva Conventions to the law of war consists in their focus on human rights, the normative profile of which, much like other peremptory norms of international law such as the principle of self-determination, may constitute a corollary of the occupant’s obligation to ensure “public order and safety” and an additional criterion to measure the legality of a military occupation. Thus, an occupation that fails to respect the human rights obligations

⁷¹ ICJ 2004 *Israeli Wall Advisory Opinion*, para.121.

⁷² Ronen, *supra* note 3, p. 221, argues that the violations of IHL “did not suffice for the Court to declare the occupation illegal”.

⁷³ See, ICJ 1971 *Advisory Opinion on the Continued Presence of South Africa in Namibia*, para. 118. The Court did not use the expression “illegal occupation”, limiting itself to stating that “maintaining the present illegal situation, and occupying the Territory without title, South Africa incurs international responsibilities.”

⁷⁴ Cf., Ronen, *supra* note 3, pp. 213-214.

⁷⁵ See, ICJ 2004 *Israeli Wall Advisory Opinion*, para. 137.

imposed on it is inherently illegal on a twofold ground: “substantively”, i.e. infringing the fundamental tenets of the law of occupation, as well as “structurally”, i.e. in terms of the international legal order.⁷⁶

Although far from establishing the category of “illegal occupation” yet, the above-mentioned rulings contribute to consolidation of the principle of the temporariness of *de facto* sovereignty over an occupied territory, postulating that military occupation ought to be a provisional regime, the final aim of which is to restore the legitimate sovereignty. A truthful determination of and reconstruction of *de jure* sovereignty is thus required in order to prevent any abuses in the temporary exercise of *de facto* sovereignty by an Occupying power.⁷⁷

CONCLUSION

The historical survey on the codification of the law of military occupation confirms the temporariness of this legal institution, which represents one of the few branches of international law based on the role of *de facto* sovereignty. Any final appraisal must thus confirm the functional approach of international law to *de facto* sovereignty which, while recognized, cannot substitute itself for the legitimate sovereignty over an occupied territory. A State, in fact, cannot deliberately exert its own jurisdiction over another State without infringing the principle of sovereign equality, enshrined in a plethora of international law instruments and widely corresponding to customary international law.

Although it has been argued, mainly with reference to the CPA’s role in Iraq, that “customary international law no longer requires adherence to the principle that an occupier is a mere trustee, without authority to transform the occupied state’s form of government and economy to reflect democratic values, particularly when the transformative goals are authorized by the UN Security Council,”⁷⁸ it is nonetheless difficult to determine a factual basis that would enable an Occupant to exercise *de jure* sovereignty in order to provide protection for other overriding values and rules governing the international community, such as democracy or human rights.

⁷⁶ Ben-Naftali et al., *supra* note 68, p. 608.

⁷⁷ Ibidem, claiming that “the time has come for the international community to promulgate clear time limitations for the duration of an occupation.”

⁷⁸ N. F. Lancaster, *Occupation Law, Sovereignty and Political Transformation: Should the Hague Regulations and the Fourth Geneva Convention Still be Considered Customary International Law?*, 189 *Military Law Review* 52 (2006), p. 52.

On the contrary, the occupation zone model confirms that a State asserting some rights to exercise powers of administration, legislation and jurisdiction over a territory always has some elements of *de facto* sovereignty,⁷⁹ but that by and large the State's exercise of *de facto* sovereignty does not affect the *de jure* sovereignty in abeyance. While international practice has frequently highlighted cases of blatant unlawful territorial situations and "illegal" occupations, combined with the abuse of *de facto* sovereignty, the aim of re-establishing full sovereignty over an occupied territory, which represents the core of the law of military occupation, cannot be considered at issue anymore. This acknowledgement finally confirms the inherent relevance of sovereignty in international law as an overriding value, the role of which is influenced by State power politics in an attempt to mould an "anarchic" international system into one where "the doctrine on occupation, just like its mirror-image, the doctrine on sovereignty, continues to be shaped by the ideas of the day and by political realities."⁸⁰

⁷⁹ Cf., I. Brownlie, *Principles of Public International Law*, 7th ed., Oxford University Press, Oxford: 2008, p. 110.

⁸⁰ Benvenisti, *supra* note 7, p. 632.

Serena Forlati* ■

THE LEGAL OBLIGATION TO PREVENT GENOCIDE: *BOSNIA V SERBIA* AND BEYOND

Abstract

This article assesses the impact of legal rules aimed at preventing genocide. The specific features of the legal obligation to prevent genocide are analyzed in light of the current debate on the “responsibility to protect” and the ICJ’s stance on the issue in Bosnia v Serbia. While the content of positive obligations such as the one under discussion is usually elaborated through the case law of judicial or quasi-judicial bodies, the ICJ refrained from doing so, stating that only manifest breaches of the obligation to prevent genocide give rise to international responsibility. The author seeks an explanation for the reasons underlying such an approach, and tries to identify other ways in which legal standards in the field of genocide prevention could be developed.

INTRODUCTION

A significant shift of focus from the repression of offenders to the prevention of genocide and other mass atrocities has taken place in the last decade. A number of efforts have been made to overcome the “Nurenbergian” attitude taken in the past at international level.¹ These include the commitments undertaken in the UN

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¹ See, W. M. Reisman, *Acting Before Victims Become Victims: Preventing and Arresting Mass Murder*, 40 Case Western Reserve Journal of International Law 57 (2007-2009) p. 59, noting that the international community “has preferred to invest its efforts in punishment rather than prevention.”

framework as regards the so-called "responsibility to protect,"² the endorsement of this concept by the Security Council,³ and the appointment of a Special Advisor to the Secretary General on this topic and on a related one specifically aimed

² On the concept of "responsibility to protect," see e.g., R. Thakur, *In Defence of the Responsibility to Protect*, 7(3) International Journal of Human Rights 160 (2003); L. Boisson de Chazournes, L. Condorelli, *De la 'responsabilité de protéger', oud'une nouvelle parure pour une notion déjà bien établie*, 110 Revue générale de droit international public 11 (2006); P. Hilpold, *The Duty to Protect and the Reform of the United Nations, a New Step in the Development of International Law?* 10 Max Planck Yearbook of United Nations Law 35 (2006); C.C. Joyner, *The 'Responsibility to Protect': Humanitarian Concern and the Lawfulness of Humanitarian Intervention*, 47 Vanderbilt Journal of International Law 693 (2006-2007); C. Stahn, *Responsibility to Protect – Political Rhetoric or Emerging Legal Norm?*, 101 American Journal of International Law 99 (2007); C. Focarelli, *The Responsibility to Protect Doctrine and Humanitarian Intervention*, 13 Journal of Conflict & Security Law 191 (2008); E. Greppi, *The Responsibility to Protect: an Introduction*, in: G.L. Beruti (ed.), *International Humanitarian Law Human Rights and Peace Operations – Proceedings of the 31st Round Table on Current Problems of International Humanitarian Law, San Remo, 4-6 September 2008*, IIHL, San Remo: 2009, p. 174; A. Peters, *The Responsibility to Protect: Spelling out the Hard Legal Consequences for the UN Security Council and its Members*, in: U. Fastenrath, R. Geiger, D.-E. Khan, A. Paulus, S. von Schorlemer & C. Vedder (eds.), *From Bilateralism to Community Interest – Essays in Honour of Judge Bruno Simma*, Oxford University Press, Oxford: 2011, p. 297; P. Hilpold, *From Humanitarian Intervention to Responsibility to Protect: Making Utopia True?* (*Ibidem*, p. 462); A. Zimmermann, *The Obligation to Prevent Genocide: Towards a General Responsibility to Protect?* (*Ibidem*, p. 629); L. Glanville, *The Responsibility to Protect Beyond Borders*, 12 Human Rights Law Review 1 (2012).

³ Notably, in Resolution 1373 (2011) concerning the situation in Libya, which, according to the UN Secretary general, "affirms, clearly and unequivocally, the international community's determination to fulfil its responsibility to protect civilians from violence perpetrated upon them by their own government" (statement of March 17, 2011, available at <http://www.un.org/apps/sg/sgstats.asp?nid=5145#>). Whereas Resolution 1973 was adopted with five abstentions, the criticism of the abstaining states related to the choice of allowing recourse to military action: no doubts were cast in the debate as to the need for UN action in order to protect civilians in Libya (see the statements made by Brazil, Germany, India, the Russian Federation and China at the 6498th meeting of the Security Council, March 17, 2011, S/PV.6498). As is well known, the Council did not take similar actions as regards other situations, such as the one in Syria (*cf.*, however, Resolutions 2042(2012) and 2043(2012)). As regards the General Assembly, Resolution 63/308 of 14 September 2009 was adopted by consensus, albeit only after the words expressing appreciation for the 2009 Secretary General's Report on Implementing the Responsibility to Protect (A/63/677, January 12, 2009) were deleted from the draft. The debate on the topic was further pursued within the framework of informal interactive dialogues taking place on August 9, 2010 and July 12, 2011 respectively, on the basis of the reports issued by the Secretary General dealing with Early warning, assessment and the responsibility to protect (A/64/864, July 14, 2010) and on The role of regional and sub-regional arrangements in implementing the responsibility to protect (A/65/877, June 27, 2011).

at genocide prevention. However, it is not always clear the extent to which these commitments are translated into legally binding norms.⁴

As regards genocide, an undertaking to prevent it is included in Article I of the UN Genocide Convention.⁵ The ICJ judgment on the merits in the *Bosnia v Serbia* case⁶ and, more recently, the judgment of the Hague Court of Appeal in *Mustafic v De Staat der Nederlanden*⁷ have emphasized the legally binding nature of this undertaking.⁸ Nevertheless, doubts are raised as to the role legal rules may play in preventing genocide,⁹ and certain commentators still hold that “the political sphere (...) is where genocide prevention really belongs.”¹⁰

This article is aimed at clarifying the impact the current legal framework may have on genocide prevention by analyzing some specific features of the obligation to prevent genocide and elaborating on possible directions in its future development. These issues will be examined in the light of the *Bosnia v Serbia*

⁴ Significantly, U.S. President Obama qualified prevention of mass atrocities and genocide as a “core national security interest and a core moral responsibility of the United States”, yet without mentioning the existence of legal obligations in this respect (*cf.*, Presidential Study Directive on Mass Atrocities – PSD-10, August 4, 2011 (available at <http://www.whitehouse.gov/the-press-office/2011/08/04/presidential-study-directive-mass-atrocities>, accessed March 28, 2012).

⁵ Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9 December 1948, 78 UNTS 277. So far, the Convention has been ratified by 142 States.

⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia) (Merits)*, [2007] ICJ Rep. 43.

⁷ The Hague Court of Appeal, Case no. 200.020.173/01, *Mehida Mustafic-Mujic et al. v De Staat der Nederlanden* (July 5, 2011), para. 6.2 (available at <http://zoeken.rechtspraak.nl>, accessed March 28, 2012; *cf.*, also the parallel Case No. 200.020.174/01, *Hasan Nuhanovic v De Staat der Nederlanden*, July 5, 2011, para. 5.8, *ibid.*). The Hague Court of Appeal thus reversed a judgment of the District Court of the Hague in which the responsibility of the Netherlands had been denied essentially on grounds of lack of attribution of the relevant conduct (Judgment of September 10, 2008, case no. 265615/HA ZA 06-167, on which *cf.*, G. Gaja, *Seventh report on responsibility of international organizations*, Doc. A/CN.4/610 of 27 March 2009, p. 11, para. 29).

⁸ As noted by O. Ben-Naftali, *The Obligations to Prevent and to Punish Genocide*, in: P. Gaeta (ed.), *The Genocide Convention – A Commentary*, Oxford University Press, Oxford: 2009, p. 41, “during the various stages of the Bosnian genocide case, the ICJ has transformed the ‘duty to prevent’ into a substantive legal obligation.”

⁹ J. Quigley, *The Genocide Convention – An International Law Analysis*, Ashgate Publishing, Aldershot: 2006, p. xiv.

¹⁰ W.A. Schabas, *Genocide and the International Court of Justice: Finally, a Duty to Prevent the Crime of Crimes*, 2 *Genocide Studies and Prevention* 101 (2007), pp. 115-116; A. Bartoli, T. Ogata & G. Stanton, *Emerging Paradigms in Genocide Prevention*, 47 *Politorbis* 16 (2007), p. 16, maintain that “genocide is a highly political act and genocide prevention cannot be but a political response.” *Cf.*, also the dissenting opinion by Judge Ranjeva in *Bosnia v Serbia*, *supra* note 6, p. 278, para. 6.

judgment, which constituted the first, and so far the only, opportunity for the International Court of Justice to apply the UN Convention in contentious proceedings on the basis of the jurisdictional clause included in Article IX.¹¹ The judgment considered the meaning and scope of some of the substantive obligations stipulated by the Convention, including the obligation to prevent genocide set forth in Article I.

1. THE UN CONVENTION FOR THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

First of all, the Court made it clear that the undertaking to prevent genocide plays an autonomous role in the Convention's framework. In response to Serbia's contention that the obligation stipulated by Article I only binds States to punish the perpetrators of genocide, the ICJ stressed that "[t]he obligation on each contracting State to prevent genocide is both normative and compelling. It is not merged in the duty to punish, nor can it be regarded as simply a component of that duty."¹²

Furthermore, the obligation to prevent genocide is broader in scope than the obligation to punish, which is set forth in Article VI. In principle, a State party is under the obligation to repress only genocide perpetrated within its territory; as regards other situations the State is only bound to cooperate with the activities of International Criminal Tribunals and Courts to whose jurisdiction it is subject.¹³ On the other hand, the ICJ read the obligation to prevent genocide as covering not only activities of non-State actors within the territory of the State party, but

¹¹ The Court dealt with the Genocide Convention in the well-known *Advisory Opinion on the Reservations to the Convention on Genocide* [1951] ICJ Rep. 15. As regards contentious proceedings, the interpretation of the Convention was at stake in the *Case Concerning the Trial of Pakistani Prisoners of War (Pakistan v India)* (for the application of May 11, 1973, see *Pleadings, Oral Arguments, Documents, Trial of Pakistani Prisoners of War*, 3 ff.) which was however removed from the list upon the request of Pakistan (see, Order of 15 December 1973, [1973] ICJ Rep. 347-348). The ICJ found it did not have jurisdiction in a number of cases – namely, the *Case Concerning Armed Activities in the Territory of the Congo (Congo v Rwanda) (Jurisdiction and Admissibility)* [2006] ICJ Rep. 6, and those *Concerning the Legality of the Use of Force* [2004] ICJ Rep. 865 (judgment against Italy); the cases against the United States and Spain were struck off the list ([1999] ICJ Rep. 916 and 761). Jurisdiction was affirmed in the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* [2008] ICJ Rep. 412, but the judgment on the merits has not been issued yet.

¹² *Bosnia v Serbia*, *supra* note 6, p. 220, para. 427.

¹³ *Ibidem*, p. 226, paras. 442 ff.

also to include genocide that may occur beyond a State's borders. In Serbia's case, it was precisely the lack of prevention of the massacre in Srebrenica – the only act qualified as genocide by the Court¹⁴ – that was considered to be in breach of the Convention.¹⁵ This interpretation, which confirms the stance taken by the Court in its 1996 judgment on jurisdiction,¹⁶ may well depart from the overall approach taken by the drafters of the Convention¹⁷ but is justified under Articles 31(1) and 31(3)(c) of the Vienna Convention on the Law of Treaties, especially in the light of the recent developments concerning the responsibility to protect. Indeed, a different interpretation of Article I would have implied the existence of a significant gap in the Convention's framework.

The Court also made it clear that, “while respecting the United Nations Charter and any decisions that may have been taken by its competent organs,” the State Party's obligation to prevent genocide does not cease when those organs have been called upon to intervene under Article VIII of the Convention.¹⁸

2. THE CUSTOMARY NATURE OF THE OBLIGATION TO PREVENT GENOCIDE

It may safely be postulated that, in addition to being incorporated in the 1948 UN Convention, the obligation to prevent genocide is a customary rule of international law. Several elements corroborate this conclusion. Already in 1951, the International Court of Justice stated that the “principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation.”¹⁹ In their joint declaration appended to the *Bosnia v Serbia* judgment, Judges Shi and Koroma characterized the obligation to prevent genocide set forth by Article I as an “overriding legal imperative.”²⁰

The idea that the substantive obligations stipulated by the Convention reflect international custom was specifically accepted by Serbia. As is well known,

¹⁴ *Ibidem*, para. 376. Cf., on the issue J. Quigley, *International Court of Justice as a Forum for Genocide Cases*, 40 Case Western Reserve Journal of International Law 243 (2007-2009).

¹⁵ *Bosnia v Serbia*, *supra* note 6, p. 225, para. 438.

¹⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v Yugoslavia) (Preliminary Objections)* [1996] ICJ Rep. 595, pp. 615-616.

¹⁷ See, A. Cassese, *Taking Stock of the Genocide Convention and Looking Ahead*, in: Gaeta, *The UN Genocide Convention*, *supra* note 8, p. 533; Ben-Naftali, *supra* note 8, p. 29 ff.

¹⁸ *Bosnia v Serbia*, *supra* note 6, p. 220, para. 427.

¹⁹ *Reservations to the Convention on Genocide*, *supra* note 11, p. 23.

²⁰ *Bosnia v Serbia*, *supra* note 6, p. 282, para. 5.

in the last phase of the *Bosnia v Serbia* case, as well as in other proceedings before the ICJ, Serbia maintained that it is not bound by the UN Convention as such (and more specifically by Article IX). However, it acknowledged that “all actors in the conflict were at all times bound by the customary international law prohibition of genocide,”²¹ without distinguishing between prohibition and prevention.

Furthermore, in a well-known passage concerning the responsibility to protect, the 2005 UN World Summit Outcome stated that “[e]ach individual State has the responsibility to protect its population from genocide, war crimes, ethnic cleansing, and crimes against humanity. This responsibility entails the prevention of such crimes (...). We accept that responsibility and will act in accordance with it.”²² Whereas the term “responsibility” is deliberately ambiguous in this context,²³ and emphasis is laid on prevention by the territorial State rather than through external pressure,²⁴ the World Summit Outcome confirms the existence of a broad consensus on the customary nature of the obligation to prevent genocide.²⁵

As a customary rule, the obligation to prevent genocide thus binds not only the State Parties to the Convention, but also other States and any other entity endowed with international legal personality; notably international organizations, including the United Nations.²⁶ For the sake of simplicity however the remainder of this article refers only to the position of States.

²¹ See the pleading of V. Djerić, counsel to Serbia, in *Croatia v Serbia*, hearing of May 26, 2008, CR 2008/9, p. 12, para. 37.

²² Res. 60/1 of September 20, 2005, par. 138. Cf., the Declaration of the Stockholm International Forum 2004 -*Preventing Genocide: Threats and Responsibilities*, of January 28, 2004 (available at <http://www.aegistrust.org/Treaties-Conventions/stockholm-declaration.html>, accessed March 28, 2012).

²³ Cf., Focarelli, *supra* note 3, p. 200.

²⁴ Cf., e.g., UN Secretary General, *Report on the role of regional and sub-regional arrangements in implementing the responsibility to protect*, *supra* note 3, para. 10.

²⁵ According to the UN Secretary General, the commitments quoted above are “firmly anchored in well-established principles of international law” (*Implementing the Responsibility to Protect*, *supra* note 3, para. 3).

²⁶ G. Gaja, *Third Report on Responsibility of International Organizations*, Doc. A/CN.4/553, para. 10. Cf., also, G. Gaja, *The Role of the United Nations in Preventing and Suppressing Genocide*, in: Gaeta (ed.), *The Genocide Convention*, *supra* note 8, p. 405; Boisson de Chazournes & Condorelli, *supra* note 2, pp. 15-16; A. Peters, *supra* note 1, p. 305 ff.; A. Zimmermann, *supra* note 2, p. 638. For a more sceptical interpretation, see, Reisman, *supra* note 1, p. 70. The responsibility of the United Nations for the Srebrenica massacre was alleged in *Mothers of Srebrenica v Netherlands & United Nations*, decided upon by the The Hague Court of Appeal, Case No. 200.022.151/01, March 30, 2010, 49 ILM 1021 (2010).

3. SPECIFIC FEATURES OF THE OBLIGATION TO PREVENT GENOCIDE

The obligation to prevent genocide binds a State to thwart genocidal behaviors which are attributable to other States and to non-State actors. In this respect, one should distinguish the obligation to *prevent* from the obligation *not to commit* genocide, which also stems from the UN Convention. The ICJ in *Bosnia v Serbia* emphasized this distinction. It first acknowledged that the 1948 Convention binds States not to commit genocide directly, thus dismissing Serbia's arguments to the contrary²⁷ and avoiding what would have been a major shortcoming in the legal framework set up by the Convention.²⁸ However, Serbia was not held to be in breach of that obligation, since the genocide performed by the Bosnian Serbs in Srebrenica was not attributed to the Serbian State.²⁹ Nor was Serbia deemed to be an accomplice in the genocide, due to a lack of evidence as to Serbia's awareness that its assistance to the Bosnian Serbs would be used to commit genocide.³⁰ On the other hand, the Court ascertained that Serbia was legally responsible for not preventing the genocide that occurred in Srebrenica (as well as for not cooperating with the ICTY).

While the judgment thus confirmed the clear-cut and autonomous nature of the obligation to prevent genocide, problems arise however in identifying the specific features of this obligation, in particular its nature, the conditions under which it applies, and its content.

3.1. The obligation to prevent genocide as a rule of *jus cogens*?

There is little doubt that acts of genocide are prohibited by a rule of *jus cogens*. The characterization of genocide as a "crime under international law", under

²⁷ The Convention does not expressly stipulate such a prohibition. For the Court's reasoning on the issue, see, *Bosnia v Serbia*, *supra* note 6, p. 113, paras. 166 ff. Serbia's contentions were upheld by some individual judges: see e.g., the Joint Declaration of Judges Shi and Koroma, [2007] ICJ Rep. 279, para. 1; the separate opinion of Judge Owada (*Ibidem*, p. 298, para. 44); the dissenting opinion of Judge Tomka (*Ibidem*, p. 333, paras. 41 and 61); the declaration of Judge Skotnikov (*Ibidem*, p. 370); and the dissenting opinion of Judge Kreca (*Ibidem*, p. 551, para. 126 ff.). See further, Quigley, *supra* note 14, p. 258.

²⁸ Genocide as such is prohibited by a peremptory norm of general international law (on this point see further under 3.1: however, the only basis for the Court's jurisdiction in the *Bosnia v Serbia* case was the compromissory clause included in the Genocide Convention. Therefore, had the Court read the Article in a more restrictive way, it could not have assessed Serbia's compliance with the obligation not to commit genocide: cf., *Bosnia v Serbia*, *supra* note 6, p. 104, para. 147.

²⁹ *Ibidem*, p. 215, para. 415.

³⁰ *Ibidem*, para. 420.

both Resolution 96 (I) of the UN General Assembly³¹ and the 1948 Convention confirms this view. Genocide is specifically defined as a breach of a peremptory norm in the ILC commentaries to the text which became Article 53 of the 1969 Vienna Convention on the Law of Treaties³² and Article 40 of the 2001 Draft Articles on State Responsibility.³³ This approach was explicitly shared by several States at the Vienna Conference,³⁴ and by the ICJ in the *Congo v Rwanda* case.³⁵ Further support for this view is reflected in the very inclusion of genocide in first place in the list of wrongful acts which give rise to a responsibility to protect according to World Summit Outcome.

However, the obligation to *prevent* genocide does not seem to be a rule of *jus cogens*.³⁶ While no specific mention of the issue may be found in the above-mentioned authorities, their emphasis was on the incompatibility with *jus cogens* of genocide as such, rather than of a lack of prevention. This lack of previous focus on the obligation to prevent genocide,³⁷ coupled with the difficulties in acknowledging a legal obligation to prevent mass atrocities in general in the framework of the current debate on the responsibility to protect,³⁸ together would seem to imply that the obligation we are here discussing, albeit legally binding, is not (yet) part of the peremptory core of the prohibition of genocide.

This view finds further support in the judgment of the Hague Court of Appeal in *Mothers of Srebrenica v the United Nations*. In this case the Court emphasized that the applicants' allegations concerned lack of prevention, not genocide *per se* or complicity in genocide, clearly implying that the two situations should be

³¹ The Resolution was adopted by unanimous vote on December 11, 1946.

³² *Report of the International Law Commission on the work of its eighteenth session*, Yearbook of the International Law Commission (1966) (II), p. 248, para. 3.

³³ *Report of the International Law Commission on the work of its fifty-third session*, Yearbook of the International Law Commission (2001) (II), p. 113, para. 4 (see also further references there). It should be recalled that draft Article 19(3)(c) of the Draft Articles on State Responsibility, as adopted on first reading, listed genocide among "State crimes": *cf.*, *Report of the International Law Commission on the work of its twenty-eighth session*, 1976 Yearbook of the International Law Commission (II), p. 95.

³⁴ *See, Official Records of the United Nations Conference on the Law of Treaties, First Session, Vienna, 26 March – 24 May 1968, summary records of the plenary meeting and of the meetings of the Committee of the Whole*, 52nd meeting, paras. 15, 31 and 43; 53rd meeting, paras. 15, 16, 35, 48, and 69; 56th meeting, para. 20.

³⁵ *Congo v Rwanda*, *supra* note 11, p. 32, para. 64.

³⁶ *Cf.*, A. Gattini, *Breach of the Obligation to Prevent and Reparation Thereof in the ICJ's Genocide Judgment*, 18 European Journal of International Law 695 (2007) p. 697. For a different stance, *see*, Ben-Naftali, *supra* note 8, p. 36.

³⁷ *Cf.*, L. Kuper, *The Prevention of Genocide*, Yale University Press, New Haven, London: 1985, pp. 84, 217.

³⁸ *Cf.*, C. Stahn, *supra* note 2, p. 120.

distinguished for the purpose of upholding immunity.³⁹ Moreover, it is significant that during the proceedings against Serbia, Bosnia requested compensation that would take into account the particularly serious nature of the wrongful acts it attributed to the respondent, but only in connection to the alleged breaches of the obligation *not to commit* genocide. As regards the obligation to prevent genocide, the request for monetary compensation was withdrawn in Bosnia's final submissions. The Court considered that the appropriate form of reparation for this kind of breach was satisfaction in the form of "a declaration in the present Judgment that the Respondent has failed to comply with the obligation imposed by the Convention to prevent the crime of genocide."⁴⁰ This treatment of the issue of reparations confirms the doubts that the obligation to prevent genocide is the object of a peremptory norm.

3.2. The conditions under which the obligation applies

As regards the conditions under which the obligation to prevent becomes applicable, according to the Court this obligation "and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed."⁴¹ Serbia's awareness of such a risk could not be in doubt, since the ICJ Order concerning provisional measures of April 8, 1993 had already proclaimed its existence and enjoined Serbia to "take all measures within its power" to prevent genocide from occurring, and more specifically to "ensure that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide" in Bosnia.⁴²

³⁹ *Mothers of Srebrenica v Netherlands & United Nations*, *supra*, note 26, paras. 5.10. On February 3, 2012, the ICJ held that international rules on immunity cannot be set aside even as regards allegations of breaches of *jus cogens* (*Jurisdictional Immunities of the State, Germany v Italy*, para. 93), but the relevance of the distinction made in the Dutch ruling mentioned in the text still remains relevant for our purposes.

⁴⁰ *Bosnia v Serbia*, *supra* note 6, p. 234, para. 463. See also: the statement of Condorelli, counsel to Bosnia, at the hearing of March 7 2006, CR 2006/11, p. 18: "il va de soi que la gravité pourtant évidente des violations de l'article I se relativise considérablement par rapport à la perpétration par la RFY du crime de génocide lui-même". For a critical appraisal of the ICJ's ruling on reparation, see: C. Tomuschat, *Reparation in Cases of Genocide*, 5 *Journal of International Criminal Justice* 905 (2007); S. Forlati, *Obbligo di prevenire il genocidio e riparazione nell'affare Bosnia c. Serbia*, 90 *Rivista di diritto internazionale* 425 (2007).

⁴¹ *Bosnia v Serbia*, *supra*, note 6, p. 222, para. 431.

⁴² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures*, Order of 8 April 1993, *Bosnia v Serbia*, [1993] ICJ Rep., p. 3 ff., p. 24, para. 52. Cf., also, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures*, Order of 13 September 1993, *Ibidem*, p. 325 ff.,

In other contexts however it may not be easy to forecast when, where and whether there is a risk of genocide. Even when risk factors unequivocally exist, there could be consequences that are less serious than genocide (or other mass atrocities), or events may develop in more positive ways notwithstanding the lack of preventive action by a given State or international organization.⁴³ It is therefore not surprising that the current debate focuses on the establishment of efficient early warning mechanisms which would not allow a State to justify its failure to undertake preventive measures by relying (in good or bad faith) on allegations of ignorance. In the words of Secretary-General Ban Ki Moon, “[g]etting the right assessment – both of the situation on the ground and of the policy options available to the United Nations and its regional and sub-regional partners – is essential for the effective, credible and sustainable implementation of the responsibility to protect.”⁴⁴

Hopefully, it will be possible to overcome the practical and political hindrances to the establishment of such mechanisms⁴⁵ and of other institutional arrangements specifically aimed at the prevention of genocide. This could be done both along the lines of those mechanisms created to complement Article 3 of the European Convention on Human Rights 1950, or the 1984 UN Convention against torture,⁴⁶

pp. 349-350. *See further*, Security Council Resolution 819 of April 16, 1993. In any case, the conduct of the Serb authorities, especially of President Milosevic, showed awareness of the risk that genocide might occur in Srebrenica. *See, Bosnia v Serbia, supra* note 6, p. 224, paras. 436-438.

⁴³ *Cf.*, T.R. Gurr, *Options for the Prevention and Mitigation of Genocide: Strategies and Examples for Policy-Makers*, 47(2) *Politorbis* 47 (2009).

⁴⁴ Early warning, assessment and the responsibility to protect, *supra* note 3, at p. 8, para. 19. Early warning is specifically mentioned both in the Stockholm Declaration and the World Summit Outcome (para. 138). The efforts of the Office of Secretary General's Special Adviser on Genocide Prevention, whose functions in this respect are specifically supported by the latter document, are focused on the identification of relevant risk factors, case studies, and other forms of risk assessment. *See*, Office of the Special Adviser on the Prevention of Genocide (OSAPG), *Analysis Framework*, available at http://www.un.org/en/preventgenocide/adviser/pdf/osapg_analysis_framework.pdf (accessed June 10, 2011). *Cf.*, also, L. Woocher, *Developing a Strategy, Methods and Tools for Genocide Early Warning – Prepared for the Office of the Special Adviser to the UN Secretary-General on the Prevention of Genocide* (26 September 2006), (available at <http://www.un.org/en/preventgenocide/adviser/pdf/Woocher%20Early%20warning%20report,%202006-11-10.pdf>, accessed March 8, 2012).

⁴⁵ *See*, Woocher, *supra* note 44, p. 6.

⁴⁶ *See respectively*, The European Convention on the Prevention of Torture of November 26, 1987 and the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, December 18, 2002. *Cf.*, in this respect, the speech delivered by the UN Secretary General Kofi Annan at the Stockholm International Forum (January 26, 2004), Press Release SG/SM/9126.

and at different levels – for instance, entrusting institutions and organizations with specific expertise in the field of genocide and mass atrocities with mediation or early warning tasks, be they within the UN framework or elsewhere.⁴⁷

From the conceptual point of view, more problems arise as to the second condition laid down by the Court, namely that the State should have at its disposal the “means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent.”⁴⁸ It would seem that here, as in other parts of the judgment,⁴⁹ the Court seeks to limit the consequences of extending the scope of the *ratione loci* of Article 1 beyond those areas falling under the jurisdiction of each State Party. This implies a qualification of the scope of the *ratione personae* of Article 1 of the Convention, which does not find any basis either in its wording or in the object and purpose of the Convention, since it widens the opportunities to justify inaction.⁵⁰ In addition, it would appear to contradict another statement of the Court, according to which, for the purpose of assessing responsibility, “it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result – averting the commission of genocide – which the efforts of only one State were insufficient to produce.”⁵¹

A more convincing construction, apparently adopted by the ICJ in its 1993 Order on provisional measures,⁵² implies that the obligation to prevent applies

⁴⁷ Early warning is one of the activities envisaged by the Foundation for the International Prevention of Genocide and Mass Atrocities, which was set up on October 18, 2010 under the auspices of the Hungarian Government.

⁴⁸ *Bosnia v Serbia*, *supra* note 6, p. 222, para. 431.

⁴⁹ *See notably*, the statement that responsibility for lack of prevention arises only in case of manifest breaches of the obligation set forth by Article I of the Convention, discussed, *infra*, in section 3.3.

⁵⁰ *But see*, Ben-Naftali, *supra* note 8, p. 39.

⁵¹ *Bosnia v Serbia*, *supra* note 6, p. 221, para. 430. *See further*, Ben-Naftali, *supra*, note 8, p. 42.

⁵² Order of April 8, 1993 *supra* note 42, p. 23, para. 45: “In the view of the Court, in the circumstances brought to its attention and outlined above in which there is a grave risk of acts of genocide being committed, Yugoslavia and Bosnia-Herzegovina, whether or not any such acts in the past may be legally imputable to them, are under a clear obligation to do all in their power to prevent the commission of any such acts in the future”. *Cf., also*, *Bosnia v Serbia*, *supra* note 6, p. 223, para. 432, in which only risk awareness is mentioned

exclusively on the basis of risk awareness, whereas the actual capacity to influence prospective *genocidaires* become relevant only for the purpose of identifying the activities that should be pursued in order to fulfill that obligation.

3.3. The content of the obligation

A common feature of all obligations of prevention is that they are usually understood as “best efforts obligations, requiring States to take all reasonable or necessary measures to prevent a given event from occurring, but without warranting that the event will not occur.”⁵³ The ICJ confirmed that this is the correct reading of the obligation set forth by Article I of the Genocide Convention. According to the Court, “it is clear that the obligation in question is one of conduct and not one of result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of State parties is rather to employ all means reasonably available to them so as to prevent genocide so far as possible.”⁵⁴

Furthermore, *Bosnia v Serbia* holds that the actual commission of genocide is a precondition of responsibility for an omitted prevention.⁵⁵ Whereas this stance confirms the approach followed by the ILC as regards obligations of prevention in general,⁵⁶ it seems unreasonable to exclude that responsibility may autonomously arise at least in case of flagrant omissions.⁵⁷

as a precondition in order for the obligation to prevent genocide to arise, and Judge Lauterpacht's Separate Opinion appended to the Order on Provisional Measures of 13 September 1993, [1993] ICJ Rep. 441-442.

⁵³ Cf., the commentary to Article 14, par. 3, of the Draft Articles on State Responsibility (ILC Report on the Work of its Fifty-Third Session, Yearbook of the International Law Commission Yearbook (2001) (II), p. 62, para. 14).

⁵⁴ *Bosnia v Serbia*, *supra* note 6, p. 221, para. 430. The wording “obligation of conduct” is here explicitly used as identifying not obligations of specific performance, as suggested by ILC Special Rapporteur Roberto Ago in his classification of internationally wrongful acts, but rather obligations of means, along the lines of the approach later followed Special Rapporteur James Crawford during the second reading of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (*See respectively*, R. Ago, *Sixth Report on State Responsibility* (doc. A/CN.4/302 and Add.1, 2 & 3), Yearbook of the International Law Commission (1977) (II:1), p. 5 ff.; and *Second Report on State Responsibility* (doc. A/CN.4/49), p. 25, para. 57. For more on the issue, see, P.-M. Dupuy, *Reviewing the Difficulties of Codification: on Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility*, 10 European Journal of International Law 366 (1999), p. 377.

⁵⁵ *Bosnia v Serbia*, *supra* note 6, p. 221, para. 431.

⁵⁶ Cf., R. Ago, *Seventh Report on State Responsibility*, Yearbook of the International Law Commission (1978) (I:1), p. 33 ff.

⁵⁷ For a convincing criticism of the Court's construction, see, Gattini, *supra* note 36, p. 702.

If genocide occurs, a test of due diligence applies, the critical issue being identification of the means that are “reasonably available”. In the ICJ’s words, the intensity of the action required depends on the actual capacity of a State to “influence effectively the action of the persons likely to commit, or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events.”⁵⁸ Therefore, there is a structural impossibility to identify once and for all what behaviors would be required to fulfill the obligation of prevention. This does not mean however that compliance is left only to the State’s good will and assessment of political opportunity. While the relevance of those factors cannot be underestimated, the issue is also regulated by legal standards.

The task of a more precise identification of the content of positive obligations in the field of human rights, beyond the general “reasonableness” test accepted by the ICJ, is usually performed by the judicial or quasi-judicial bodies that monitor compliance with the relevant treaties. Their case-law and decisions provide guidance for future actions by the Contracting Parties. For instance, the Committee of Economic, Social and Cultural Rights considered that the right to the highest attainable standard of health, set forth by Article 12 of the Covenant, implies that public health and health care facilities have to “include the underlying determinants of health, such as safe and potable drinking water and adequate sanitation facilities, hospitals, clinics and other health-related buildings, trained medical and professional personnel receiving domestically competitive salaries, and essential drugs, as defined by the WHO Action Programme on Essential Drugs;”⁵⁹ respect for the principle of nondiscrimination is also required.⁶⁰ With reference to positive obligations stemming from the right to life, the European Court of Human Rights (ECtHR) has held Article 2 of the European Convention on Human Rights (ECHR) to be breached if the national authorities fail to do “all that could reasonably be expected of them to avoid a *real* and *immediate* risk to life of which they have or ought to have knowledge.”⁶¹ In specific contexts, this legal standard may be

⁵⁸ *Bosnia v Serbia*, *supra* note 6, p. 221, para. 430. The same approach to positive obligations was taken by other international courts or monitoring bodies. For the position of the ECHR, see, e.g., *Ilascu v Moldova and Russia*, (48787/99), July 8, 2004, para. 333. All ECtHR judgements are available at <http://www.echr.coe.int>.

⁵⁹ General Comment n. 14 (2000) of August 11, 2000, E/C.12/2000/4, p. 4, para. 12(a).

⁶⁰ *Ibidem*, p. 4, para. 12(b), and p. 6, paras. 18 ff.

⁶¹ *Osman v United Kingdom* (87/1997/871/1083), Grand Chamber, ECHR, October 28, 2008, para. 115. Emphasis added.

developed further, also by reference to soft-law sources, such as the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials in cases where risks to life originate directly from police activity.⁶² In other instances, as in the case of enforced disappearances⁶³ or torture,⁶⁴ positive obligations identified as being part of the due diligence standard may be subsequently transposed in international agreements, thus becoming autonomous obligations of specific performance.

The Genocide Convention entrusts the ICJ with the function of interpreting the Convention and assessing compliance with its provisions. While *Bosnia v Serbia* admittedly did not go very far in clarifying what Serbia should have done in order to comply with its obligation to prevent genocide,⁶⁵ nonetheless some indicators can be drawn from the judgment. First of all, while distinguishing between the obligation to punish and the obligation to prevent genocide, the ICJ acknowledged that “one of the most effective ways of preventing criminal acts, in general, is to provide penalties for persons committing such acts, and to impose those penalties effectively on those who commit the acts one is trying to prevent.”⁶⁶ The setting up of effective repression mechanisms that prevent the perpetrators from acting with impunity can thus be seen as one mechanism of compliance with the obligation to prevent. Nevertheless, especially in the light of the gravity and the scale of genocide, an approach based solely on repression is by no means satisfactory.⁶⁷

A second, more general indicator, concerns the need to act “within the limits permitted by international law.”⁶⁸ The current debate concerning the responsibility

⁶² See e.g., *Giuliani and Gaggio v Italy* (23458/02), Grand Chamber, ECHR March 24, 2011, para. 154. The Principles were adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana (Cuba) from August 27 to September 7, 1990.

⁶³ Cf., A. Annoni, *La responsabilità internazionale dello Stato per sparizioni forzate*, 88 Rivista di Diritto internazionale 667 (2005), p. 693.

⁶⁴ See, A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, Hart, Oxford/Portland: 2004; C. Tomuschat, *Human Rights Between Idealism and Realism* (2nd ed.), Oxford University Press, Oxford: 2008, p. 43; F. Jacobs & R.C.A. White, *The European Convention on Human Rights* (5th ed.), Oxford University Press, Oxford: 2010, p. 86; R. Pisillo-Mazzeschi, *Responsabilité de l'Etat pour violation des obligations positives relatives aux droits de l'homme*, 333 Recueil des Cours 177 (2008), pp. 314, 323, 345 ff.; Cf., also: the instruments quoted *supra* note 46.

⁶⁵ Cf., the critical remarks of Judges Shi and Koroma in their joint declaration, *supra*, note 19, para. 6.

⁶⁶ *Bosnia v Serbia*, *supra* note 6, p. 219, para. 426. Cf., Quigley, *supra*, note 9, p. 282.

⁶⁷ Cf., Reisman, *supra* note 18, p. 40.

⁶⁸ *Bosnia v Serbia*, *supra* note 6, p. 221, para. 430.

to protect focuses on the precise identification of those limits, and more specifically on the legality of humanitarian intervention beyond the framework of Chapter VII of the Charter. As is well known, it is not likely that a broad consensus will be reached soon on this very complex⁶⁹ and critical⁷⁰ aspect. And since the issue did not arise under the circumstances of the *Bosnia v Serbia* case, it is not surprising that the Court did not take a stance on it.

On the other hand, taking into account the traditional reluctance shown by States and international organizations, including the United Nations, to take on their responsibilities in the prevention of genocide, shifting the focus from armed reaction to other ways and means through which this aim may be effectively pursued could prove useful.⁷¹ In this perspective, an effort could have been made to specify the *minimum* content of the legal obligation to prevent genocide, along the lines of the developments recalled above as regards other kinds of positive obligations. The ICJ instead followed an opposite route: while ascertaining that Serbia had not taken any steps whatsoever to avoid genocide⁷² – a finding that, in itself, can hardly be open to criticism – the Court also stressed that, as a matter of principle, “for a State to be held responsible for breaching its obligation of prevention, it does not need to be proven that the State concerned definitely had the power to prevent the genocide; it is sufficient that it had the means to do so and that it *manifestly refrained* from using them.”⁷³ It may be asked why only manifest breaches of obligations to prevent genocide would give rise to responsibility? No similar statement is to be found in other international judgments dealing with similar issues: for instance, in *Congo v Uganda*⁷⁴ the ICJ assessed that Ugandan forces “took no action” to prevent ethnic conflict in the Ituri region, failed to prevent the recruitment of child soldiers in areas under its control and, more generally, “did not take measures” to ensure respect for human rights and international humanitarian law in the occupied territories.⁷⁵ However, nowhere in the judgment did the ICJ state

⁶⁹ See, Focarelli, *supra* note 2, p. 212; Juan E. Mendez, *Remarks on Intervention*, 40 Case Western Reserve Journal of International Law 87 (2007-2009), p. 88.

⁷⁰ See, Joyner, *supra* note 2; Ben-Naftali, *supra* note 8, p. 44.

⁷¹ See, Mendez, *supra* note 69, at 89. *Cf.*, also, Secretary-General Kofi Annan’s Action Plan to Prevent Genocide, SG/SM/9197 of 7 April 2004.

⁷² *Bosnia v Serbia*, *supra* note 6, p. 225, para. 438.

⁷³ *Ibidem* (emphasis added).

⁷⁴ *Armed Activities on the Territory of the Congo (Congo v Uganda) (Merits)* [2005] ICJ Rep., p. 168 ff.

⁷⁵ *Ibidem*, pp. 240-241, paras 209-2011. As regards the lack of prevention of looting and exploitation of natural resources by private parties in the same region, the Court assessed that “rather than preventing the illegal traffic in natural resources, including diamonds, high-ranking members of the UPDF facilitated such activities.” *Ibidem*, p. 253, para. 248.

or imply that Uganda was responsible only because that State's omissions were manifest. In *Osman*, the European Court of Human Rights specifically rejected this kind of interpretation, which had been put forward by the United Kingdom as regards its positive obligations stemming from the right to life under Article 2 of the Convention. In the ECtHR's words, applying a standard of "gross negligence or wilful disregard" in that context would be "incompatible with the requirements of Article 1 of the Convention and the obligations of Contracting States under that Article to secure the practical and effective protection of the rights and freedoms laid down therein, including Article 2."⁷⁶

The Court's different treatment of this issue in *Bosnia v Serbia* does not seem to rely on a parallelism with the high standard of proof that the ICJ set as regards genocidal acts in themselves: that standard was justified in the light of the egregious nature of these acts⁷⁷ while, for the reasons set out above, a breach of the obligation of prevention is not perceived to be as serious as genocide itself. Such an approach could rather be explained by taking into account some specific features of the obligation to prevent genocide, to which the Court hinted when it stressed that it did not "purport to establish a general jurisprudence applicable to all cases where a treaty instrument, or other binding legal norm, includes an obligation for States to prevent certain acts."⁷⁸ One of those specificities lies in the very broad territorial scope of the obligation of prevention which, it should be recalled, binds States also with regard to situations occurring outside their jurisdiction, whereas this is not usually the case in the field of human rights.⁷⁹ Furthermore, while the scale of genocide (which affects groups, not individuals, and is thus easier to foresee in advance) in some respects facilitates preventive action, the complexity of situations of risk amplifies the discretion left to those who may be responsible for taking such action. Setting a high threshold for assessing responsibility ensures that any such finding rests on a firm legal basis and cannot be criticized as being politically biased.

⁷⁶ *Osman v United Kingdom*, *supra* note 61, para. 115.

⁷⁷ *Bosnia v Serbia*, *supra* note 6, p. 130, para. 210. Cf., W.A. Schabas, *What is Genocide? What are the Gaps in the Convention? How to Prevent Genocide?*, 47(2) *Politorbis* 33 (2009), p. 44.

⁷⁸ *Bosnia v Serbia*, *supra* note 6, p. 220, para. 429.

⁷⁹ As regards humanitarian law, it is well known that Common Article 1 binds State Parties to "respect and ensure respect" for the Geneva Conventions of 1949. This implies an obligation for Contracting parties to seek compliance by other States with the relevant standards (cf. ICRC, *Commentary to common Article 1*, available at <http://www.icrc.org/ihl.nsf/COM/375-590004?OpenDocument>, accessed March 9, 2012). Such an obligation is deemed to exist also in respect of customary humanitarian law (cf., J.-M. Henckaerts, L. Doswald-Beck, *Customary International Humanitarian Law*, 3rd ed., Cambridge University Press, Cambridge: 2009, p. 509).

CONCLUSION

The obligation to prevent genocide is a legally binding obligation both under the 1948 UN Convention and customary international law. As with all obligations of due diligence, it does not pre-determine the behavior required in order to comply with it. While the task of specifying the content of positive obligations in the field of human rights is usually performed by judicial or quasi-judicial bodies entrusted with the task of monitoring compliance with the relevant treaties, the peculiarities pertaining to the obligation to prevent genocide have led the ICJ not to follow the same approach as regards the interpretation of Article I of the Genocide Convention. Whereas the Court did give some indications as to the way in which the obligation to prevent genocide should be implemented, it also stressed that only manifest breaches of that obligation could give rise to international responsibility.

Nevertheless, the development of legal standards for genocide prevention could be pursued in other ways. The UN Convention could be complemented by specific instruments – including some soft law instruments, such as guidelines. These should concern not only the highly controversial issue of humanitarian intervention, but also identify a minimum standard of conduct for preventing genocide which would limit a State's discretion in reacting to risks of genocide. If such guidelines and/or standards were enunciated, noncompliance therewith would point at the existence of a breach of the obligation to prevent genocide and give rise to responsibility, even if the omission was not as blatant as Serbia's. Should the relevant rules be legally binding, their breach would give rise to responsibility even in cases when genocide is actually averted. Reaching consensus on such rules is a challenge for the next decade – and a good test for the commitments undertaken within the framework of the responsibility to protect.

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MARITIME DELIMITATION IN THE BARENTS SEA AND INTERNATIONAL PRACTICE IN MARITIME DELIMITATION

Abstract

International legal practice provides that final delimitation should correspond to the notion of justice, but at the same time there are no explicit methods for delimitation of international maritime areas, the median line method being only one among others. In most cases the parties agree on points with lines derived from the median, or other types of lines guided only by the rationale of fair delimitation. The delimitation process in the Barents Sea concerns the issue of delimitation between the Arctic coastal states and the factors that should be included in the course of this process, as well the range of other international legal problems, such as the status of the Svalbard and its adjacent maritime areas. This article presents the background of the maritime boundary dispute between Norway and Russia and examines the 2010 Barents Sea Delimitation Treaty, discussing its key features in light of international maritime delimitation practice. The 2010 Russian-Norwegian Treaty defined the maritime borders of the Barents Sea between Norway and Russia in a compromise fashion, including solutions on fishery issues and maritime cooperation, but it did not resolve all the issues linked to the delimitation, especially status of the Svalbard maritime area.

INTRODUCTION

The delimitation process in the Barents Sea has been a very complicated process, covering the issue of delimitation of maritime areas between the Arctic coastal states and including a number of factors in the course of the process. It has

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included as well a range of other international legal problems, such as the status of the Svalbard and its adjacent maritime areas. The process has encompassed the delimitation of the territorial Arctic sea, continental shelf, exclusive economic zones (hereinafter sometimes “EEZ”) and exclusive fisheries zones (hereinafter sometimes “EFZ”).

This article examines a set of international legal issues regarding maritime delimitation. It first analyses the practice of delimitation that takes place both through negotiations between the interested parties and through international judicial bodies. This is a necessary introduction into a further analysis of the 2010 Treaty between Norway and Russia and the set of problems that existed with regard to the Barents Sea. The judicial practice in the first part of the article refers mainly to the core of delimitation practice, and the mode in which the elements are included and discussed in this article may also reflect a certain indirect expression of the authors’ position, since maritime delimitation is an extremely broad and developing issue.

The further analysis, concerning the delimitation of maritime areas in the Arctic, has two dimensions. The first refers to the delimitation of maritime areas between states, and the second concerns the definition of the external borders of the continental shelf towards the North Pole, outside the EEZ. In the case of delimitation between States, the practice followed by the Arctic states included two main methods of delimitation: division based on the perpendiculars running along the meridian (sector line), and division based on the median and equidistance line.

The bilateral agreement between the Kingdom of Norway and the Russian Federation on the delimitation of maritime areas and cooperation in the Barents Sea and the Arctic Ocean, signed on September 15, 2010, finalized a dispute over the delimitation of maritime areas in the Barents Sea that lasted for more than four decades.¹ The agreement is a compromise and the result of concessions made by both parties in order to obtain a mutually acceptable solution. The final approval and demarcation of the maritime border between the parties is based on the Agreement which entered into force on July 7, 2011, and corresponds to contemporary trends in the application of the law of the sea. This agreement is also extremely interesting due to the fact that it applies to the Arctic region, which historically possessed its own specific characteristics in terms of delimitation.

As has been mentioned, Norway and Russia have been engaged in an almost forty-year negotiation process on a maritime delimitation line between the two states. The Russians have traditionally relied on the sector line principle in staking

¹ The text of the treaty is available on the webpage of the Norwegian Foreign Ministry: http://www.regjeringen.no/upload/UD/Vedlegg/Folkerett/avtale_engelsk.pdf.

out their position. Norway's original and traditional stance on this question was that the delimitation line should be based on an equidistance line between the coasts on either side of the border. The extensive on-again, off-again negotiations have been completed successfully and on September 15, 2010, the Foreign Ministers of Norway and Russia signed a treaty on maritime delimitation and cooperation in the Barents Sea and the Arctic Ocean. The 2010 Russian-Norwegian Treaty defines the maritime borders of the Barents Sea between Norway and Russia, as well as covering fishery issues and maritime cooperation at sea issues, effectively ending the territorial dispute between the two states. The area in contention has been shared almost equally, with both Russia and Norway making concessions in relation to their original position. The 2010 Agreement establishes a single maritime boundary that divides the two states' continental shelves (within and beyond 200 nautical miles, hereinafter "nm") and exclusive economic zones.

Before moving to the substance of this article, two preliminary remarks should be made. First, the issues that do not directly relate to the legal problems posed by delimitation process (such as global warming and its impact on the negotiations between Russia and Norway, more general political considerations, etc.) were consciously omitted because of concerns about the length of this article. Secondly, for the same reasons, the review of the extensive international judicial practice in the first section is restricted only to that case law which the authors regarded as essential to the topic of this article.

1. THE GENESIS OF SECTORAL DELIMITATION IN LIGHT OF CONTEMPORARY PRACTICE OF MARITIME DELIMITATION

The first agreement that used the sector line in delimitation was concluded between Russia and the United Kingdom in 1824 on the border delimitation in North America, and again in 1867 between Russia and the United States of America. Both agreements provided that the boundary between the possessions of the parties would be marked in accordance with the line running along 141° W meridian "on the whole of its length until the Frozen Sea."² The question of whether

² "... dans son prolongement jusqu'à, la mer Glaciale ...", "... в своемъ продолженіи до Ледовитаго моря ...", Конвенція, заключенная въ Санктпетербургѣ между Императоромъ Всероссийскимъ и Королемъ Великобританскимъ, 17/5 IV 1824 (The Convention concluded in St. Petersburg between the Emperor of Russia and the King of Great Britain, signed on 17/5 April 1824, Code of Law of Russian Empire (edited by Speransky), No. 30233a, Part I. Vol. 40, pp. 72-74, Art. III para. 2), available at: <http://explorenorth.com/library/history/bl-ruseng1825fr.htm>, <http://www.pszri.ru/>.

the application of the 1824 Convention applies only to the land or only in relation to marine areas remains open. Nevertheless, it is possible to speak about the beginning of delimitation of the Arctic land and maritime areas according to the perpendiculars running along the meridians. The Russian-American Agreement on the sale of Alaska in 1867 provided exactly the same formula for the determination of borders.³ The original boundary drawn between the Russian and British possessions in North America was retained as the boundary between the United States and Canada (as a British dominion). In addition, Russia and the United States agreed that the border between the countries would run in the Arctic along the meridian, which is drawn in the direction of the North Pole. This mode of delimitation in the Arctic performed along meridians was initially designed rather for the delimitation of land areas that fall within the sector. This kind of delimitation seemed to be the most appropriate, convenient and relatively easy to carry into effect, especially taking into account the sparsely populated areas adjacent to the Arctic Ocean. It can therefore be assumed that the colonial UK-Russian and US-Russian delimitation constituted the basis for the further use of perpendiculars running along meridians as a method of delimitation of maritime areas in the Arctic.

The first claims on Arctic areas were put forward by Canada in 1904 and 1906. The Canadian Ministry of the Interior prepared maps that included the land areas lying to the west of Greenland and north of the Canadian mainland into the territory of Canada between 60° and 141° W, regardless of whether they were discovered or not. The Canadian claims to the land areas were confirmed and expressed in its internal legislation in the form of amendments to the Act on the Northwest Territories of July 1, 1925. The amendments introduced a ban on any activity of other countries in the designated area without the consent of Canada.⁴ These claims did not cover any maritime areas. There is no link between the claims from 1925 and the claims made today to the exclusive economic zone and continental shelf, since the latter concepts were not yet known in international law in 1925. A similar approach was adopted by the USSR in 1926, when

³ Treaty concerning cession of the Russian Possessions in North America (signed on June 20, 1867). Art. 1 uses the same formula: "... in its prolongation as far as the Frozen Ocean ...". Later the Parties defined more precisely the line of delimitation along 168°58'37" W (available at: <http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=015/llsl015.db&recNum=573>).

⁴ D. G. Shelagh, *Sovereignty or Security? Government Policy in the Canadian North, 1936-1950*. University of British Columbia Press, Vancouver: 1988, pp. 306-307.

the Presidium of the USSR Central Executive Committee issued a decree which stated similar claims by the USSR between 32° E to 168° W.⁵ In 1933 Denmark put forward their claims to land areas between 10° and 60° W. The US did the same in the proclamation of President Truman of September 28, 1945, whereby it was decided that the mineral resources located on the continental shelf of the United States should stay under the jurisdiction of the US.⁶ It should be noted that the state practice in the 1920s and 1930s used the sector principle for maritime delimitation in the Arctic. A similar process also took place in claims made in the Antarctic, following the sector principle as well, with the sectors being determined along the meridians. Looking at events from a historical perspective, it should be acknowledged that the initial maritime delimitation procedure did not set any fixed criteria or rules. The first delimitation agreements usually applied to the points located between the shores defined during the negotiations and lines that ran between the mentioned points and constituted, in most cases, either perpendiculars or a median line.⁷

Later on, when economic activity in the Arctic was intensified, the Arctic states expanded their claims in the region. The adoption of four Geneva Conventions in 1958 on the law of the sea constituted a new stage in the process of maritime delimitation. In accordance with Article 6.1 of the 1958 Convention on the Continental Shelf, the delimitation of the exclusive economic zone and continental

⁵ Resolution of the Presidium of the Central Executive Committee of the USSR, "On the declaration of the lands and islands in the Arctic Ocean as territory of the Union of SSR", April 15, 1926, "Izvestia VCIK", April 16, 1926.

⁶ The term "continental shelf" as a legal institution was introduced by the Truman Proclamation in September 1945, where the US President stated that mineral resources of the US continental shelf are under the jurisdiction of the US Government. The US Presidential Proclamation 2667 of September 28, 1945, "Policy of the United States With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf", September 28, 1945, 10 Fed. Reg. 12303; XIII Bulletin, Dept. of State, No. 327, September 30, 1945, p. 485. See, e.g., R. Anand, *Origin and Development of the Law of the Sea*, Martinus Nijhoff Publishers, the Hague: 1982, pp. 163-166. See also, R. Jensen, *Kontinentalsokkelens avgrensning utenfor 200 nautiske mil: Norske og russiske perspektiver i de nordlige havområder*, 66(4) Internasjonal Politikk (2008), p. 565.

⁷ See e.g., Art. 5 of *Accordo italo-turco relativo alla delimitazione delle acque territoriali tra l'Isola di Castelrosso e la Costa d'Anatolia* (Italo-Turkish Agreement on the delimitation of territorial waters between the island of Kastellorizo and the coast of Anatolia), Regio Decreto Legge 14 Aprile 1932, N. 379. Text available at <http://www.hri.org/MFA/foreign/bilateral/italturb.htm>; see also, Treaty between His Majesty in respect of the United Kingdom and the President of the United States of Venezuela relating to the submarine areas of the Gulf of Paria, signed on February 26, 1942, UNTS 4829, Art. 3.

shelf is carried out in accordance with median line, unless special circumstances are present. At the same time it should be noted that in accordance with the provisions of the 1958 Convention on the Continental Shelf delimitation was done primarily on the basis of an agreement between states. Also, the 1958 Convention on the Territorial Sea and Contiguous Zone provided that delimitation should be carried out through the median line unless an agreement between the states otherwise is concluded. A delimitation based on median line can be changed in cases when so-called “special circumstances” are present. The *travaux préparatoires* of the 1958 Conference on the Law of the Sea demonstrate that originally the concept of “special circumstances” referred to a delimitation that leads to an equal partition of the disputed areas.⁸

The earlier procedures on delimitation were based on customary rules and practice, but this changed after the adoption of the 1958 Convention. It should be noted that the Convention was the first international legal instrument that provided rules on the delimitation of continental shelf. The adoption in 1958 of the Convention on the Continental Shelf and the Convention on the Territorial Sea and Contiguous Zone significantly strengthened the role of the median line as the main method of delimitation of maritime areas. Such a situation did not last long however, because state practice began to later question the median line status as the main method of delimitation. Moreover, though the median line was the most common method of carrying out delimitation, the Convention on the Law of the Sea of 1982 (hereinafter “UNCLOS”)⁹ does not directly state (as opposed to the Convention of 1958) that the median line should be applied during the delimitation procedure.

In accordance with the provisions contained in both UNCLOS and the 1958 Convention on the Territorial Sea and Contiguous Zone and the 1958 Convention on the Continental Shelf, delimitation of marine areas should be performed based on bilateral agreements between the states concerned. Both parties should reach agreement on this issue through negotiations conducted in good faith. The 1958 Convention on the Continental Shelf provides the legal ground for the median line delimitation of the continental shelf and exclusive economic

⁸ See e.g., A. O. Elferink, *The Law of maritime boundary delimitation: a case study of the Russian Federation*, Martinus Nijhoff Publishers, Dordrecht: 1994, pp. 19-25. U. Leanza, *La delimitation du plateau continental et la zone économique exclusive: une introduction*, in: D. Pharand, U. Leanza, *The continental shelf and the exclusive economic zone*, Martinus Nijhoff Publishers, Dordrecht: 1993, pp. 37-45.

⁹ United Nations Convention on the Law of the Sea, December 10, 1982, 1833 UNTS 396.

zone. The subsequent practice of maritime delimitation showed parties putting forward claims justified by the application of the median line.¹⁰

Articles 74 and 83 of UNCLOS provide that the delimitation of the continental shelf and exclusive economic zone should be performed by agreement according to international law in such a way that the outcome of the delimitation would be a fair solution for both parties. This is a more comprehensive approach than was provided for in the 1958 Convention and constitutes the rule applied in cases where coastal states are opposite or adjacent to each other. However, in the case of delimitation of the territorial sea between States with coasts that are opposite or adjacent to each other, “neither of the two States is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two States is measured”. This rule, embodied in Article 15 of UNCLOS, does not apply in cases of historical title or other special circumstances where the delimitation of the territorial waters of both states can be performed in another way other than using the median line.

It should be noted that a substantial part of the UNCLOS provisions evolved from international customary law, *inter alia*, the principle of just delimitation. The international practice of maritime delimitation confirmed that the contemporary rules of the law of the sea include several elements that are rooted historically in international custom.¹¹ Owing to the ambiguous practice of carrying out delimitation, UNCLOS does not establish any specific rules on either the delimitation of the continental shelf or the exclusive economic zone. It should be also noted that the Convention has confirmed and consolidated the status of the median line as the main method for carrying out the delimitation of territorial sea in the absence of special circumstances (Article 15). UNCLOS provides that during the delimitation of the EEZ and continental shelf, one should strive to achieve an equitable solution (Articles 74.1 and 83.1, respectively). The delimitation of maritime areas (territorial waters, EEZ, and continental shelf) should be performed using a single line, regardless of their status. The International Court of Justice (hereinafter “ICJ”) noted that “the court observes that the concept of a single maritime

¹⁰ See, e.g., D. Colson, R. Smith, *International Maritime Boundaries*, Vol. V, Martinus Nijhoff Publishers, Leiden: 2005, pp. 3200-3202.

¹¹ *Award of the Arbitral Tribunal in case between Eritrea v. Yemen (second stage)*, PCA 17 December 1999, p. 40, para. 130 (available at <http://www.pca-cpa.org/upload/files/EY%20Phase%20II.PDF>); *Case concerning the continental shelf (Libya v. Malta)* [1985], ICJ Reports 1985, p. 30, para. 27.

boundary does not stem from multilateral treaty law but from State practice, and it finds its explanation in the wish of States to establish one uninterrupted boundary line delimiting the various – partially coincident – zones of maritime jurisdiction appertaining to them.”¹²

International judicial practice proves that the procedure for delimitation is based mostly on the median line, while the burden of proof for showing the presence of special circumstances rests with the state which argues the existence of such circumstances.¹³ It should also be noted, however, that international practice has shown that the use of the median line in the course of the delimitation procedure is not a settled *a priori* conclusion, which has also been proven in international jurisprudence. A similar opinion was expressed by the ICJ in the delimitation of the continental shelf in the North Sea. In that case, the ICJ did not refer to the median line, and it stated that justice “... finds its objective justification in considerations lying not outside but within the rules.”¹⁴ Here one may ask whether such an approach is applicable to the formula of “equitable solution”. In the same case the ICJ actually favored using perpendiculars as a method of delimitation. The use of perpendiculars is to a large extent similar (but not identical) to sectoral delimitation.¹⁵ It seems reasonable to ask whether the concept of “justice” should be interpreted in terms of equitable delimitation or in the sense of legality and reliance on legal rules, as was stated in *Grisbådarna* case.¹⁶

Taking into account the analysis of international practice with regard to the delimitation of maritime areas (territorial waters, EEZ and the continental shelf), it should be noted that there are three stages to the delimitation procedure, as was confirmed in the *Libya v. Malta* judgment, as well as in the *Qatar v. Bahrain* case.¹⁷ The first stage refers to the choice of which delimitation method will be used as the main one in the final delimitation.

The second stage of the delimitation procedure takes into account the existence of special/relevant circumstances. This issue was acknowledged in the

¹² *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain) (Merits)* [2001] ICJ Reports 2001, p. 93, para. 173.

¹³ N. Antunes, *Towards the Conceptualisation of Maritime Delimitation: Legal and Technical Aspects of a Political Process*, Brill Academic Publishers: Leiden, 2003, p. 34.

¹⁴ *North Sea Continental Shelf cases (Germany v. Denmark/Netherlands)* [1969] ICJ Reports 1969, p. 49, para. 88.

¹⁵ *Ibidem*, p. 46, paras. 81-85.

¹⁶ *Award of the Arbitral Tribunal in Grisbådarna case (Sweden v. Norway)*, PCA 23 October 1909, p. 5 (available at <http://www.pca-cpa.org/upload/files/EY%20Phase%20II.PDF>).

¹⁷ *Case concerning the Continental Shelf (Libya v. Malta) (final judgement)* [1985] ICJ Reports 1985, pp. 46-48, paras. 60-64; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Merits)*, p. 94, para. 176.

delimitation of the continental shelf between the Norwegian island of Jan Mayen and Greenland. The ICJ noted that the 1958 Conventions on the Territorial Sea and Contiguous Zone and on the Continental Shelf require the examination of special circumstances, while according to customary law it is important to take into account relevant circumstances in order to achieve a just delimitation result.¹⁸ The interpretation of the term “special circumstances” before the entry into force of UNCLOS was applied on the basis of treaty law, while the interpretation of “relevant circumstances” evolved from customary law. UNCLOS uses the definition “special circumstances” only with regards to territorial waters, whereas as regards maritime areas beyond territorial waters, the Convention uses the term “relevant circumstances”.¹⁹ The question here arises whether these two types of circumstances can be regarded as similar and could be applied to the entire set of delimitation processes of marine areas, i.e. territorial waters, exclusive economic zones, and continental shelf. The delimitation line between the states constitutes a single delimiting line for all maritime areas that are subject to partition, and “special” and “relevant” circumstances cannot be applied separately despite the formal distinction in their wording.²⁰

The ICJ on several occasions has expressed its position regarding the interpretation of “relevant” and “special” circumstances.²¹ A set of factors are taken into consideration while carrying out the delimitation: the geology and geomorphology of the bottom (for the delimitation of maritime areas over 200 nautical

¹⁸ *Case concerning Maritime delimitation between Greenland and Jan Mayen (Denmark v. Norway)* [1985] ICJ Reports 1985, p. 62, paras. 54-56. In the *Case concerning the Delimitation of the Continental Shelf*, the Court stated that the median line and special circumstances cannot be applied separately from each other (*Case concerning the Delimitation of the Continental Shelf (France v. United Kingdom)* [1978] 31 ILM 1149 (1992), p. 1169, para. 70).

¹⁹ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras) (Merits)* [2007] ICJ Reports 2007, p. 39, paras. 103-104. In the *Maritime Delimitation and Territorial Questions between Qatar and Bahrain* case, the ICJ stated that special circumstances concern territorial sea while relevant circumstances, which evolved from the international judicial practice after 1958, refer to the exclusive economic zone and continental shelf (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, p. 111, para. 229).

²⁰ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, p. 93, para 171.

²¹ *Case Concerning maritime delimitation in the area between Greenland and Jan Mayen (Denmark v. Norway)*, p. 28, para. 55; *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, p. 75, para. 229; see also, L. Sohn, *The Use of Geophysical Factors in the Delimitation of Maritime Boundaries*. in: J. Charney, L. Alexander (eds.), *International Maritime Boundaries*, Vol. II, Martinus Nijhoff Publishers, Leiden: 1996, pp. 163-202.

miles from the baselines),²² access to mineral resources,²³ coastline configuration and its length,²⁴ historic title,²⁵ and safety considerations.²⁶

During the third stage of the delimitation procedure the length and shape of the coastline are taken into account in relation to the surface of the marine areas subject to partition. If the disparity between the length of the state coastline and their marine areas is large, the competent adjudicating authority can determine whether these disparities may constitute circumstances to be taken into account to achieve a fair delimitation result.²⁷ It should be noted that in international jurisprudence the disproportions do not always impact on the final decision.²⁸

²² In the *Continental Shelf* case the ICJ stated that the geological and geomorphological arguments are not relevant in the case of delimitation between opposite coasts that lie less than 400 miles from each other (*Continental Shelf case (Libya v. Malta) (final Judgement)* [1985] ICJ Reports 1985, p. 35, para. 39).

²³ The ICJ on several occasions took into account the mineral resources when delimiting the continental shelf: *Case concerning delimitation of the maritime boundary in the Gulf of Maine area (Canada v. U.S.A.)* [1984] ICJ Reports 1984, p. 101, para. 239; *North Sea Continental Shelf* cases, p. 21, para 17; *Case Concerning the Land and Maritime boundary between Cameroon and Nigeria (final Judgement)* [1998] ICJ Reports 1998, pp. 138-140, paragraphs 282-283; *Arbitration between Barbados and the Republic of Trinidad and Tobago, relating to the delimitation of the exclusive economic zone and the continental shelf between them, decision of 11 April 2006 (Barbados v. Trinidad and Tobago)* [2006] RIAA, Vol. XXVII, p. 214, para. 241. It is possible to conclude that the fact of the presence of mineral resources within the disputed areas does not constitute a special/relevant circumstance until such time as the parties cannot agree on their mode of exploration.

²⁴ In several cases the ICJ expressed its opinion on the coastline configuration and its length and its impact on the final delimitation: *North Sea Continental Shelf* cases, pp. 50-51 paras. 89-91; *Case concerning delimitation of the maritime boundary in the Gulf of Maine area*, p. 93, para. 220; *Maritime Delimitation in the Black Sea (Ukraine v. Romania)* [2009] ICJ Reports 2009, pp. 129-130, paras. 213-214; *Case concerning Maritime delimitation between Greenland and Jan Mayen*, p. 34, para. 68; *Case concerning the Continental Shelf*, p. 56, para. 78.

²⁵ Art. 15 of the Convention on the Territorial Sea, April 9, 1958 516 UNTS 205. In the *Eritrea v. Yemen* arbitration, the arbitral court stated that the long period of use (*longa possessio*) is an important condition in the determination of historical rights (*Award of the arbitral tribunal in the first stage of the proceedings between Eritrea and Yemen* [1998] 114 ILR, p. 125, para. 450).

²⁶ The argument of security was not accepted since the delimitation took place far from the coastline of the states. See e.g., *Case concerning the Continental Shelf*, p. 52, para. 73.

²⁷ *Award in the Canada-France Maritime Boundary Arbitration (Canada v. France)* [1992] 31 ILM 1148 (1992), p. 62, para. 56.

²⁸ This took place in the *Maritime delimitation in the Black Sea* case (*Maritime delimitation in the Black Sea case (Ukraine v. Romania)* [2009] p. 130, paras. 215-216). In the previous cases, such as the *Case concerning Maritime Delimitation between Greenland and Jan Mayen* and the *Case concerning the Continental Shelf*, the ICJ took into consideration

It should also be noted that in the practice of delimitation of the continental shelf between States with adjacent coasts, various forms of perpendiculars are used, corresponding to an equitable delimitation of the maritime area. The median line (as well as sectoral) forms a perpendicular line that in the vast majority cases links the points established by the parties, taking into account the special/relevant circumstances. Such delimitation should in any case correspond to a fair final delimitation. In the *Gulf of Maine* case, the ICJ ruled that “delimitation is to be affected by the application of equitable criteria and by the use of practical methods capable of ensuring, with regard to the geographic configuration of the area and other relevant circumstances, an equitable result.”²⁹

The delimitation of Arctic marine areas does not constitute an exception to the generally accepted principles of delimitation, even though it has its specific characteristics, in particular its location in relatively close proximity to the North Pole, the disputed status of the adjacent to Svalbard waters, the sparse population, and the length and configuration of the coastline. Delimitation with the help of sector division is a quite logical and historically developed form, though it is still not the only unique method of delimitation. A significant aspect of the sector concept is that it represents an important stage in the delimitation and, like the median line, can be used for the initial delimitation. Having regard to the delimitation of the Arctic it is worth focusing on the concept of bisector division, as described by the ICJ in the *Nicaragua v. Honduras* case.³⁰ In that case the ICJ admitted that the median line may not always be used for the initial delimitation.³¹ It is possible

the disproportions between the length of coastlines in both instances (as 1 to 9 and 1 to 8 correspondingly). A similar qualification was made by the arbitral court in the Award in the *Canada-France Maritime Boundary Arbitration*. In this case the question was not the proportionality between the maritime area and the length of the coastline, but the just proportion. See also, *Guinea/Guinea Bisau Maritime Delimitation Arbitration (Guinea v. Guinea Bisau)* [1985] 25 ILM 251 (1986), pp. 183-184, paras. 94-95. It should be noted as well that the appropriate judicial institution may not consider the presence of small isles within maritime areas that are subject to delimitation or diminish their presence, and may not grant their own maritime areas out of territorial waters (*Maritime delimitation in the Black Sea case*, p. 122, para. 185).

²⁹ *Case concerning delimitation of the maritime boundary in the Gulf of Maine area*, pp. 57-58, para. 112.

³⁰ *Case concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, pp. 90-91, paragraphs 284-285. See also, *Case concerning delimitation of the maritime boundary in the Gulf of Maine area*, pp. 87-88, paras. 199-201, *Continental Shelf case (Tunisia v. Libya) (final judgement)* [1982], ICJ Reports 1982, pp. 71-72, para. 121.

³¹ *Case concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*, pp. 88-89, para. 280.

therefore to conclude that the sector delimitation and its derivatives constitute methods of initial delimitation equal in their status to that of the median line. At the same time it should be stressed that in each case the demarcation of marine areas should be analyzed separately, and the use of sectoral lines is rather a stage than the final result of delimitation.

2. DEVELOPMENT OF THE MARITIME DELIMITATION PROCESS IN THE BARENTS SEA. THE NORWEGIAN-RUSSIAN MARITIME BOUNDARY DISPUTE

The Barents Sea forms part of the Arctic Sea and covers about 1.4 million km². Altogether the disputed area measured approximately 175.000 km². The post-World War II concept of continental shelf as a legal institution and the concept of a 200 nautical mile EEZ provoked the need to delimit maritime areas between the Soviet Union (and its successor, the Russian Federation) and Norway. It should be noted that before the concept of EEZs emerged during the 1970s the Norwegian-Russian maritime boundary dispute was limited to the delimitation of both states' continental shelves.

The history of the maritime delimitation process and boundary disputes in the Barents Sea is quite long. In 1957, Norway and the Soviet Union agreed on their first maritime boundary and concluded an agreement – known as the “Varangerfjord Agreement” – which delimited most of the Varangerfjord area and established the maritime boundary between the territorial seas of mainland Norway and the Soviet Union.³² The Varangerfjord agreement contains two straight line segments. The first segment delimits the territorial sea between the two states, and the other segment runs from the end point of the territorial sea boundary to the middle point of the Varangerfjord closing line. Following the regulation provided for in the 1958 UN Convention on the Continental Shelf, both states claimed exclusive rights to their continental shelves. Norway put in a formal claim to its continental shelf in 1963, issuing its Royal Decree of 31 May 1963.³³

³² Agreement concerning the Sea Frontier between Norway and the USSR in the Varanger Fjord of February 15, 1957, 312 UNTS 4523. Descriptive Protocol relating to the Sea Frontier between Norway and the USSR in the Varanger Fjord of February 15, 1957, 312 UNTS 4523.

³³ “The sea-bed and the subsoil in the submarine areas outside the coast of the Kingdom of Norway are under Norwegian sovereignty as regards exploitation and exploration of natural resources, as far as the depth of the superjacent waters admits of exploitation of natural resources, within as well as outside the maritime boundaries otherwise applicable,

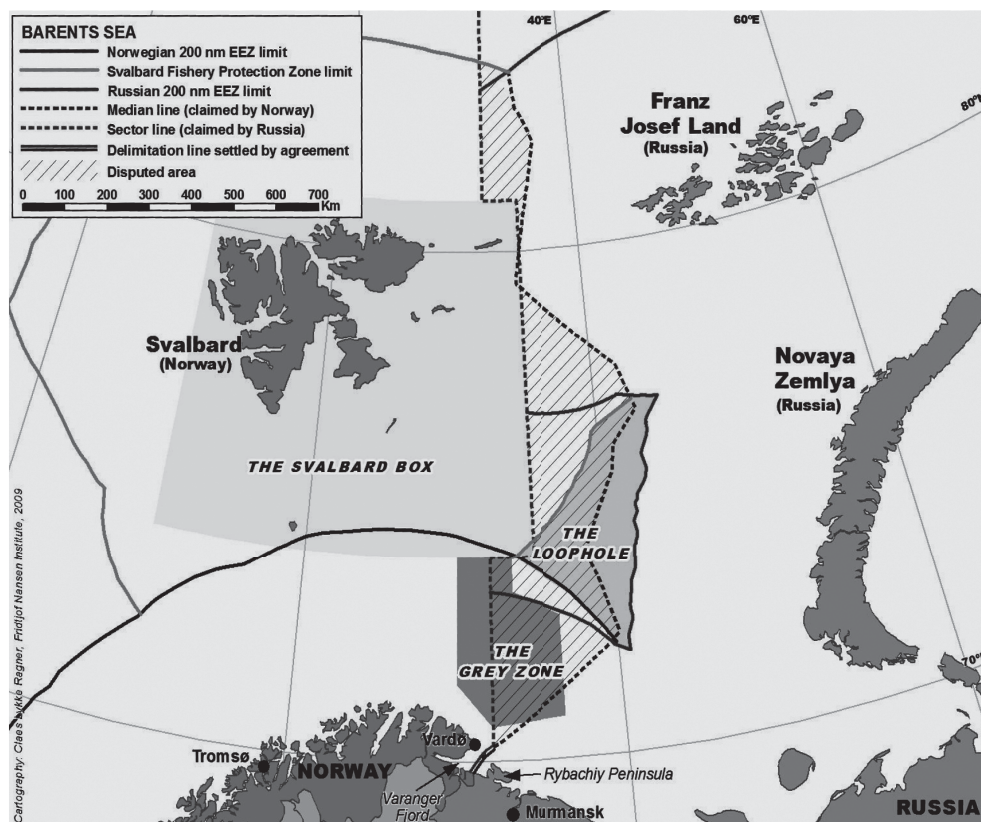


Figure 1. Map of the legal positions of Norway and the Russian Federation in the Barents Sea

Source: P. J. Aasen, *The Law of Maritime Delimitation and the Russian-Norwegian Maritime Boundary Dispute*, Lysaker: 2010, p. 71.

Five years later the Soviet Union also made a formal claim to its continental shelf, issuing the Decree of the Presidium of the Supreme Soviet of the USSR of February 6, 1968. Large parts of the Barents Sea's seabed were seen as constituting continental shelf pursuant to the 1958 Convention, and therefore the need arose for a bilateral maritime delimitation agreement resolving boundary disputes between the two states. Both states entered into informal talks in 1970.³⁴ The formal

but not beyond the median line in relation to other states", Royal Decree of May 31, 1963 Relating to the Sovereignty of Norway over the Sea-Bed and Subsoil outside the Norwegian Coast.

³⁴ K. Kubiak, *Interesy i spory państw w Arktyce* (States' interests and disputes in the Arctic), Wydawnictwo Naukowe Dolnośląskiej Szkoły Wyższej, Wrocław: 2009, pp. 84-85.

negotiations concerning the delimitation of maritime borders between Norway and the Soviet Union commenced in 1974. The applicable law at that time was Article 6 of the 1958 Convention on the Continental Shelf, and both states agreed to conduct the negotiation process on the basis of its provisions related to median line delimitation.³⁵ At the core of the issue were competing claims from both parties to a disputed area of about 175,000 km², of which 155,000 km² was located within the Barents Sea and 20,000 km² just north of it (in the Arctic Ocean).³⁶ Significantly, the southern part of the disputed area has one of the world's best fisheries. There are also very large quantities of oil and gas in this region.³⁷

As mentioned above, initially the negotiations were concerned only with the delimitation of the continental shelf. In 1977 Norway and the Soviet Union made their respective claims with regard to the maritime areas in the Barents Sea, i.e., they established their respective claims to EEZs. The establishment of 200 nm EEZs complicated the negotiation process. Since that time, the negotiations concerned both the delimitation of the EEZs and the fishery zones. In addition, the overlapping EEZ claims were not resolved. From the start of the negotiations, both parties held different opinions with regard to the demarcation line. By reason of the widely varying stances of the two parties, the negotiations became more complicated, which resulted in turning them into a very long and difficult process. Norway based its claims on the median line principle and its position was that the equidistance line should form the appropriate maritime boundary in accordance with international law. The Soviet Union (and its successor the Russian Federation), on the other hand, advocated for the sector line solution³⁸. Throughout the negotiation process the Russians argued that the sector line along the longitude 32° 4' 35' E forms an appropriate delimitation line in accordance with international law. In the opinion of the Russians, there were so-called "special circumstances," as per Article 6 of the 1958 Continental Shelf Convention, which

³⁵ Article 6 of the 1958 Continental Shelf Convention stipulates that the boundary is the median line unless another boundary is justified by so-called "special circumstances". Convention on the Continental Shelf (adopted April 29, 1958, entered into force June 10, 1964) 1958 499 UNTS 311.

³⁶ P. J. Aasen, *The Law of Maritime Delimitation and the Russian-Norwegian Maritime Boundary Dispute*, Fridtjof Nansen Institute Report 1/2010, Lysaker: 2010, p. 68.

³⁷ L. Łukaszuk, *Współpraca i spory międzynarodowe na morzach, wybrane zagadnienia prawa, polityki morskiej i ochrony środowiska* (Cooperation and international disputes on seas. Selected issues in law, maritime politics and environmental protection), Difin, Warszawa: 2009, p. 108.

³⁸ G. Hønneland, *Kompromiss als Routine: Russisch-Norwegische Konfliktlösung in der Barentssee* (Compromise as Routine: Russian-Norwegian Conflict Resolution in the Barents Sea), 2-3 Osteuropa (2011), p. 260.

justified deviating from the median line. The Russians considered that the special circumstances should lead to a boundary following the sector line originated in the above-mentioned 1926 Soviet Decree, which laid claim to the sector principle and declared that all territory within two designated eastern and western meridians were part of the Soviet Union.³⁹ The Russians argued that the Decree itself constitutes the maritime boundary and used it in the delimitation dispute with Norway. This point of view seems to be entirely unjustified because there is no mention of sovereignty over maritime zones in the 1926 Soviet Decree, and in addition at the time the concept of maritime zones had not been established in international law. The 1926 Soviet Decree thus could not be considered as a justified and rightful claim to maritime zones in the Barents Sea, as they did not exist at the time when the decree was issued and adopted.⁴⁰ Furthermore, the wording of the 1926 Soviet Decree indicates that the decree proclaimed sovereignty only over islands situated east of line drawn from the westernmost point of Russia up to the North Pole and a similar line drawn from the easternmost point.⁴¹ The Russians consistently referred to “special circumstances” of both a geographical nature (configuration of the coast, disproportionality between the comparative lengths of coastlines) and non-geographical nature (greater population in Russia, economic and security interests, unequal distribution of fishing resources, ice conditions, presence of islands and rocks, special environmental risks, geological conditions, and the existence of the Svalbard Treaty and its special status in international law). Norway on the other hand consistently contended and argued that there are no special circumstances in the disputed area. The Norwegians also objected to the Russian stance that special circumstances would justify any adjustment of the equidistance line and did not agree to the Russian assertion that the sector line should form the maritime boundary.

³⁹ The 1926 Soviet Decree stated: “[a]ll lands and islands, both discovered and which may be discovered in the future, which do not comprise at the time of publication of the present decree the territory of any foreign state recognized by the Government of the USSR, located in the northern Arctic Ocean, north of the shores of the Union of Soviet Socialist Republics up to the North Pole between the meridian 32°04'35" E. long. from Greenwich, running along the eastern side of Vaida Bay through the triangular marker on Cape Kekurskii, and the meridian 168°49' 30" W. long. from Greenwich, bisecting the strait separating the Ratmanov and Kruzenstern Islands, of the Diomedé group in the Bering Sea, are proclaimed to be territory of the USSR”, L. Timtchenko, *The Russian Arctic Sectoral Concept: Past and Present*, 50(1) Arctic (1997), p. 30.

⁴⁰ Aasen, *supra* note 36, p. 72.

⁴¹ A. T. Falkanger, *International Law in the Arctic: Sovereignty and Delimitation Issues from a Norwegian Perspective*, in J. P. Rui (ed.), *Retts hjelp fra kyst til vidde – Festskrift til Jusshjelpa i Nord-Norge 20 år*, Gyldendal Akademisk, Oslo: 2009, p. 131.

It is worth mentioning that there was no shelf-activity at the time, and therefore there was no urgent need at that time to settle this border dispute. However, in January 1978 the parties concluded a provisional and temporary arrangement regulating fishing activities in parts of the disputed area.⁴² This interim arrangement – called the “Grey Zone Agreement” – covered an area within 200 nm from the mainland coast of both countries. The “grey zone” included 67,500 km², of which 41,500 km² was located in the disputed area.⁴³ Under the provisions of the Grey Zone Agreement each party was entitled to exercise jurisdiction solely over fishing vessels flying its own flag. It also contained regulations related to third-country fishing vessels. Both states agreed to draw a single maritime boundary for the continental shelf and the EEZ, but they could not reach a consensus on the boundary line. The Grey Zone Agreement was initially limited to one year, but since its adoption it has been regularly extended on a yearly basis. The agreement was a classic mechanism of control over the management and conservation of fish stocks in international or disputed waters.⁴⁴ The Grey Zone Agreement was a provisional solution regulating fishing activities, which was the most pressing issue at the time. Throughout the following years there were periodic suspensions and resumptions of the negotiation process. Many factors influenced each state’s approaches to the boundary question. Both parties ratified UNCLOS (Norway in 1996 and Russia in 1997). This led to modifying the rules applicable to the delimitation of the continental shelf and the EEZ. Since then, the provisions of Articles 73 and 84 of UNCLOS were applicable to the dispute. At this stage of negotiations the parties agreed that their objective was to establish a single boundary for the EEZ and the continental shelf in the areas within 200 nm from their relevant coastlines.⁴⁵

⁴² Avtale mellom Norge og Sovjetunionen om en midlertidig praktisk ordning for fisket i et tilstøtende område i Barentshavet med tilhørende protokoll og erklæring (Agreement Between Norway and the Soviet Union on a Temporary and Practical Arrangement for the Fishery in an Adjacent Area of the Barents Sea), Oslo, January 11, 1978, entered into force April 27, 1978, *Overenskomster med fremmede stater* (1978), 436.

⁴³ The 67,500 square kilometres of “Grey Zone” comprised the Loop Hole (Norwegian: Smutthullet), a high seas triangle bound by Russian EEZ, the disputed waters between both states, the Svalbard fishery zone and Norwegian EEZ. 23,000 km² are in undisputed Norwegian waters and 3,000 km² are in undisputed Russian waters. M. Laruelle, *International Law and Geographical Representations: The Russia Stance on Territorial Conflicts in the Arctic*, in L. Salmela (ed.), *Nordic Cooperation and the far North*, National Defence University, Helsinki: 2011, p. 28.

⁴⁴ *Ibidem*.

⁴⁵ T. Henriksen, G. Ulfstein, *Maritime Delimitation in the Arctic: The Barents Sea Treaty*, 42(1) *Ocean Development & International Law* 1 (2011), p. 2.

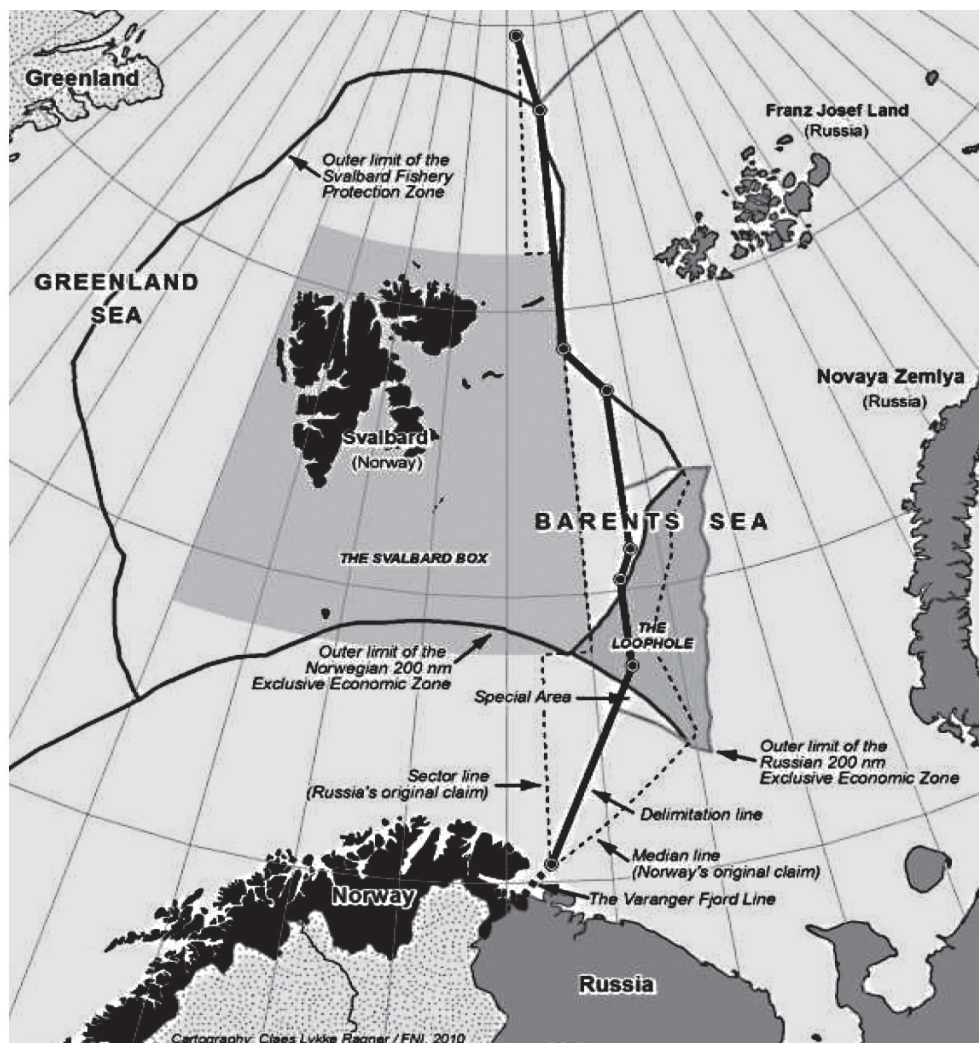


Figure 2. The delimitation line agreed in the Norwegian-Russian 2010 Agreement

Source: Ø. Jensen, *Current Legal Developments, The Barents Sea: Treaty between Norway and the Russian Federation concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean*, 26(1) *International Journal of Marine and Coastal Law* (2011), p. 153.

Throughout the 1990s and the first decade of the 2000s there were recurring tensions between the two states, particularly in the fisheries sector.⁴⁶ The unresolved maritime boundary dispute prompted numerous controversies and

⁴⁶ A. Moe, D. Fjærtøft, I. Øverland, *Space and Timing: Why was the Barents Sea Delimitation Dispute Resolved in 2010?*, 34(3) *Polar Geography* 145 (2011), p. 149.

flashpoints over the inspection and boarding of Russian fishing vessels by the Norwegian Navy. In 1988 the Soviet Union proposed a joint development zone for hydrocarbons, but this was rejected by Norway. In addition the negotiations were put on hold for a while due to the dissolution of the Soviet Union. In 2007 both parties agreed to update and supplement the Varangerfjord Agreement of 1957, which was seen as at least some progress. The Varangerfjord Agreement was revised mainly due to Norway's expansion of its territorial sea from four to 12 nm and the establishment of a 24 nm contiguous zone in 2004.⁴⁷ The parties agreed to extend the maritime boundary to a point approximately 30 kilometers from the terminus of the Varangerfjord. The median line and sector line cross at this point, and the southern part of the disputed area was established. The boundary agreed on in 2007 was consistent with a simplified median line.⁴⁸ Finally a decisive breakthrough in the negotiations was reached in 2010. After almost four decades of on-again, off-again negotiations, the parties concluded a definitive agreement in April 2010 during President Medvedev's visit to Norway. On April 27, 2010, the Norwegian and Russian Foreign Ministers signed a joint statement in Oslo, announcing that, following extensive negotiations that had covered all related issues, the two countries' negotiating delegations had reached a preliminary agreement on delimitation. The Foreign Ministers of both states announced in the 2010 Joint Statement that the negotiation process was completed and a tentative delimitation agreement had been achieved. On September 15, 2010 in Murmansk (Russia), they signed a formal treaty on maritime delimitation and cooperation in the Barents Sea and the Arctic Ocean. The new 2010 Delimitation Treaty defines a single maritime boundary that divides an overall disputed area of about 175,000 km².

3. THE 2010 BARENTS SEA DELIMITATION TREATY

The 2010 Agreement defines the maritime delimitation line by eight points (see the attached map in Figure 2). The delimitation line, which splits the disputed area nearly in half, is multi-functional. The single delimitation line applies both to the water areas (i.e. both states EEZs) and continental shelf in areas within and beyond 200 nm of their coast. According to the 2010 Joint Statement, the agreed delimitation line is in accordance with "international law in order to achieve an

⁴⁷ Aasen, *supra* note 36, p. 69.

⁴⁸ Henriksen et al, *supra* note 45, p. 4.

equitable solution". The delimitation line is a modified version of both states' former claims. The agreed-upon demarcation line lies, apart from certain deviations, practically half way between Norway's original median line claim and Russia's sector claim.⁴⁹ Both parties to the Barents Sea boundary dispute have made concessions in relation to their original positions in order to achieve the delimitation agreement. Thus the agreement may be rightly seen as a compromise solution. The final scope of the agreed delimitation line seems to have been influenced only partially and indirectly by the concept of special or relevant circumstances. According to the 2010 Joint Statement of both states' Foreign Ministers, the only factor which was taken into account was "the effect of major disparities in respective costal lengths."⁵⁰ However there are no references in the 2010 Delimitation Agreement either to the median line or to the sector principle. This does not mean that the delimitation process in the Barents Sea did not follow the existing state practice concerning maritime delimitation developed in recent years. Nonetheless there are some factors of a political nature that may have been taken into account during the delimitation process. The parties refer in the 2010 Joint Statement to "the course of long standing negotiations between the parties in order to reach agreement". This suggests that the political will to reach an appropriate agreement satisfying to both parties may have played a significant role in the Norwegian - Russian delimitation process.⁵¹ It seems that the final scope of delimitation line agreed upon in the 2010 Delimitation Treaty was based on a baseline measured from the Svalbard coast. While the issue of the terminology used in the 2010 delimitation agreement is rather of an academic nature, it is nevertheless still important. The Russians use the term "modified sector line" to describe the agreed boundary line, while the Norwegians prefer the term "modified median line".⁵² Both terms indirectly refer to Russia's and Norway's original claims made during negotiations. A special feature of the 2010 Delimitation Agreement is the establishment of a "Special Area" (Norwegian: "det særskilte området", Russian: "Специальный район"). Under Article 3 of the Treaty, Russia is entitled to sovereign rights and jurisdiction

⁴⁹ Ø. Jensen, *Current Legal Developments, The Barents Sea: Treaty between Norway and the Russian Federation Concerning Maritime Delimitation and Cooperation in the Barents Sea and the Arctic Ocean*, 26 (1) *International Journal of Marine and Coastal Law* 151 (2011), p. 153.

⁵⁰ The text of the joint statement is available at the webpage of the Norwegian Foreign Ministry: <http://www.regjeringen.no/upload/UD/Vedlegg/Folkerett/100427-FellesuutalelseEngelsk.pdf>.

⁵¹ Taking a longer view there are some other factors that may have served as drivers for finalizing the negotiations process and finally concluding of the 2010 Delimitation Treaty. National economic interests and strategic and security considerations are good examples, Moe et al, *supra* note 46, p. 146.

⁵² Henriksen et al, *supra* note 45, p. 7.

in this special area, which is an undisputed part of Norway's EEZ. This "special area" is located east of the delimitation line, within 200 nm of Norway's EEZ and beyond 200 nm of Russia's EEZ.⁵³ According to the construction agreed upon, Norway's sovereign rights to an area to which normally it would be entitled to under international law have been transferred to Russia. Since the special area fell on the Russian side of the maritime boundary, Norway is excluded from exercising jurisdiction in this area.⁵⁴ This special regulation made it possible for Russia to enjoy sovereign rights beyond its 200 nm EEZ. However, this exceptional agreement does not adjudicate the question of legal title to this area. It has also been stated that the regulation provided for in Article 3 does not imply any formal extension of Russian maritime areas.

It is unclear which arguments were taken into consideration during the negotiations concerning the establishment of the special area. Most likely, the parties' aim in establishing the special area was based on their will to settle on a harmonized maritime boundary. Another possible explanation is Russia's desire to exercise the same sovereign rights in the special area as in its continental shelf within 200 nm, without bearing any additional costs. The "special area" does not appear however as a wholly innovative construction under international law of the sea. Another example of this construction is provided in the 1990 agreement on the maritime boundary concluded between the USA and Russia. Both parties transferred to each other their sovereign rights and jurisdiction in the special area. It has also been stated that an exercise of sovereign rights and jurisdiction deriving from such an agreement does not constitute an extension of the exclusive economic zones or continental shelves of the state exercising the sovereign jurisdiction. This legal construction makes it possible for one state to have the right of usage over zones

⁵³ Article 3 of the 2010 Barents Sea Delimitation Treaty states:

"1. In the area east of the maritime delimitation line that lies within 200 nautical miles of the baselines from which the breadth of the territorial sea of mainland Norway is measured but beyond 200 nautical miles of the baselines from which the breadth of the territorial sea of the Russian Federation is measured (hereinafter 'the Special Area'), the Russian Federation shall, from the day of the entry into force of the present Treaty, be entitled to exercise such sovereign rights and jurisdiction derived from exclusive economic zone jurisdiction that Norway would otherwise be entitled to exercise under international law.

2. To the extent that the Russian Federation exercises the sovereign rights or jurisdiction in the Special Area as provided for in this Article, such exercise of sovereign rights or jurisdiction derives from the agreement of the Parties and does not constitute an extension of its exclusive economic zone. To this end, the Russian Federation shall take the necessary steps to ensure that any exercise on its part of such sovereign rights or jurisdiction in the Special Area shall be so characterized in its relevant laws, regulations and charts."

⁵⁴ Jensen, *supra* note 49, p. 154.

located beyond 200 nm and within the scope of an EEZ or continental shelf-zone within 200 nm of another state, without the CLCS's approval and the payment of those fees or contributions which are foreseen under the provisions of UNCLOS.

4. THE SVALBARD ARCHIPELAGO AND THE SVALBARD MARITIME ZONES CONTROVERSY – A STILL UNRESOLVED QUESTION

The 2010 Norwegian-Russian agreement leaves unresolved the question of maritime zones around Svalbard. The archipelago of Svalbard is situated midway between Norway and the North Pole (between 74° and 81° north latitude in the Arctic Ocean). The Svalbard islands – also known as Spitsbergen – were *terra nullius* until the conclusion of the Svalbard Treaty in 1920. The archipelago covers 61,000 km² in the Barents Sea. In 1924 the Soviet Union accepted Norway's sovereignty over Svalbard in exchange for the establishment of diplomatic relations with Oslo. In 1935 the Soviet Union ratified the 1920 Svalbard Treaty, which recognized Norway's full and absolute sovereignty over the Svalbard archipelago. The international controversy and disputes around Svalbard are threefold, and are linked to the question of the status of the maritime areas around Svalbard (Svalbard's Fisheries Protection Zone and the continental shelf around Svalbard), and the interpretation and the jurisdictional framework of the 1920 Svalbard Treaty. However, the main international controversy and the most fundamental dispute over Svalbard today concerns whether the provisions of the Svalbard Treaty apply to the continental shelf and waters beyond the territorial waters of Svalbard (12 nautical miles).

With regard to the question of the Norwegian-Russian dispute over Svalbard, both parties still disagree on whether Norway is entitled to establish new maritime zones around the archipelago and to exercise coastal state jurisdiction in these areas. There is also a disagreement between both parties about the scope of application of the Svalbard Treaty, and whether the other signatory parties are entitled to enjoy rights under it in maritime areas beyond the territorial waters of the archipelago. While the 2010 delimitation agreement does not refer to the Svalbard archipelago, it establishes a delimitation line between the Svalbard Fisheries Protection Zone and the Russian EEZ. It also delimits the continental shelf in the mid- and northern Barents Sea.⁵⁵ At the same time, Article 6 of the 2010 Barents Sea Delimitation Treaty provides that it does not prejudice any rights and obligations under other international treaties to which both the Kingdom of Norway

⁵⁵ Henriksen, et al., *supra* note 45, p. 9.

and the Russian Federation are parties. Therefore the question of the Svalbard Treaty's area of application and the legal status of Svalbard's maritime zones – the continental shelf and the Fishery Protection Zone (hereinafter “FPZ”) – still provoke controversy.

The preliminary question is whether Svalbard generates its own continental shelf. Norway's traditional stance on this question has been that the continental shelf around Svalbard is a natural prolongation of mainland Norway,⁵⁶ and that Svalbard does not generate its own continental shelf.⁵⁷ Nevertheless, Norway's position seems to have been changed taking into account the recent delimitation practices it has been involved in. First of all one should mention the maritime boundary agreement of February 20, 2006 between Denmark and Norway. The procedure of this delimitation seems to be based on the method of equidistance line between the nearest base points, based on the coastlines of Svalbard and Greenland. The 2010 delimitation procedure in the Barents Sea seems also to be based on the base line measured from the coast of Svalbard. This indicates that both parties to the 2010 Norwegian-Russian agreement implicitly recognized Svalbard's ability to generate its own continental shelf,⁵⁸ which means that the

⁵⁶ This is a rather problematic question. From a geological and geomorphological standpoint, the Archipelago of Svalbard sits on a continental shelf. The natural prolongation of mainland Norway's continental shelf is rather not possible because south of Bear Island the Barents Through cuts the Norwegian mainland shelf in two, U. Jenisch, *Arktis und Seerecht*, 2-3 Osteuropa (2011), p. 67.

⁵⁷ Naturally there was no mention of the continental shelf and another maritime areas in the Svalbard Treaty, the simple reason being that the concept of maritime zones such as continental shelf, EEZ, FPZ (known in modern international law of the sea) was unknown to the signatory parties of the Svalbard Treaty. As we know, the concept of maritime zones was developed and legally formalized after World War II. *See also*, M. Ruud, G. Ulfstein, *Innføring i folkerett*, Universitetsforlaget, Oslo: 2006, pp. 159-161.

⁵⁸ If Svalbard does not have its own continental shelf it would be rather impossible to determine basepoints based on the coastlines of Svalbard. One of the best known Norwegian experts in international law, Geir Ulfstein, argues that the part of Norway's claims presented in its submission to the Commission on the Limits of the Continental Shelf relates to an area which is located beyond 200 miles (measured from Svalbard) north of Svalbard. If Svalbard does not generate its own continental shelf the area claimed by Norway would have to be delimited from the Norwegian mainland, not from Svalbard. In addition, if Svalbard can generate a 200-mile FPZ (as Norway has claimed since 1977), all the more it has ability to generate its own continental shelf (separate from mainland's continental shelf), the reason being that a state may have a continental shelf without an EEZ, but it cannot have an EEZ without a continental shelf (as was stated by the ICJ in the *Libya/Malta* case, 1985 ICJ Rep. 18 at 33, para. 34). In the opinion of the authors of this article it is hard to disagree with Ulfstein's argumentation. For a detailed discussion of this topic, *see generally*, G. Ulfstein,

continental shelf around Svalbard is a Svalbard shelf, not a mainland shelf.⁵⁹ In the event Svalbard has its own continental shelf, then obviously the Norwegian mainland shelf and Svalbard shelf have to be delimited. This problem does not seem incapable of resolution and could be solved by administrative means, applying the rules of international law by analogy. Several states have delimited continental shelves between some of their coastal provinces. As examples one could mention the Canadian provinces of Newfoundland and Nova Scotia, or the United Kingdom, which has determined maritime boundaries between Anguilla and the British Virgin Islands and between Guernsey and Jersey.⁶⁰ The scope of the delimitation line agreed upon in the 2010 Treaty supports the assertion that Svalbard does indeed generate its own shelf. The agreed delimitation line is considerably closer to the equidistance line measured between Svalbard and the Russian provinces Novaya Zemlya and Franz Josef Land than to the equidistance line between the Norwegian mainland (measured from province Finnmark) and Russian coastal provinces. The main controversy over the Svalbard continental shelf may thus be seen as a legal conflict arising from differences in interpretation of the Svalbard Treaty.⁶¹

Another issue that has been a source of international controversy is the 200 mile FPZ around Svalbard. The concept of fisheries zones established beyond the territorial sea became part of international law on the basis of state practice in the 1960s and 1970s.⁶² The Svalbard fisheries protection zone was established in 1977 by the May 23 Royal Decree. The FPZ around Svalbard is subject to a unique form of limited jurisdiction aimed at ensuring the effective conservation of fish stocks on a nondiscriminatory basis among states whose vessels have a history of fishing in the area. This zone could be characterized as either a fisheries zone or a limited type of economic zone.⁶³ Since the very beginning Russia and some other states have been contesting the Norwegian claims to maritime zones around Svalbard. Russia has questioned the legal basis for Norway's claimed jurisdiction over

R. Churchill, *The Disputed Maritime Zones Around Svalbard*, in M. H. Nordquist, J. N. Moore, T. H. Heidar (eds.), *Changes in the Arctic Environment and the Law of the Sea*, Martinus Nijhoff Publishers, Leiden: 2010, pp. 588-592.

⁵⁹ G. Ulfstein, *The Svalbard Treaty. From Terra Nullius to Norwegian Sovereignty*, Scandinavian University Press, Oslo: 1995, p. 422.

⁶⁰ D. H. Anderson, *The Status Under International Law of Maritime Areas Around Svalbard*, Ocean 40 Development and International Law 373 (2009), p. 378.

⁶¹ T. Pedersen, *The Svalbard Treaty Continental Shelf Controversy: Legal Disputes and Political Rivalries*, 37 Ocean Development and International Law 339 (2006), p. 353.

⁶² W. Czapliński, A. Wyrozumska, *Prawo międzynarodowe publiczne, zagadnienie systemowe* (Public international law, systemic issues), C.H. Beck, Warszawa: 2004, p. 157.

⁶³ Anderson, *supra* note 60, p. 378.

geographical areas not specified by the Svalbard Treaty.⁶⁴ Russia and Norway have also taken opposite positions concerning the jurisdictional reach of the Svalbard Treaty. Norway argues that the Treaty has to be interpreted according to its wording and cannot apply to areas located beyond the 12 nm territorial sea. Russia on the other hand claims that Norwegian sovereignty over Svalbard is limited to the provisions of the Paris Treaty, and that Svalbard maritime zones should be subject to the administration and jurisdiction of the signatory parties to the Svalbard Treaty. Finally, Norway and Russia still disagree on whether the equal treatment rights guaranteed by the provisions of the 1920 Svalbard Treaty apply to the waters and maritime zones around Svalbard.

At the present time the above issues regarding Svalbard are not pressing questions, but the increasing interest in exploring and exploiting natural and petroleum resources, as well hydrocarbon-related activities outside Svalbard, may well create the need to resolve the legal questions relating to this archipelago in the near future.⁶⁵ Undoubtedly the increasing focus of the international community on this region is motivated by economic factors. The 2010 Norwegian – Russian delimitation agreement did not resolve a set of complicated questions relating to international law concerning the Archipelago of Svalbard,⁶⁶ the main and fundamental reason being that Russia still does not recognize Norway's claims and jurisdiction in maritime areas around Svalbard.⁶⁷ In all likelihood, the final settlement of the maritime dispute in the Barents Sea will, on one hand, consolidate the FPZ established by Norway around Svalbard, and on the other it will strengthen Norway's claims to the Svalbard continental shelf.

⁶⁴ Pedersen, *supra* note 61, p. 354.

⁶⁵ T. Neumann, *Norway and Russia Agree on Maritime Boundary in the Barents Sea and the Arctic Ocean*, 14(34) American Society of International Law Insight 1 (2010).

⁶⁶ See also e.g., J. Symonides, *Delimitacja obszarów morskich na Morzu Barentsa i Oceanie Arktycznym między Rosją a Norwegią* (Delimitation of maritime areas on the Barents Sea and Arctic Ocean between Russia and Norway), in U. Jackowiak, I. Nakielska, P. Lewandowski (eds.), *Współczesne problemy prawa. Księga pamiątkowa dedykowana Profesorowi Jerzemu Młynarczykowi*, Wyższa Szkoła Administracji i Biznesu im. Eugeniusza Kwiatkowskiego, Gdynia: 2011, pp. 76-79.

⁶⁷ For a detailed discussion of this topic, see generally, A. N. Vylegzhanin, V. K. Zilanov, *Spitsbergen: Legal Regime of Adjacent Marine Areas* (edited and translated by W. E. Butler), Eleven International Publishing, Utrecht: 2007, pp. 27-75.

CONCLUSION

The question of the equitable delimitation of the continental shelf and exclusive zones has been and still is one of the most complicated and controversial subjects in contemporary international law. Norway and Russia could have resolved their maritime boundaries only by agreement or by consent to international adjudication. After almost 40 years of negotiations the two states reached agreement on the bilateral maritime delimitation of the continental shelf and the exclusive economic zones in the Barents Sea. The agreement reached is a compromise solution, reflecting elements of the former claims and positions of both parties. Russia's original position was based on the concept of the sector line derived from the 1926 Soviet Decree. Due to the Svalbard Treaty, the shape of the sector line claimed by Russia indicated a deviation toward the east as it passes the archipelago. Additionally, the Russians subsequently referred to "special circumstances" as per Article 6 of the 1958 Continental Shelf Convention. The Norwegians, on the other hand, consistently objected to the Russian stance and based their claims on the median line/equidistance line. It is difficult to resist the conclusion that the final scope of the agreed delimitation line appears to have been influenced by a perpendicular line solution, the reason being that the boundary line seems to be drawn approximately halfway between Norway's original median line claim and Russia's former sector line claim.

The date of signing the 2010 Agreement is not coincidental. It is self-evident that both parties' growing economic interest in this region drove them to conclude an agreement. The new possibilities and prospects – transarctic shipping and transportation, access to natural resources, exploitation and exploration activities in the Barents Sea area – played a significant role in the settlement of this boundary dispute. An agreed-upon maritime boundary makes it possible for both states to enact domestic legislation enabling gas-related and oil-related activities in the previously disputed area, as well in the entire region of the Barents Sea.

The final settlement of the maritime border between Norway and Russia may only partially implicate state practice concerning maritime delimitation, the reason being that the 2010 Barents Sea Delimitation Treaty does not provide any information about which special or relevant circumstances were predominant or were used to determine the delimitation line. However, the treaty could be relevant for other unresolved boundary disputes in the Arctic region and become part of a comprehensive legal framework creating an Arctic legal regime. Last but not least, the case of the Barents Sea Delimitation Treaty affirms the significant role of bilateral negotiations in boundary disputes.

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DOMESTIC INVESTIGATION INTO PARTICIPATION OF POLISH OFFICIALS IN THE CIA EXTRAORDINARY RENDITION PROGRAM AND THE STATE RESPONSIBILITY UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Abstract

Poland has been accused of participation in the extraordinary rendition program established by the United States after the September 11, 2001 attacks. It is believed that a secret CIA detention facility operated on the Polish territory, where terrorist suspects were transferred, detained and interrogated with the use of torture. Currently, Poland has found itself in a unique situation, since, unlike in other countries, criminal investigation into renditions and human right violations is still pending. Serious doubts have arisen, however, as to the diligence of the proceedings. The case was incomprehensibly prolonged by shifting the investigation to different prosecutors. Its proper conduct was hindered due to state secrecy and national security provisions, which have covered the entire investigation from the beginning. This article argues that Polish judicial authorities, along with the government, should undertake all actions aiming at explaining the truth about extraordinary rendition and seeking accountability for human rights infringement. Otherwise, Poland may face legal responsibility for violating the European Convention on Human Rights. This scenario becomes very probable, since one of the

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Guantanamo prisoners has already lodged a complaint against Poland with the European Court of Human Rights.

INTRODUCTION

Poland is one of three Central European countries¹ accused of hosting secret American Central Intelligence Agency (CIA) detention facilities, established within the framework of the “war on terror” commenced by the United States after the September 11, 2001 attacks in order to detain and interrogate suspected terrorists. Though Polish authorities have consistently denied Poland’s involvement in the extraordinary rendition program, there have recently been serious new developments that supplement and, to a great extent, confirm the information previously established by special investigation commissions created by the Parliamentary Assembly of the Council of Europe, the European Parliament and special rapporteurs of the United Nations. There is official information, for instance, about planes associated with the CIA landing at Poland’s Szymany airport in 2002-2003 and transporting passengers, possibly terrorism suspects. Furthermore, two men claiming to be detained and tortured in Poland were granted victim status in a pending criminal investigation, according to the Polish Prosecutor Service. Finally, on March 27, 2012, the daily *Gazeta Wyborcza* disclosed that charges were presented against Mr. Zbigniew Siemiątkowski, a former Polish intelligence head, in connection with existence of CIA prisons in Poland.

Poland may face domestic and international responsibility for its alleged involvement in the CIA extraordinary renditions. Since one of the Guantanamo prisoners has already lodged a complaint against Poland with the European Court of Human Rights (ECtHR), it is highly probable that Poland may be held responsible for violating the European Convention on Human Rights (ECHR) in this particular case, but maybe also in some new upcoming cases.

1. EUROPEAN CONTEXT OF THE WAR ON TERROR

The first information about CIA prisons in Europe was reported by Dana Priest in *The Washington Post* on November 2, 2005.² Subsequently, on November 7, 2005, the human rights organization Human Rights Watch named

¹ Others are Romania and Lithuania.

² D. Priest, *CIA Holds Terror Suspects in Secret Prisons*, *The Washington Post*, November 2, 2005, available at: <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/01/AR2005110101644.html> (accessed April 10, 2012).

Poland and Romania as the Central European countries involved in extraordinary rendition. Later that year, ABC News released the names of twelve terrorism suspects that had allegedly been held in Polish prisons.³

In the wake of the above disclosures, the issue became the subject of reports by the Swiss Senator Dick Marty, which were published as part of the investigation undertaken by the Parliamentary Assembly of the Council of Europe,⁴ the Report of the Temporary Committee of the European Parliament⁵ and the Report by the UN Special Rapporteurs Manfred Nowak and Martin Scheinin.⁶ These international bodies found the existence of a network of prisons, so-called “black sites”, as well as flights enabling the CIA to illegally transfer detained persons. The CIA created a “global spider’s web” of secret places of detention and other military or intelligence detention facilities where individuals – alleged al-Qaeda members – were interrogated and kept for “intelligence-gathering” purposes. Those suspects in the global war on terror, commenced by the Bush administration, were captured by the CIA or arrested by allied forces, handed over to US military or intelligence personnel and subsequently transferred to one of the secret places of detention for interrogation.

The global spider’s web connected a considerable number of countries around the world. Persons captured on suspicion of involvement in terrorist activities could

³ A. Bodnar, D. Pudzianowska, *Alleged Existence of Secret CIA Facilities on Polish Territory – In Search of Truth and Accountability*, in M. Nowak, R. Schmidt (eds.), *Extraordinary Renditions and the Protection of Human Rights*, Neuer Wissenschaftlicher Verlag/ Intersentia, Wien, Graz: 2010, p. 82.

⁴ D. Marty, *Alleged secret detentions and unlawful inter-state transfers involving Council of Europe Member States*. First Report of June 7, 2006 of the Committee on Legal Affairs and Human Rights PACE, available at: <http://assembly.coe.int/Documents/WorkingDocs/doc06/edoc10957.pdf> (“Marty I”); D. Marty, *Secret detentions and illegal transfers of detainees involving Council of Europe Member States*. Second report of June 11, 2007 of the Committee on Legal Affairs and Human Rights PACE, available at: <http://assembly.coe.int/Documents/WorkingDocs/Doc07/edoc11302.pdf> (“Marty II”).

⁵ European Parliament resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, adopted midway through the work of the Temporary Committee (2006/2027(INI)) of July 6, 2006, available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2006-0316+0+DOC+XML+V0//EN> (accessed April 10, 2012).

⁶ United Nations, *Joint study on global practices in relation to secret detention in the context of countering terrorism of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, the Working Group on Arbitrary Detention and the Working Group on Enforced or Involuntary Disappearances, available at: <http://www.hfhrpol.waw.pl/cia/images/stories/Rport%20ONZ.doc> (accessed April 10, 2012).

be rendered to prisons in such countries as Syria, Jordan, Egypt and Morocco, where torture interrogation methods are commonly used. Those individuals could also be transferred to one of the secret CIA detention facilities, such as the “Salt Pit” in Afghanistan, or to black sites in other countries, including those in Central and Eastern Europe.

According to findings of international organizations, the northern Polish military base in Stare Kiejkuty, which serves as a school for Polish intelligence, was allegedly a part of such a network. In this and similar secret facilities, detainees were subjected to harsh interrogation techniques, approved by American authorities as “enhanced interrogation techniques” that previously were not legal due to their torturous nature.⁷ Suspects were eventually transferred to military detention facilities at Guantanamo Bay, Cuba, where they were detained *incommunicado*. Many prisoners, such as Abd al-Nashiri and Abu Zubaydah, are still detained there – some for more than eight years – without being charged, prosecuted or granted the opportunity for a fair trial.

A confidential report from the International Committee of the Red Cross (ICRC) was leaked in February 2007,⁸ suggesting that high-value detainees in European countries had been subjected to extremely harsh treatment, including waterboarding, which is a type of interrogation technique. One of the Guantanamo detainees, Khalid Sheikh Mohammed, said in his interview with ICRC that various factors led him to believe he was detained in Poland, including the snow on the ground, buildings with old-fashioned heating systems and a water bottle he received showing email addresses ending in “.pl”.

2. A PARLIAMENTARY INQUIRY

Responding to the aforementioned reports, the lower chamber of the Polish Parliament examined the case of the alleged existence of CIA secret prisons in Poland during a closed meeting of the Intelligence Services Committee (*Komisja do Spraw Służb Specjalnych*) held on December 21, 2005. According to politicians that took part in the meeting, there was no in-depth discussion on the issue.⁹

⁷ The opinion of International Committee of the Red Cross of July 21, 2007 stating that enhanced interrogation techniques constituted torture, available at: <http://www.icrc.org/eng/resources/documents/misc/terrorism-ihl-210705.htm> (accessed April 10, 2012).

⁸ ICRC Report on the Treatment of Fourteen “High Value Detainees” in CIA custody, February 2007, available at: <http://www.nybooks.com/icrc-report.pdf> (accessed April 10, 2012).

⁹ Bodnar, Pudzianowska, *supra* note 3, p. 83.

The minutes of the Committee meeting were not disclosed; the public was informed only that there had been no CIA prisons in Poland and that the matter was considered dealt with. The Temporary Committee of the European Parliament underlined that this meeting could not be described as independent or subject to scrutiny. The Parliamentary Assembly of the Council of Europe stated that the Polish Parliament confined itself to an inquiry whose main purpose was to defend the official position of the national authorities.¹⁰

3. INVESTIGATION INTO SECRET CIA SITES IN POLAND

After several years of constant denials by Polish authorities of Poland's involvement in the CIA extraordinary rendition program, the new Polish government, headed by Prime Minister Donald Tusk, finally ordered the launch of an investigation regarding the existence of CIA secret prisons in Poland. As the Polish Prosecutor Service stated,¹¹ proceedings commenced on March 11, 2008. They were initiated before the Appellate Prosecutor's Office 5th Department of Organized Crime and Corruption in Warsaw on the basis of Article 231(1) of the Polish Criminal Code.¹² The investigation seeks to identify whether public officials abused their powers by allowing the establishment of an extraterritorial zone under the control of a foreign state's jurisdiction. The investigation is still pending.

Since the investigation was classified from the beginning as "top secret", most evidence-taking activities are not disclosed and findings of the inquiry have also been classified as state secrets. As a consequence, for approximately two years from 2008 until 2010, the public had been deprived of nearly all information concerning the case. During that time, the Prosecutor's Office made only one disclosure, confirming on February 4, 2009 that CIA planes flew into and out of Polish

¹⁰ See, D. Marty, *Abuse of state secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations*, Report of 16 September 2011, Committee on Legal Affairs and Human Rights, available at: <http://assembly.coe.int/Documents/WorkingDocs/Doc11/EDOC12714.pdf> ("Marty III").

¹¹ The letter of the Prosecutor Service of April 9, 2009 is a response to the letter of the Helsinki Foundation for Human Rights concerning the question whether International Committee of the Red Cross' report is included in the investigation's files. The letter is available at: http://www.hfhrpol.waw.pl/cia/file/odp_prokuratura_krajowa_9_04_09.pdf (accessed April 10, 2012).

¹² Recently, the Appellate Prosecutor Office in the letter of December 15, 2010 confirmed that the basis for the investigation has not changed and it is conducted in reference to the Article 231(1) Criminal Code. The letter is available at: http://www.hfhr.org.pl/cia/images/stories/Odpowiedz_Prokuratura_15_12_2010.pdf (accessed April 10, 2012).

territory through Szymany airport. Due to the secrecy, the public knew little beyond that; hardly any information about flight paths, procedural actions, or approximate dates of termination were revealed.

4. RIGHT TO ACCESS INFORMATION AS AN EFFECTIVE INSTRUMENT TO EXPLAIN ENGAGEMENT IN THE EXTRAORDINARY RENDITION

The Helsinki Foundation for Human Rights (HFHR) was one of the few organizations to show continued interest in seeking an explanation of Poland's involvement in the renditions. Since November 2005, the HFHR sent numerous intervention letters and freedom of information requests under the Polish Freedom of Information Act in an attempt to receive the most precise information as possible from state authorities on Polish involvement in renditions. As a result, the HFHR received refusals from the Prime Minister, Ministry of Defense, and Military Intelligence Service, who declined to disclose information regarding the existence of, *inter alia*, secret agreements between the USA and Poland, due to state secrecy.

However, the HFHR did manage to receive other very important information. The majority of information about the CIA secret prisons in Poland that was disclosed to the public was obtained from media reports or through actions taken by the HFHR. For instance, the Foundation, in collaboration with the Open Society Justice Initiative, was able to obtain flight logs from the Polish Air Navigation Services Agency (*Polska Agencja Żeglugi Powietrznej*, PANS),¹³ which showed CIA planes landing in Poland several times. The logs also revealed attempts by the CIA and its Polish partners to cover up the true destination of rendition flights: several flights that landed in Szymany had declared Warsaw as the official destination, even in filings with pan-European aviation authorities.

The disclosure marked the first time that a Polish government agency, rather than the independent prosecutor conducting the investigation, confirmed that aircrafts associated with the CIA landed repeatedly at Szymany Airport, close to the suspected CIA secret detention and interrogation site for “high-value detainees” in Stare Kiejkuty. It was a crucial disclosure, as the Polish government had, in the past, denied involvement in rendition and failed to provide the flight records to previous investigations conducted by the European Parliament and the Council of Europe.

¹³ Document available at: http://www.hfhrpol.waw.pl/pliki/OBS_CIA.zip (accessed April 10, 2012).

In addition, the landing in Poland of planes associated with the CIA was confirmed by a document disclosed in response to the HFHR's request to the Border Guard Service.¹⁴ The document provided supplementary information on the passengers of the CIA planes that allegedly transported individuals suspected of terrorist activity by the US. The data details the border clearance of the crew and passengers of planes landing at Szymany airport in Poland from 2002 to 2005.

According to the letter from the Border Guard Office, seven planes commonly associated with CIA front companies landed at Szymany airport between December 5, 2002 and September 22, 2003. Five came to Poland with passengers but departed with only crew on board, while the last plane flew to Szymany empty but left Poland with five passengers.

The transmission of all the above information indicates that utilizing the right of access to public information may be an effective method of learning and analyzing the serious allegations of Poland's role in renditions.

5. NEW DEVELOPMENTS IN THE INVESTIGATION

Al-Nashiri and Abu Zubaydah, two Guantanamo detainees who claim they were illegally detained and tortured by the CIA in Poland, currently intend to seek justice before the Polish courts.

On October 27, 2010, al-Nashiri was granted victim status in the proceedings conducted by the Appellate Prosecutor's Office in Warsaw.¹⁵ The decision was made after al-Nashiri's lawyers filed a September 2010 motion¹⁶ for punishing those guilty of detaining and torturing their client. The motion included a notification of the commission of a crime and a request for awarding victim status to al-Nashiri. Subsequently, lawyers for Zubaydah also filed a motion that notified the commission of a crime against Zubaydah during his detention in Poland. The alleged crimes include using torture, inhumane and degrading treatment and

¹⁴ Document available at: <http://www.hfhr.org.pl/cia/images/stories/SKAN%20DOKUMENTU.pdf> (accessed April 10, 2012).

¹⁵ Article: *Saudyjski więzień CIA otrzymał status poszkodowanego od polskiej prokuratury* (Saudi CIA prisoner was granted status of a victim by Polish prosecutor service), Polish Press Agency, available at: http://wiadomosci.gazeta.pl/Wiadomosci/1,80708,8574539,Saudyjski_wiezien_CIA_otrzyamal_status_poszkodowanego.html (accessed April 10, 2012).

¹⁶ The motion available at: <http://www.hfhrpol.waw.pl/cia/images/stories/Al%20Nashiri%20redacted%20application%20PL-3.pdf> (accessed April 10, 2012).

intrusion into bodily integrity. On January 11, 2011, the Prosecutor Service also granted the second Guantanamo prisoner victim status.¹⁷

The motions filed with the prosecutor's office on behalf of both al-Nashiri and Zubaydah were based exclusively on the case files open to the public and that are not classified as state secrets. The decisions of the Appellate Prosecutor Service in Poland to grant victim status to the two detainees gives a solid basis to the assumption that a secret CIA prison was situated in Poland and that the two were detained in that facility. This is undoubtedly a huge step that brings us closer to the disclosure of truth about Poland's involvement in extraordinary rendition.

Additionally, in its December 15, 2010 letter sent to the HFHR,¹⁸ the Appellate Prosecutor's Office provided, for the first time, comprehensive and complete information about the current stage of the proceedings, which marked a shift from the previous attitude of the Polish Prosecutor Service. The Prosecutor confirmed that the Appellate Prosecutor's Office in Warsaw is continuing its investigation of potential violation of Article 231(1) of the Polish Criminal Code, concerning abuse of power by public officials detrimental to the public interest.

Moreover, the Prosecutor revealed that on March 18, 2009, the Appellate Prosecutor's Office in Warsaw submitted a legal assistance request to US judicial authorities regarding the investigation. On October 7, 2009, the US Department of Justice informed Polish authorities that under Article 3(1) (c) of the Mutual Legal Assistance in Criminal Matters Agreement (MLAT) signed by the United States and Poland, the request was refused and American authorities consider the case closed. The Prosecutor did not publicly disclose the content of the mutual assistance request due to state secrecy.

The above developments were subsequently supplemented by comprehensive information provided by the Appellate Prosecutor's Office on February 4, 2011¹⁹ in response to the letter from the HFHR. The Prosecutor again confirmed the current basis for the investigation (Criminal Code, Art. 231(1)) and provided, for the first time, comprehensive information about procedural actions undertaken in the course of the investigation. According to the letter, steps undertaken by the prosecutors were and still are connected to the verification of the landings

¹⁷ See, INTERRIGHTS and REPREIVE press release, *Polish Prosecutor officially recognises Guantánamo prisoner Abu Zubaydah as a victim in Poland's CIA secret prison investigation; decision should allow former 'high-value detainee' to testify against his US torturers and their allies* available at: <http://www.interights.org/view-document/index.htm?id=609> (accessed April 10, 2012).

¹⁸ Document available at: http://www.hfhr.org.pl/cia/images/stories/Odpowiedz_Prokuratura_15_12_2010.pdf (accessed April 10, 2012).

¹⁹ Document available at: http://www.hfhr.org.pl/cia/images/stories/odpowiedz_PG_4_02_2011.pdf (accessed April 10, 2012).

without clearance by CIA planes between 2002 and 2003 at the Szymany airport. Border guard and custom service officers were interrogated, as were employees of the Szymany airport, flight controllers and a member of the European Parliament's Commission analysing the circumstances under investigation. A document concerning planes landing at Szymany airport, *inter alia*, was obtained from the Polish Air Navigation Service Agency. The reports of international organizations and press releases were also added to the files.

6. ANOTHER LEGAL ASSISTANCE REQUEST FILED WITH US AUTHORITIES

A development of high importance for the criminal investigation was the March 22, 2011 submission of a legal assistance request to the US Department of State, sought under the MLAT by the Polish Public Prosecutor's Office. The Prosecutor did not officially disclose its content, but press reports revealed that Polish prosecutors asked for, *inter alia*, an interrogation of the two men who had been granted victim status in the Polish investigation, al-Nashiri and Zubaydah.

Filing the second MLAT request was an important step toward a full and comprehensive understanding of the truth behind the allegations of Polish cooperation with the CIA's extraordinary rendition program. If they do not grant the Polish request, US authorities will have made it *de facto* impossible to clarify the case concerning grave human rights violations, such as torture, on Polish territory. It is not yet known what the US authorities' answer will be, though it appears that the second request might not be refused. The current circumstances of the case are radically different than they were at the time of the first request, a result of the successful intervention of two former prisoners of secret CIA facilities in Poland into the investigation as well as the different circumstances and scope of information that is now in the public domain regarding Polish-American collaboration on renditions.

Recent developments in the criminal investigation show even more significant changes. The Prosecutor Service has disclosed information regarding the current stage of proceedings, though without including any substantial information regarding the content of the MLAT request or who was interrogated. It is nonetheless an important change, taking into consideration that no information was previously available despite the Foundation's official requests and the media's demands. The decision to file a second MLAT request with US authorities indicates that the Prosecutor Service is treating the case with the utmost seriousness. Due to the multilevel and international character of the case, the request for legal assistance

was indispensable, and the Polish Prosecutor's request will be crucial to preliminary proceedings concerning Polish involvement in extraordinary rendition.

What has not changed, however, is the Prosecutor Service's statement regarding the classified nature of the entire investigation that overrides public interests. The prosecutor seems to believe that the importance of keeping state secrets excuses denials to reveal information about an investigation, even if the case involves human rights violations. It has been stressed that the gathered materials include testimony and documents that are classified as "top secret"; as such, any disclosure of the results of the investigation, its scope or its methodology is impossible, as it would constitute a criminal offence of unauthorized disclosure of classified information (Polish Criminal Code, Art. 265).

Additionally, the length of the investigation was subject to judicial control. The proceedings were commenced in 2008 and, according to press reports, are now prolonged until August 2012. On March 23, 2011, the media reported that lawyers of al-Nashiri filed a complaint on the extensive length of proceedings, since judicial control could be very important for speeding up the proceedings.²⁰ However, in April 2011, the Polish court rejected the complaint.²¹

7. WILL AN UNEXPECTED TWIST CHANGE THE DIRECTION OF THE INVESTIGATION?

On May 20, 2011, Prosecutor Jerzy Mierzewski was removed from the criminal investigation into secret CIA prisons and replaced by Waldemar Tyl, the Deputy of the Appellate Prosecutor in Warsaw.²² Tyl himself made the decision on Mierzewski's removal, though there were no publicly-raised objections to Mierzewski's actions in the course and conduct of the investigation.

Interestingly, this surprising and confusing decision was made just before US President Barack Obama's visit to Poland, raising serious suspicion as to whether

²⁰ Article: *Sprawę więzień CIA powinien skontrolować sąd* (The case should be analysed by the court), Rzeczpospolita, available at: <http://www.rp.pl/artykul/535475,631302-Adwokat-al-Nashiriego--sprawe-powinien-skontrolowac-sad.html> (accessed April 10, 2012).

²¹ Article: „*Polski więzień CIA*” skarży Polskę do Trybunału w Strasburgu (“Polish CIA prisoner” lodged application against Poland to the Tribunal in Strasbourg), Polish Press Agency, available at: <http://www.polskieradio.pl/5/3/Artykul/365263,Polski-wiezien-CIA-skarzy-Polske-do-Trybunalu-w-Strasburgu> (accessed April 10, 2012).

²² Article: *Prokurator odsunięty od śledztwa w sprawie więzień CIA* (Prosecutor put aside from the investigation on CIA prisons), Gazeta Wyborcza, available at: http://wyborcza.pl/1,75478,9638926,Prokurator_odsuniety_od_sledztwa_w_sprawie_wiezien.html (accessed April 10, 2012).

the decision was politically motivated. At that time, it also raised the question whether the next step in the investigation would be the discontinuance of the case, as was the case in Lithuania, where prosecutors dropped that country's investigation into alleged CIA prisons.

Several days after President Obama's visit, the media reported that Jerzy Mierzewski was attempting to pursue charges against officials of the former left wing government regarding violations of the Constitution, unlawful detention and participation in crimes against humanity.²³ The media also reported on questions Mierzewski and others asked a team of legal experts, who were to examine whether the alleged detention of prisoners, named as al-Qaeda terrorism suspects by the CIA, had been a violation of international law. The questions were submitted in February; in May, the legal team sent a fifty-page reply.²⁴ It stated the following: no law exists that allows for the establishment in Poland of a facility, operated by a foreign intelligence agency, which is excluded from the jurisdiction of domestic authorities; operating such a facility or detaining suspects therein amounts to a violation of the Polish Constitution and international treaties; any detainees of such a facility fall within the legal definition of victims of war crimes and crimes against humanity; there are no specific laws directly applicable to al-Qaeda members; US regulations such as those allowing for waterboarding violate international law.

Furthermore, for the first time, Polish President Bronisław Komorowski publicly indicated the importance of the need for an explanation of the case of CIA prisons on Polish soil, saying on May 30, 2011: "[w]hat we need is a thorough investigation instead of talks about loyalty to an ally."²⁵ It was also reported that the Prosecutor Service planned to file a motion requesting the Polish President to release former President Kwaśniewski from his confidentiality obligations.²⁶

²³ W. Czuchnowski, *CIA miało więzienie w Polsce* (CIA held a prison in Poland), *Gazeta Wyborcza*, available at: http://wyborcza.pl/1,75478,9689626,CIA_mialo_wiezienie_w_Polsce.html (accessed April 10, 2012).

²⁴ Article: *Pytania prokuratorów* (Prosecutors' questions), *Gazeta Wyborcza*, available at: http://wyborcza.pl/1,75402,9689932,Pytania_prokuratorow,,ga.html (accessed April 10, 2012).

²⁵ Article: *Komorowski o więzieniach CIA: potrzeba rzetelnego śledztwa* (Komorowski about CIA prisons: need for comprehensive investigation), *Gazeta Wyborcza*, available at: http://wyborcza.pl/1,75478,9690394,Komorowski_o_wiezieniach_CIA__potrzeba_rzetelnego.html (accessed April 10, 2012).

²⁶ Article: *Komorowski zwolni z tajemnicy Kwaśniewskiego?* (Will Komorowski dismiss Kwaśniewski from the confidentiality obligation?), *Gazeta Wyborcza*, available at: http://wyborcza.pl/1,75478,9736855,Komorowski_zwolni_z_tajemnicy_Kwasniewskiego.html (accessed April 10, 2012).

Although President Komorowski had earlier suggested (even before this information was made public) that he would take such an action into consideration, finally in September 2011 he refused to dismiss Kwaśniewski from state secrecy.²⁷

Interestingly, in November 2011, the prosecutor in charge, Waldemar Tyl, provided information that he expected the proceedings to be closed in 2012, possibly in August. However, in February 2012, the Prosecutor Office made another surprising decision. The investigation on the CIA rendition facilities was transferred from the Prosecution Office in Warsaw to the Prosecution Office in Cracow. The decision was very confusing, especially taking into consideration that on February 2, 2012 the Attorney General, Andrzej Seremet, stated in the Polish Parliament that he felt great responsibility for this particular investigation. Unfortunately, due to state secrecy, the reason for Waldemar Tyl's removal from the case and for the shift to Cracow is yet publicly unknown. There was no explanation provided by the authorities that would be persuasive to the public. However, according to the disclosure made by *Gazeta Wyborcza* on March 27, 2012 one can guess that the reason for removal may be of a political nature aiming to prolong investigation.²⁸ According to reporters, this decision had been made after presenting charges against the former head of the Polish intelligence, Zbigniew Siemiątkowski. This decision was presented orally and grounds were not prepared. Subsequently, the case was moved from Warsaw to Cracow. Mr. Siemiątkowski confirmed that charges were presented against him, but he refused – due to state secrecy – to testify in the investigation and in the potential case pending before the court.²⁹ According to the new information provided by the Cracow Appellate Prosecutor, the investigation is prolonged until August 11, 2012. The prosecutor responsible for the case is Katarzyna Płończyk. The case-file consists of 20 volumes and 62 witnesses have been interrogated.³⁰

²⁷ Article: *Kwaśniewski nie opowie o więzieniach CIA w Polsce* (Kwaśniewski will not talk about CIA prisons in Poland), RMF 24, available at: <http://www.rmf24.pl/fakty/polska/news-kwasniewski-nie-opowie-o-wiezieniach-cia-w-polsce,nId,359493> (accessed April 10, 2012).

²⁸ W. Czuchnowski, A. Krzykowski, *Zarzuty za polskie więzienie CIA* (Charges for Polish CIA prisons), *Gazeta Wyborcza*, March 27, 2012.

²⁹ Article of W. Czuchnowski and A. Krzykowski published in “*Gazeta Wyborcza*” on March 27, 2012 was reported by the New York Times: N. Kulish, S. Shane, *Polish ex-spy chief charged in case of secret CIA prison, report says*, New York Times, March 28, 2012.

³⁰ See information provided to the Helsinki Foundation for Human Rights on April 4, 2012, available at http://www.hfhr.pl/wp-content/uploads/2012/04/odpowiedz_prokuratura.pdf (accessed April 10, 2012).

8. IMPACT OF INFORMATION DISCLOSED BY US AUTHORITIES ON THE POLISH CASE

Upon President Barack Obama's entrance to office, he prohibited the use of "enhanced interrogation techniques"³¹ and publicly announced that the Guantanamo detention centre would be closed.³² Increasingly, information on the practices of the Bush administration and its allies in the war on terror was at least partially declassified and is now available in the public domain.

Although most of the information is relevant only for internal accountability within the US, there is some information that is of great importance for the case of Polish involvement in the CIA program. In combining that information with other data found – for example, in international reports or HFHR freedom of information litigation cases – the probability that Poland cooperated with the CIA in the war on terror and in the abusive treatment of terrorism suspects on Polish soil is extremely high.

The most important disclosure in this respect is the internal CIA report of May 7, 2004 prepared by the CIA Inspector General and titled, "Special Review 'Counterterrorism Detention and Interrogation Activities' (September 2001 – October 2003)."³³ It provides information concerning, *inter alia*, interrogation techniques used with detainees suspected of terrorism. According to the report, Khalid Sheikh Mohammed was subjected to waterboarding 183 times in March 2003.³⁴ Data regarding the place of interrogation or the identity of personnel involved remains classified. However, the analysis of other publicly available information leads to the possible conclusion that Khalid Sheikh Mohammed was waterboarded in Poland. Such a conclusion arises when comparing the flight logs and analysis in Dick Marty's second report,³⁵ the flight data disclosed by the Polish Air Navigation Services Agency³⁶ and the assessment of the detainees' profiles recently disclosed

³¹ Executive Order Ensuring Lawful Interrogations of January 22, 2009 available at: http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations.

³² Executive Order Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities of January 22, 2009 available at: http://www.whitehouse.gov/the_press_office/ClosureOfGuantanamoDetentionFacilities (accessed April 10, 2012). The Guantanamo facility is, however, still operating.

³³ CIA Special Review, *Counterterrorism Detention and Interrogation Activities (September 2001 – October 2003)*, May 7, 2004, available at: <http://www.aclu.org/oigreport> (accessed April 10, 2012).

³⁴ *Ibidem*, p. 91.

³⁵ Marty II, *supra* note 4, p. 36.

³⁶ PANSA flight logs, *supra* note 13.

by American authorities.³⁷ It thus appears that March 7, 2003 was the possible landing date of a CIA plane transporting Khalid Sheikh Mohammed.

9. EXTRAORDINARY RENDITIONS AND HUMAN RIGHTS VIOLATIONS

In general, in relation to the above, the practices performed within the extraordinary rendition program aroused considerable controversy due to the serious violations of basic human rights. Illegal transfers, secret detention, torture for interrogation purposes, breaches of *non-refoulement* to torture obligations, abduction and long detention *incommunicado*, and infringement of private and family life are all practices that represent the most serious violations of basic human rights.

States' responsibility for the above-mentioned practices should be analyzed on the basis of national law, the ECHR and general international law.³⁸

As regards the domestic level, it should be considered whether a particular state applied national law, following the rule of law. In Poland, for instance, two types of responsibility might be taken into consideration: constitutional liability before the State Tribunal for acts against constitutional order as well as liability for crimes committed in connection to renditions.³⁹

In reference to international law, legal responsibility might be considered within the framework of several international instruments, such as the International Covenant of Civil and Political Rights, the UN Convention Against Torture, the European Convention for the Prevention of Torture and Inhumane or Degrading Treatment or Punishment, the ECHR or the Statute of the International Criminal Court. It may also be analyzed from the perspective of customary international law, for example as embodied in the Draft Articles on the Responsibility of States for Internationally Wrongful Acts.⁴⁰

³⁷ Memorandum of Department of Defense of December 8, 2006 regarding Combatant Status Review Tribunal Input and Recommendation for Continued Detention Under Department of Defense Control for Guantanamo Detainee, Khalid Sheikh Mohammed, available at: <http://wikileaks.ch/gitmo/pdf/ku/us9ku-010024dp.pdf> (accessed April 10, 2012).

³⁸ The issue of state responsibility was broadly discussed in *The Transcript of the Debate: State Responsibility for the CIA's Secret Prisons in Third States (Outside the US)*, 30 Polish Yearbook of International Law 275 (2010).

³⁹ *Ibidem*.

⁴⁰ *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report

Within the framework of the war on terror, it must be remembered that one of the most severe violations is the use of torture for interrogation purposes. The prohibition of torture is recognized as a peremptory rule of international law and no exception is applicable. Furthermore, there are no reservations stemming from international conventions that deal with this issue.

In general, it is also well established that according to international obligations, states have positive obligations to exercise “due diligence” to prevent violations on their territory, protect against them and investigate, prosecute and provide redress in the event of a breach.⁴¹ Each country accused of participating in the CIA rendition program is therefore under a positive obligation to establish independent investigations into possible human rights violations and to hold any and all guilty persons responsible. The level of fulfillment of this obligation further determines states’ responsibility in the light of international law.

10. STATE SECRECY AS A SERIOUS OBSTACLE TO EXPLAIN HUMAN RIGHTS VIOLATIONS

Focusing on domestic level, according to all information and facts on rendition presented above, there is little doubt whether such a CIA “black site” was located in Poland and whether Poland acted against the prohibition of torture. There is a strong likelihood that Poland violated binding international agreements as well as Constitutional provisions and may, therefore, face both international and domestic responsibility. Poland is thus under positive obligation to explain these allegations. However, the investigation into CIA secret detention facilities on the Polish territory does not address this problem. In fact, it might be perceived as an example of a case in which state secrecy, apart from other factors such as political will, becomes a serious obstacle to the explanation of serious human rights violations and the disclosure of some information to protect the public interest.⁴²

Such a situation is consistent with the tendency appearing in other states during the course of criminal and civil proceedings concerning extraordinary renditions. According to the latest report of the Parliamentary Assembly of the Council of Europe: “[i]n combating terrorism, governments are increasingly invoking

covering the work of that session (A/56/10), available at: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (accessed April 10, 2012).

⁴¹ E.g., H. Duffy, *Extraordinary Rendition and International Law*, 16(1) Interights Bulletin (2010), p. 5.

⁴² Marty III, *supra* note 10, pp. 2, 18-22.

‘state secrecy’ or ‘national security’ in order to ward off parliamentary or judicial scrutiny of their actions.”⁴³ Additionally, it states, “[i]n some countries, in particular the United States, the notion of state secrecy is used to shield agents of the executive from prosecution for crimes such as abduction and torture, or to stop victims from suing for compensation.”⁴⁴

11. OTHER CRIMINAL PROCEEDINGS CONCERNING THE RENDITION CASES AND ACTIONS FOR DAMAGES BROUGHT BY VICTIMS

Several cases were pending before the judicial authorities in Italy, Germany, Lithuania, the United States and Great Britain, concerning the criminal responsibility for the state’s involvement in the war on terror.⁴⁵

Investigations in Italy and Germany were both remarkable. In Italy, for instance, it led to convictions *in absentia* of 25 persons, including 22 CIA agents and an American military officer, for illegal rendition of Usama Mostafa Hassan Nasr (known as Abu Omar). Nasr is an Egyptian national who, while residing in Italy, was abducted from a street in Milan in February 2003 and transferred by the CIA to Egypt, where he was held in secret and allegedly tortured. Charges against five high-level officials of the Italian intelligence agency, however, were denied since evidence gathered against them was classified. Therefore, it could not be admitted to the trial.⁴⁶

In the case of the German citizen Khaled El-Masri, who claimed to be rendered and tortured in a black site in Afghanistan,⁴⁷ German prosecution authorities also conducted a comprehensive investigation. It resulted in arrest warrants against 13 CIA agents who, however, were never transmitted to American authorities since the US had announced from the outset that any extradition request would be refused on national security grounds.⁴⁸

In 2010, the British government announced an extrajudicial inquiry chaired by Sir Peter Gibson. However, human rights groups boycotted the investigation

⁴³ *Ibidem*, p. 2.

⁴⁴ *Ibidem*.

⁴⁵ Marty III, *supra* note 10, pp. 7-12.

⁴⁶ See, Amnesty International Public Statement, *Italy: Court Upholds Convictions in Abu Omar Kidnapping Case*, December 17, 2010, available at: <http://www.amnesty.org/ar/library/asset/EUR30/010/2010/en/bdfb8db9-f1e6-4e0e-a9f9-bbf5e1858624/eur300102010en.pdf> (accessed April 10, 2012).

⁴⁷ Marty I, *supra* note 4, pp. 25-32.

⁴⁸ Marty III, *supra* note 10, p. 8.

out of fears that it would be hampered by extensive application of the state secrets privilege. It was brought to a halt after Scotland Yard declared a criminal investigation into the renditions of two Libyans.⁴⁹ Lithuanian prosecutors discontinued their investigation in 2011, a move which was subject to the criticism, *inter alia*, of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).⁵⁰ In the United States, however, until now no criminal proceedings have been brought against perpetrators of acts of torture.⁵¹

Interestingly, in the United States, civil actions for damages brought by victims of renditions also proved unsuccessful, again, due to the state secrets privilege claimed by the government.⁵² They could not seek justice before courts due to state secrecy, although it was the Bush administration that was the main architect of the extraordinary rendition program implemented within the post 9/11 war on terror. For instance, the US Supreme Court refused to review the case of Khaled El-Masri after a lower court dismissed his complaint, since President Obama had invoked the doctrine of state secrets privilege.⁵³ The case was rejected despite the US Secretary of State admitting that the US had made an “error” in El-Masri’s case.⁵⁴ The same happened in the case of Maher Arar, a Canadian who was abducted and rendered by the CIA to Syria, where he was subjected to torture. No accusation was ever made against him. The US Supreme Court refused to consider the case⁵⁵ after he complained for damages against the former US Attorney General and other representatives of the Bush administration; it was dismissed again on the grounds of national security. Five other victims of rendition – Binyam Mohamed, Abu Elkassim Britel, Ahmed Agiza, Mohamed Farag Ahmad Bashmilah and Bisher al-Rawi – brought an action against the Jeppesen Dataplan Inc., a private company whose planes were allegedly used by the CIA to circumvent international

⁴⁹ Article: *UK investigations into torture and rendition – a guide*, February 13, 2012, The Guardian, available at: <http://www.guardian.co.uk/world/2012/feb/13/uk-investigations-torture-rendition-guide> (accessed April 10, 2012).

⁵⁰ Article: *Litwa musi ujawnić prawdę o więzieniach CIA* (Lithuania has to reveal the truth about CIA prisons) Amnesty International, May 19, 2011, available at: http://amnesty.org.pl/no_cache/archiwum/aktualnosci-strona-artykulu/article/7350/589/category/5/neste/6.html (accessed April 10, 2012).

⁵¹ Marty III, *supra* note 10, p. 11.

⁵² *Ibidem*, p. 13.

⁵³ The judgment of the United States Supreme Court refusing to review the case: *El-Masri v. United States*, 128 S. Ct. 373, 169 L. Ed. 2d 258 (2007).

⁵⁴ See statement of the Open Society Justice Initiative: *Extraordinary Renditions: The Right to the Truth*, available at: <http://www.soros.org/initiatives/justice/litigation/macedonia> (accessed April 10, 2012).

⁵⁵ Article: *High court rejects appeal in rendition case*, Washington Post, June 14, 2010, available at: <http://archive.feedblitz.com/637402/~3849694> (accessed April 10, 2012).

aviation law. Invoking the state secrets privilege, the US Supreme Court rejected the request to hear the lawsuit in May 2011.⁵⁶

Thus, the need for accountability for the CIA's extraordinary rendition program has shifted to Europe. Currently, in the United Kingdom, the British authorities are reaching friendly settlements with rendition victims. The government decided to pay significant financial compensation to avoid the court proceedings brought by former Guantanamo prisoners. It still continues to officially deny its role in the secret transfer of terror suspects and its responsibility in this respect.⁵⁷ Therefore, a situation has arisen, in which victims are granted damages in order to prevent judiciary authorities from dealing with information concerning legitimate secrets and from disclosing this data.⁵⁸

12. IN SEARCH OF ACCOUNTABILITY

Analysis of the course of proceedings mentioned above leads to an unpromising conclusion. It shows that the domestic investigations into the states' involvement into the war on terror, even those of remarkable quality, at some point cannot break through the barrier of state secrecy and national security extensively invoked by states.⁵⁹ As a result, judicial authorities cannot provide a comprehensive explanation of all of the allegations of grave human rights violations to the public opinion. Importantly, prosecution and judicial authorities thus cannot effectively seek for accountability and liability of states' officials – the perpetrators of international law violations.

Due to the state secret privilege invoked by the government, US courts seem to close their doors to victims of renditions and tortures who seek to claim

⁵⁶ See, American Civil Liberties Union Statement *Mohamed et al. v Jeppesen Dataplan, Inc*, November 15, 2012, available at: <http://www.aclu.org/national-security/mohamed-et-al-v-jeppesen-dataplan-inc> (accessed April 10, 2012).

⁵⁷ Article: *Guantanamo payout deal is climax of years of denials of UK role in rendition*, November 16, 2012, The Guardian, available at: <http://www.guardian.co.uk/world/2010/nov/16/guantanamo-payout-deal-climax-years-official-denials> (accessed April 10, 2012).

⁵⁸ Rendition victim, Binyam Mohamed, in a course of the court's proceedings intended to obtain an order that the government release to him "the seven paragraphs" confirming his torture in American facility in Pakistan. This was to supplement the case brought before US court. Although the British Government claimed "public interest immunity", the court finally published the paragraphs in February 2010. See article: *In seven paragraphs, the proof of MI5 complicity in torture of Binyam Mohamed* of February 10, 2010, The Guardian, available at: <http://www.guardian.co.uk/world/2010/feb/10/binyam-mohamed-torture-seven-paragraphs> (accessed April 10, 2012).

⁵⁹ Marty III, *supra* note 10, pp. 7-14.

damages in civil cases for their ill-treatment. In the United Kingdom, on the other hand, damages are granted to victims, including those who unsuccessfully sought justice in the US, based on the fact that the UK aided in the victims' transfer abroad for torture. It seems, however, that the financial contribution is a price for evading the explanation of Britain's role in the war on terror, which will remain secret.

Therefore, the situation of ineffective domestic instruments, despite pressure of other countries or the international community (i.e. the European Parliament, Council of Europe or UN bodies), resulted in a necessity to take into consideration other ways of seeking justice and accountability.

First, countries like Poland, Lithuania, and Macedonia became crucial in this process since, according to all publicly available information, they were actively involved in, and linked to, the extraordinary rendition program. Moreover, Poland – where the investigation is still pending – creates a considerable potential for litigation and thus for investigating the truth.

Second, in this respect, application to the ECtHR against European countries becomes a highly important and useful instrument. For instance, the proceedings in Lithuania and Macedonia appeared to be ineffective and gave grounds for lodging complaints with the ECtHR. Such a strategy may bring real effects in the explanation of the circumstances of the war on terror and in accountability, due to the findings of the ECtHR as well as the highly developed system of execution of ECtHR judgments. There are already three rendition cases in Strasbourg and more victims have declared their intention to follow this strategy.

13. RENDITION CASES IN THE EUROPEAN COURT OF HUMAN RIGHTS

In general, the jurisdiction of the ECtHR extends to human rights violations committed not only within the territory of the Council of Europe Member States. It is well-established that a state's obligations also arise when affected individuals are subject to its jurisdiction, through its agents acting abroad.⁶⁰ This is crucial due to the transboundary nature of renditions. In the landmark judgment in the case *Al-Skeini and Others vs. the United Kingdom*,⁶¹ the ECtHR expressed the rule of extraterritorial application of human rights law, and in particular of the ECHR. The ECtHR found that the UK's human rights obligations apply to its acts in Iraq,

⁶⁰ Duffy, *supra* note 39, p. 4.

⁶¹ *Al-Skeini and Others v. the United Kingdom* (55721/07), Grand Chamber, ECtHR, July 7, 2011, all cited judgement of ECtHR available at: <http://www.echr.coe.int>

where the UK was an occupying power. It also stated that the UK had violated the ECHR by failing to investigate the circumstances of the killings of Iraqi civilians by its soldiers in 2003.

Also, the ECtHR determines whether a state is under a positive obligation to act and to prevent violations on their territory, protect against them and investigate, prosecute and provide redress in the event of breach. States are under a positive obligation when “the authorities knew or ought to have known at the time of the existence of a real and immediate risk ... from the criminal acts of a third party and ... failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.”⁶² It was also held that, in the event of a serious violation, the state must act with “exemplary diligence” in discharging its obligations to investigate.⁶³

The first rendition case brought to the ECtHR was the case of Khaled El-Masri against the Macedonian government on July 20, 2009.⁶⁴ The case concerns Macedonian agents who captured El-Masri in a bus at the border with Macedonia and Germany and held him without charge for 23 days, accusing him of being a member of Al-Qaida. El-Masri was then handed to the CIA and rendered to Kabul, where he was detained for four months. The government of Macedonia denied any involvement in his abduction and did not take any investigative steps. The case was brought to the ECtHR after a criminal complaint was unsuccessfully filed with the Skopje Public Prosecutor’s Office on October 6, 2008. The request alleged that personnel of the Macedonian Ministry of the Interior were responsible for the deprivation of his liberty and for his torture and other ill-treatment. The prosecutor took no action until the statutory time limit for commencing a criminal case expired in early 2009. Additionally, in 2009, El-Masri filed a civil lawsuit for damages, which is still pending. The civil proceedings, however, are not capable of providing effective remedies for the violation of El-Masri’s rights under the ECHR.⁶⁵

In the complaint El-Masri indicated a violation of Article 5 ECHR due to illegal detention without charges and without an appearance before a judge, as well as to his handover to the CIA rendition team. He also claimed infringement of Article 3 ECHR in both substantive and procedural aspects. He was handed over despite a real risk that he would be detained in conditions that were inhumane

⁶² *Osman v. Great Britain* (23452/94), ECtHR, October 28, 1998.

⁶³ *Isayeva, Yusupova and Bazayeva v. Russia* (57947/00, 57948/00, 57949/00), ECtHR, February 24, 2005.

⁶⁴ Application to the ECtHR in case Khaled El-Masri against the former Yugoslav Republic of Macedonia of July 20, 2009 (39630/09) is available at: <http://www.soros.org/initiatives/justice/litigation/macedonia/Application-Public-Version-20090921.pdf> (accessed April 10, 2012).

⁶⁵ Marty I, *supra* note 4, pp. 25-32.

without trial and that he would be tortured. There was also never an investigation regarding his detention in Macedonia and thus, in violation of Article 13, he was unable to effectively get to the court.⁶⁶

On October 8, 2010 the ECtHR formally communicated the case to Macedonia, and asked the government to respond to El-Masri's claims. Interestingly, on January 24, 2012 the case was transferred to the Grand Chamber of the ECtHR. This means, that the ECtHR not only acknowledged all the information provided in the application as credible enough to officially communicate the case to the Government and deliver judgment in the case, but also that the ECtHR will treat the rendition case with utmost importance and scrutiny.

Another case was brought to the ECtHR by Abu Zubaydah against Lithuania on October 28, 2011.⁶⁷ He is a Guantanamo detainee who was captured in 2002 and transferred to Poland and Lithuania to secret facilities where he was unlawfully detained and tortured. He was the first "high value detainee" and the person around whom the CIA developed their notorious "enhanced interrogation" system. In total, he spent four and a half years in secret detention, and until now remains in Guantanamo, although there have never been any charges pressed against him. Similar to the case of El-Masri, Abu Zubaydah claimed violation of Articles 3, 5, 6, 8 and 13 ECHR. As of the time of this writing, the ECtHR has not decided on the communication of the case to the Lithuanian government.

14. POLISH RENDITION CASES IN STRASBOURG

As regards the current state of the Polish investigation, two Guantanamo prisoners claiming to be unlawfully detained and ill-treated in secret CIA facilities on Polish territory – Al-Nashiri and Abu Zubaydah – were already granted victim status in the pending national investigation. Since the cases brought before the US judicial authorities were unsuccessful for the victims, they are now seeking justice in Polish proceedings. This is crucial because of the fact that the investigation is not terminated and more former prisoners may intend to intervene in it. At the beginning of 2012 media reported that the lawyers of the next person, Walid bin Attash, intend to obtain his victim status.⁶⁸

⁶⁶ *Ibidem*.

⁶⁷ Application to the ECtHR in case of Abu Zubaydah against Lithuania of October 28, 2011 is available at: http://www.reprive.org.uk/media/downloads/2011_10_27_AZ_v_Lithuania_ECHR_Application_Final.pdf (accessed April 10, 2012).

⁶⁸ A. Krzykowski, *Kolejny pozew za tajne więzienia* (Another suit for the Polish prisons), "TVP Info" television, available at <http://tvp.info/informacje/polska/kolejny-pozew-za-tajne-wiezienia/6539554> (accessed April 10, 2012).

This implies serious consequences for Poland. If the criminal proceedings are not prompt and effective, it seems that the next natural step in the intervention of all Guantanamo prisoners would be the submission of a complaint against Poland to the ECtHR to seek responsibility before the ECtHR.

One of the interveners has already brought a case against Poland to the ECtHR.⁶⁹ The case concerns Al-Nashiri, a Saudi national, who in 2002 was captured in Dubai and secretly transferred to a CIA prison in Afghanistan, and later Thailand, where he was waterboarded. He was also transported to yet another secret prison in Poland where he was subjected to ill-treatment such as mock executions with a power drill. Subsequently, Poland assisted the US in secretly flying al-Nashiri out of Poland, despite the grave risk of his being subjected to further torture, incommunicado detention, and the death penalty while in US custody.⁷⁰

In their application, lawyers of Al-Nashiri claimed violation of Articles 3, 5, and 8 ECHR for unlawful detention and torture. Moreover they indicated the infringement of Articles 2, 3, and Protocol 6 to the ECHR due to the transfer out of Polish territory despite a real risk that he would be subjected to the death penalty, an unfair trial, further ill-treatment in US custody or incommunicado detention. They also argued the violation of Articles 2, 3, 5, 8 and 13 ECHR for lack of an effective investigation. As of the time of this writing, there has been no decision of the ECtHR as to its communication to Polish government.

The case of Al-Nashiri and other potential rendition cases before the ECtHR, may have real, grave consequences for Poland. Looking at the El-Masri case, it is very probable that the Strasbourg court will decide to examine the case and to deliver a judgment. In view of ECtHR jurisprudence, Poland could be found directly responsible for violations of the above provisions.

One of the obligations possibly violated by Poland in the practice of extraordinary rendition is the right to life (Art 2 of the ECHR); states are under positive obligation to undertake actions to protect life of all persons within their jurisdiction.⁷¹ Furthermore, the ECHR prohibits torture and other inhuman or degrading treatment (Art. 3 of the ECHR); the prohibition is of an absolute nature, meaning that under no circumstances can it be derogated or justified. When states engage in torture or other ill treatment, alone or in collaboration with

⁶⁹ Application to the ECtHR in case of Al-Nashiri against Poland of May 6, 2011 is available at: <http://www.soros.org/initiatives/justice/litigation/nashiri/echr-al-nashiri-application-20110506.pdf> (accessed April 10, 2012).

⁷⁰ More information in the facts of the case see: Open Society Justice Initiative statement *Poland Complicit in Rendition, Detention, and Torture at CIA Black-site Prison*, available at: <http://www.soros.org/initiatives/justice/litigation/nashiri> (accessed April 10, 2012).

⁷¹ *L.C.B. v United Kingdom* (23413/94), ECtHR, June 6, 1998.

other states, they are responsible for violating the prohibitions of such treatment in human rights law.⁷²

It is possible that the ECtHR could find Poland in violation of Article 3 of the ECHR, even without directly carrying out torturous treatment. Such responsibility may happen when a state transfers an individual from its territory or control to another state where there is a real risk of serious rights violations. The obligation of *non-refoulement* prohibits the transfer of an individual to a state where there are “substantial grounds” on which to assume there is a real and foreseeable risk of serious rights violations.⁷³ According to ECtHR case law, Poland could have violated human rights by not preventing extradition to a country in which the person is in danger of being sentenced to death and when the death penalty is likely to be imposed following unfair proceedings, such as those conducted by the Guantanamo military commissions. The *non-refoulement* obligation also covers other serious violations such as the right to life (Article 2 of the ECHR) and the right of access to justice (Art. 6 and 13 of the ECHR).⁷⁴ In the context of extraordinary rendition, *non-refoulement* is established as an absolute obligation of a state party.⁷⁵

Other violations for which Poland may be held responsible are the infringements of the rights to liberty and to the security of the person (Art. 5 of the ECHR). These rights ensure that detentions have a lawful basis and that procedural guarantees are respected. Furthermore, *incommunicado* detention may seriously violate the right to challenge illegal practices – for example, detention or use of torture – before a court in accordance with fair trial rights (Art. 6 of the ECHR).

If the ECtHR finds Poland as a perpetrator of human rights enshrined in the ECHR, Poland must take into account particular consequences. First, the ECtHR may order significant financial compensation as just satisfaction. Second, it is possible that Poland will be obliged to reopen its investigation, following the Recommendations No. R (2000) 2 of the Committee of Ministers.⁷⁶ The document encourages states to provide in their domestic legislation adequate possibilities for re-examination of a case, including reopening of proceedings, in instances where the Court has found particular violations of the Convention.

⁷² Duffy, *supra* note 39, p. 4.

⁷³ *Ibidem*.

⁷⁴ *Soering v United Kingdom* (14038/88), ECtHR, July 7, 1989.

⁷⁵ *Saadi v. Italy* (37201/06), ECtHR, February 28, 2008.

⁷⁶ Recommendation No. R (2000) 2 of the Committee of Ministers to member states on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights Adopted by the Committee of Ministers on January 19, 2000 at the 694th meeting of the Ministers’ Deputies, available at: <https://wcd.coe.int/ViewDoc.jsp?id=334147&Site=CM> (accessed April 10, 2012).

Finally, at the forum of the international community Poland would be seen as a grave violator of human rights that failed to perform its international obligations and did not prove its commitment to the democratic values.

CONCLUSION

Currently, Poland has found itself in a unique situation. The criminal investigation into renditions is still pending and two former prisoners were granted victim status (a third is contemplating submission of relevant motion), while other countries seem to be closing their proceedings. Such a situation strengthens the role of the Poland and underlines the importance of the investigation. Poland now has the chance to examine and disclose to the public, the truth about the war on terror conducted by President George W. Bush, the alleged human rights violations connected with it, and the role that Poland played in the extraordinary rendition program. The investigation may effectively allow victims of this rendition program to seek justice at the domestic level or potentially at the ECtHR level and it may even influence the indefinite nature of Guantanamo detention and/or pending death penalty proceedings in the US.

There is international pressure coming from different directions to investigate the rendition case. In June 2009, Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, singled out Poland as a state that needed to conduct an independent inquiry in which state secrets may not be raised to justify a refusal to disclose information about human rights violations. In its recommendations published October 29, 2010, the United Nations Human Rights Committee also said that Poland should conduct a thorough investigation concerning extraordinary rendition, the results of which should be made public. The Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe, in September 2011, urged Polish prosecuting authorities to persevere in seeking to establish the truth about the allegations of secret CIA detentions⁷⁷. Finally, on March 27, 2012 the LIBE Committee of the European Parliament organized a special follow-up hearing devoted to this issue.⁷⁸ This means that international community will remain alert as regards potential developments of the case and investigation in Poland. Interestingly in this context, the recent

⁷⁷ Marty III, *supra* note 10, p. 3.

⁷⁸ See program of the hearing, available at: <http://www.europarl.europa.eu/document/activities/cont/201203/20120320ATT41327/20120320ATT41327EN.pdf> (accessed April 10, 2012).

information on putting charges against Mr. Siemiątkowski shows that there is a real interest in explaining the case in Poland, as compared to other CEE countries.

However, taking into consideration the course of the investigation and its latest developments, serious doubts arise as to the diligence of the investigation. First of all, it seems as though the proceedings were incomprehensibly prolonged by removing from the investigation the following prosecutors: firstly, Jerzy Mierzeński, shortly after the media disclosed information that he was willing to bring charges against high-ranking officials and secondly, Waldemar Tyl, after the media stated that he is willing to close the investigation in 2012. Finally, the case was transferred to Cracow. All of this happened without providing any explanation to the public. The recent decision in particular – coupled with press leak of putting charges against former Polish intelligence agency head Zbigniew Siemiątkowski – raises doubts with regard to political independence of the investigation.

Second, serious obstacles, as previously mentioned, to the proper conduct of the case have emerged due to the state secrecy and national security provisions, which have covered the entire investigation from the beginning. Additionally high-ranking officials, like the president of Poland at the time, cannot testify due to the state secrecy. There is a real threat that, even if the court will consider the case, the proceedings and their findings will be also classified and not disclosed to the public. Such a solution will definitely not meet the standards of a fair trial as stipulated by Strasbourg jurisprudence.

Third, following the recent decision to bring charges against Mr. Siemiątkowski, there is a lot of discussion in Poland as regards closing the investigation as it allegedly threatens the Polish state interest. In the opinion of many politicians, Polish authorities, including prosecutors' office, should not undertake any further action, as it might be detrimental to the state security. Certainly such views – completely ignoring the norms of the Constitution or international obligations, including the ECHR – do not help in proper explanation of the case.

Polish judicial authorities, along with the government, should, therefore, undertake all actions aiming at explaining the truth about extraordinary rendition and seek the responsibility of those who were involved in human rights violations. Additionally, it is in the interest of Poland to initiate declassification of parts of the investigation, such as evidence gathered in its course. It is important that state secrecy and national security are obeyed. They cannot, however, hinder the proper conduct of the investigation. Otherwise, Poland may be held responsible the ECtHR and bear all the connected consequences stemming from violations of the ECHR.

Karolina Wierczyńska* ■

SOME REMARKS ON POLAND'S POTENTIAL RESPONSIBILITY FOR THE TREATMENT OF DETAINEES IN A CIA PRISON IN POLAND

Abstract

Secret detentions, renditions, torture and other forms of cruel treatment cannot be considered as humane treatment in any situation. A State that performs such acts can obviously be held responsible, as can any other States which aid, assist, facilitate, and offer their airports or prisons. All these violations of international law were connected with the American and European counter-terrorism actions in the context of their "global war on terror". Detaining prisoners without the consent of a competent court, without informing their families, interrogating them, torturing them and other examples of using "enhanced techniques" amount to a violation of international law and can lead to either the legal responsibility of the state, the criminal responsibility of state officials, or both. This article analyzes the scope of Poland's potential responsibility for violations of both international and domestic law connected with the question of the detainment of American secret prisoners on Polish soil.

INTRODUCTION

A few years ago the international press and international nongovernmental organizations began to inform the public about the alleged rendition and detention of American secret prisoners in some countries in Europe, i.e. Romania, Poland and Lithuania. A few other states, such as Germany and the UK, were accused of being involved in interrogations while others, such as Sweden, Macedonia, and Italy, were accused of allowing the USA to use their territory for abduction

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and rendition. The governments of these countries continuously denied the accusations, until the moment the detained prisoners began to confirm revealed facts. In 2007 Dick Marty – the Special Rapporteur of the Council of Europe – confirmed in his report that “secret detention facilities run by the CIA did exist in Europe from 2003 to 2005, in particular in Poland,”¹ and were part of the “global war on terror” announced after the September 2001 terrorist attack on the World Trade Center in New York. According to the report, eight high-value detainees, including Abu Zubaydah, Khalid Sheikh Mohamed, Ramzi bin al-Shibh, Tawfiq [Waleed] bin Attash and Ahmed Khalfan [al-] Ghailani, were allegedly held between 2003 and 2005 in the village of Stare Kiejkuty in Poland. Two of those prisoners, Abd al-Rahim al-Nashiri and Abu Zubaydah, accused Poland of unlawful detention and torture. They were both granted the status of victim by the Prosecutor’s office.

The aim of this article (mainly based on the reports of international organizations) is twofold. First, it intends to analyze the scope of Poland’s potential responsibility for violations of international and domestic law connected with the issue of US secret prisons. Second it also attempts to examine Polish law relating to the prohibition of torture and war crimes. Although the issue is very serious and complex its discussion in public in Poland has been muted by political considerations and alleged issues of national security. While it is virtually established that Poland participated in the American activities connected with detaining the prisoners, up until now Poland has yet to explain the scope of its cooperation and who bears responsibility for making the decisions which led to the violation of prisoners’ rights.

The first section of this article discusses the issue of the war on terror, the legal status of “unlawful combatants” and the scope of protection of the Common Article 3 of the Geneva Conventions. Next the article focuses on the reports of international organizations describing Poland’s activities in the context of the “war on terror” and the claims of detainees (in particular Abu- Zubaydah and Al-Nashiri) directed against Poland. The following section is focused on state responsibility for violations connected with secret detentions of prisoners. Next the article discusses Poland’s responsibility in the context of the general rules of the law of state responsibility, and the responsibility of state officials in the context of Polish domestic law and international rules. The last section is devoted to the

¹ Dick Marty, *Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report*, Council of Europe, doc. 11302 rev., 11 June 2007. Available at: <http://assembly.coe.int/Documents/WorkingDocs/Doc07/edoc11302.pdf> (accessed August 20, 2011).

possible remedies available to the detained persons. This section also formulates some general remarks on the question of Poland's potential responsibility for the CIA prisons if its participation is confirmed.

1. THE WAR ON TERROR

Following the attack on the World Trade Center the Government of the United States declared a war on terror. In February 2002 the President of the USA, in his memorandum entitled "Humane Treatment of Taliban and Al Qaeda detainees,"² declared that the Third Geneva Convention does not apply to the detainees as it applies to conflicts between states and al-Qaeda is not a state, and additionally that the Common Article 3 of the Geneva Conventions³ does not

² Memorandum of the President of the United States, *Humane Treatment of Taliban and al Qaeda detainees*, 7 February, 2002, www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf (accessed February 28, 2012).

³ Geneva Conventions of 1949 (entered into force August 12, 1949), 75 UNTS 287, available at: <http://www.unhcr.org/refworld/docid/3ae6b36d2.html>, (specifically: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Convention (III) relative to the Treatment of Prisoners of War; Convention (IV) relative to the Protection of Civilian Persons in Time of War).

Common Article 3. In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular, humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

apply to the Taliban detainees and Al Qaeda members as it refers to the conflicts which are not of an international character. The memorandum also described the detainees as “unlawful combatants,” not eligible for qualification as prisoners of war under Article 4 of the Third Geneva Convention. At the same time, President Bush declared that the detainees would be treated humanely to the extent appropriate and consistent with military necessity and applicable law.

In the course of the war on terror many people were arrested in the USA and abroad, and some of them are still detained in the American prison located in Guantanamo Bay, Cuba. In September 2006 President Bush also confirmed the existence of CIA detention centers around the world, and the fact that high-value detainees were kept in CIA custody.⁴ Although the detainees were to be treated humanely, the Director of the CIA Leon Panetta confirmed that the CIA used “enhanced interrogation” techniques, including waterboarding, on the detainees in the CIA detention centers.⁵

The USA’s initial position, declaring that the detained al-Qaeda members are unlawful combatants and are not entitled to the protection of the Geneva Conventions, leads to the question of the scope of protection of the Common Article 3 of the Geneva Conventions and the legal status assigned to the unlawful combatants, i.e. whether they remain outside the scope of the Geneva Conventions.

1.1. The scope of Common Article 3 and the issue of unlawful combatants

The discussion concerning the Common Article 3 is focused on the fact that its provisions apply to conflicts of a non-international character, and the question arises whether it can be applied in the case of al-Qaeda members. At the time of the formulation of Common Article 3, the *travaux préparatoires* indicated that the scope of its applicability was intended to be narrower,⁶ but it is no longer interpreted according to the terms of the *travaux* anymore. As has been noted in the legal doctrine, the provisions of Article 3, as a set of minimum standards, should be adhered in every situation.⁷ According to the commentary to the Convention on

⁴ D. Gonyea, *Bush Concedes CIA Held Suspects in Secret Prisons*, September 6, 2006, available at: <http://www.npr.org/templates/story/story.php?storyId=5776968> (accessed February 28, 2012).

⁵ CIA Director Leon Panetta confirms that waterboarding / enhanced interrogation techniques led to Osama Bin Laden, MSNBC interview, available at: <http://winteryknight.wordpress.com/2011/05/04/cia-director-leon-panetta-confirms-that-waterboarding-led-to-osama-bin-laden/> (accessed February 28, 2012).

⁶ A. Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, Cambridge University Press, Cambridge: 2010, p. 60.

⁷ *Ibidem*, p. 59.

the issue, "This minimum requirement in the case of a non-international armed conflict, is *a fortiori* applicable in international conflicts. It proclaims the guiding principle common to all four Geneva Conventions, and from it each of them derives the essential provision around which it is built."⁸ Also the case law makes clear that provisions of Article 3 are so fundamental that they apply to both international and internal conflicts⁹ and they are part of customary law binding all the parties to a conflict.¹⁰

"Unlawful combatant" as a notion is not used in the text of Geneva Conventions.¹¹ The Geneva Conventions refer to civilians, prisoners of war, and medical personnel, and there is nothing about the status of so-called unlawful combatants. The commentary to the Fourth Geneva Convention stresses that: "there is no 'intermediate status'; nobody in enemy hands can be outside the law."¹² As nobody should be left outside the scope of protection of the Geneva Conventions, it becomes critical to settle the legal status of an unlawful combatant. In the discussion on the legal status of alleged terrorists two groups should be considered: the Taliban, and al-Qaeda members. The Taliban were part of the effective government of Afghanistan and should be treated as prisoners of war according to the Third Geneva Convention.¹³ Al-Qaeda on the other hand must be defined as an organization composed of persons of differing nationalities. It is not a party of Geneva Conventions and cannot be considered as a subject of international law.¹⁴

Antonio Cassese confirms the prevailing opinion that there is no category between civilians and combatants, adding that the notion of unlawful combatant

⁸ Commentary to Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, p. 14, on line at: <http://www.icrc.org/ihl.nsf/COM/380-600002?OpenDocument> (last visited February 2012).

⁹ *Prosecutor v. Z. Delalic, Z. Mucic, H. Delic, E. Landzo, Judgement*, IT-96-21-A, 20 February 2001, paras. 143-145; *Prosecutor v. M. Mrksic, V. Sljivancanin, Judgement*, IT-95-13/1-A, 5 May 2009, para. 70.

¹⁰ *Prosecutor v. D. Kumarac, R. Kovac, Z. Vukovic, Judgement*, IT-96-23&IT-96-23/1-A, 12 June 2002, para. 68.

¹¹ Geneva Conventions of 1949, *supra* note 3.

¹² Commentary to Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949, p. 51, available at: <http://www.icrc.org/ihl.nsf/COM/380-600007?OpenDocument> (accessed February 28, 2012).

¹³ A. Cassese, *International law*, Oxford University Press, Oxford: 2005, p. 410; J. Barcik, *Status prawny Talibów i członków al-Qaeda zatrzymanych przez władze USA* (Legal status of Taliban and al-Qaeda members detained by the USA powers), 1 Państwo i Prawo 91 (2003), p. 93.

¹⁴ G. Aldrich, *The Taliban, al Qaeda, and the Determination of Illegal Combatants*, 4 Humanitäres Völkerrecht – Informationsschriften 202 (2002), p. 203, available at: http://www.pegc.us/archive/Journals/aldrich_illegal_combatants.pdf (accessed February 28, 2012).

can only be used as a descriptive category.¹⁵ According to the doctrine, unlawful combatants are al-Qaeda members who have been combatants in hostilities and are not entitled to the status of prisoner of war.¹⁶ This definition leads to the conclusion that unlawful combatants are not protected by the Third Geneva Convention. As indicated by Cassese however, al-Qaeda members must be regarded as civilians who participated in criminal activities.¹⁷ In that situation it must be underlined that they are at least entitled to the protection ensured by the Common Article 3 of the Geneva Conventions and Article 75 of the Additional Protocol I to the Conventions¹⁸ (although it is not clear whether the United States, which is not a state party to the Additional Protocol I is bound by the provisions of Article 75 as a rule of customary law¹⁹). The provisions of Article 75 relate to persons who are under the power of a Party to a conflict and who do not benefit from more favorable treatment under the Conventions or under the Protocol. According to the text they “shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria”. What is of key importance in context of further considerations under Article 75 is that the person arrested or detained should be informed why such measures were taken, and also that any sentences and penalties relating to the detained person can be pronounced only by a regularly constituted court.

The Fourth Geneva Convention applies to unlawful combatants if they fulfill the nationality criteria mentioned in the Article 4 of that convention.²⁰ In any case detained persons are protected by the Common Article 3 and Article 75 of Additional Protocol I, irrespective of whether they fulfill the nationality criteria or not.

In dealing with lawsuits filed by the detainees, the United States Supreme Court challenged the attempts of its government to limit the scope of the Geneva

¹⁵ Cassese, *supra* note 13, p. 409.

¹⁶ Cf., Aldrich, *supra* note 14, p. 203; K. Doermann, *The legal situation of “unlawful/unprivileged combatants”*, 85(849) RICR Mars IRRC March 45 (2003), p. 46, available: http://www.pegc.us/archive/Journals/irrc_849_Dorman.pdf (accessed February 28, 2012); E. Crawford, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict*, Oxford University Press, Oxford: 2010, p. 58.

¹⁷ Cassese, *supra* note 13, p. 410.

¹⁸ Doermann, *supra* note 16, p. 50, Aldrich, *supra* note 14, p. 203.

¹⁹ See the discussion: <http://www.ejiltalk.org/article-75-ap-i-and-us-opinio-juris/> (accessed February 28, 2012).

²⁰ Doermann, *supra* note 16, p. 66.

Conventions. In the case of *Hamdan v. Rumsfeld* the Court, interpreting the Common Article 3 of the Geneva Conventions, noted that “the term ‘conflict not of an international character’ is used (in the Convention) in contradistinction to a conflict between nations,” adding that the provisions of Article 3 are applicable “even if the relevant conflict is not one between signatories.”²¹ This judgment confirming the applicability of Common Article 3 to any detainees in any armed conflict must be treated as a landmark decision, as it determines the minimum protection and the legal status of military detainees, especially when the US is not a party to Additional Protocol I (the Court in the case of *Hamdan v. Rumsfeld* observed that the although US declined to ratify Additional Protocol I, government’s objection to the protocol was not to Article 75; this however is not enough to confirm its customary status as a rule of law).

These considerations lead to the conclusion that unlawful combatants cannot be deprived of all their rights. At a minimum they should be treated humanely, should be informed about their rights, and should be judged by a regular court. This article however focuses not on the responsibility of the US for the illegal treatment of prisoners, but on the potential responsibility of Poland as a state which took part in the American activities in its war on terror.

2. SECRET PRISONS IN POLAND ACCORDING TO THE REPORTS OF INTERNATIONAL ORGANIZATIONS AND CLAIMS OF DETAINEES.

In June 2006 Dick Marty – Rapporteur of the Committee on Legal Affairs and Human Rights of the Council of Europe – issued his first report concerning the issue of the existence of secret detention centers in Poland and Romania. The report confirmed that at that particular stage there was no formal evidence of the existence of such centers, but that an “unspecified number of persons, deemed to be members or accomplices of terrorist movements, were arbitrarily and unlawfully arrested and/or detained and transported under the supervision of services acting in the name, or on behalf, of the American authorities. These incidents took place in airports and in the European airspace, and were made possible either by seriously negligent monitoring or by the more or less active participation of one or more government departments of Council of Europe

²¹ *Salim Ahmed Hamdan, petitioner v. Donald H. Rumsfeld, Secretary of Defense, et al.*, 548 U.S. 557 (2006), p. 67, available at: <http://www.supremecourt.gov/opinions/05pdf/05-184.pdf> (accessed February 28, 2012).

member states.”²² In his second report (2007) Dick Marty confirmed that there was enough evidence to confirm that secret detention centers, run directly and exclusively by the CIA, existed in Poland and Romania from 2003 – 2005.²³ Marty mentioned eight high-value detainees kept in a detention center in Poland who were subjected to special treatment called “enhanced interrogation techniques”. According to the second report, the detainees were subjected to inhuman and degrading treatment, including “enhanced” interrogation methods based on the imposition of physical and psychological pain, including beatings, waterboarding, stress positions, sleep deprivations and so on. All those techniques, and even lesser ones, fulfill the definition of torture and inhuman and degrading treatment as provided by Article 3 of the European Convention on Human Rights²⁴ and the United Nations Convention against Torture.²⁵

As to Poland, in his second report Marty gathered evidence from different sources (for example from civil aviation records) confirming landings of American airplanes at the airport in Szymany (Poland), with vans leaving the airport in the direction of an intelligence training base in Stare Kiejkuty. He confirmed the existence of a secret detention center in Poland, and also that local officials performed only logistical functions, without having contact with the detainees. Marty also confirmed that only a few people in Poland – all high ranking officials – actually knew about existence of these centers of detention for high value detainees. Although they did not know the specific number of detainees, they were aware of the illegal activities of the CIA in Poland. Marty mentioned, among other persons, the former President of Poland, the chief of the National Security Bureau (also Secretary of the National Security Committee) and the Minister of National Defense.

²² Committee on Legal Affairs and Human Rights, *Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe member states*, Doc. 10957, 12 June 2006, available at: <http://assembly.coe.int/Main.asp?link=http://assembly.coe.int/Documents/WorkingDocs/doc06/edoc10957.htm?link=/Documents/WorkingDocs/Doc06/EDOC10957.htm> (accessed August 20, 2011).

²³ Committee on Legal Affairs and Human Rights, *Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report*, Doc. 11302 rev., June 11, 2007, p. 7, available at: <http://assembly.coe.int/Documents/WorkingDocs/Doc07/edoc11302.pdf> (accessed August 20, 2011).

²⁴ [European] Convention for the Protection of Human Rights and Fundamental Freedoms (adopted November 4, 1950, entered into force September 3, 1953), 213 UNTS 222.

²⁵ United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (adopted December 10, 1984, entered into force June 26, 1987), 1465 UNTS 85.

The Report of the Human Rights Council of the UN from February 2010²⁶ repeated many of the findings of Dick Marty²⁷ and also added new information already in the public domain concerning the secret flights and the proceedings instituted by the Office of Prosecutor in Warsaw in the case of “the alleged existence of so-called secret CIA detention facilities in Poland, as well as the illegal transport and detention of persons suspected of terrorism”. According to the report: “[a]fter 18 months, still nothing is known about the exact scope of the investigation. The experts expect that any such investigation would not be limited to the question of whether Polish officials had created an ‘extraterritorial zone’ in Poland, but also whether officials were aware that ‘enhanced interrogation techniques’ were applied there.”²⁸ In other words, at that moment almost nothing was known about the proceedings undertaken by the Polish prosecutors as they were kept confidential. On February 4, 2011 the Office of Prosecutor sent a letter to the Helsinki Foundation for Human Rights (HFHR) confirming that an investigation concerning public officials exceeding their powers was still pending, and that recently it had been moved from Warsaw to Cracow.²⁹

Following the request of the HFHR, and acting in accordance with the Polish Act concerning access to public information,³⁰ the Polish Air Navigation Services Agency (PANSa) revealed³¹ that planes had landed in Poland. PANSa also took part in actions to cover up the true destination of certain flights and

²⁶ Human Rights Council, *Promotion and protection of all human rights, civil, political, economic, social and cultural rights including the right to development. Joint study on global practices in relation to secret detention in the context of countering terrorism, of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak; the working group on arbitrary detention represented by its vice-chair, Shaheen Sardar Ali; and the working group on enforced or involuntary disappearances represented by its chair, Jeremy Sarkin*, A/HRC/13/42, 19 February 2010, available at: <http://www2.ohchr.org/english/bodies/hrcouncil/docs/13session/A-HRC-13-42.pdf> (accessed August 20, 2011).

²⁷ *Ibidem*, paras. 115-116.

²⁸ *Ibidem*, para. 118.

²⁹ The letter presented by the Prosecutor's office, available at: <http://www.interights.org/userfiles/Documents/20110204ProsecutorlettertoHFHRreFOIPolish.pdf> (accessed March 12, 2012); information about the status of the investigation available at: http://www.reprive.org.uk/press/2012_03_02_Poland_CIA_cover_up/ (accessed March 12, 2012).

³⁰ Ustawa o dostępie do informacji publicznej (Act concerning access to the public information), *Dziennik Ustaw* (Journal of Laws), 2001, No. 112, item 1198.

³¹ Cited data available at: http://www.soros.org/sites/default/files/disclosure-20100222_0.pdf (accessed February 10, 2012).

assisted the Americans in navigating aircraft.³² Further information was obtained by the HFHR from the Polish Border Guard Office, indicating that landings and departures differed in the number of passengers on board, which could be evidence that there existed a secret prison in Poland where certain passengers were left off and detained.

Two Guantanamo detainees, specifically Al-Nashiri and Abu-Zubaydah (acting via their attorneys as both are currently detained in Guantanamo Bay) filed motions which constituted notifications on suspicion of criminal offences committed against them in Poland.³³ They claim that they were illegally transported to Poland, where they were tortured and abused, and that Polish state officers were aware of those activities and raised no objections to them. The Polish Prosecutor officially recognizes both claimants as potential victims in its CIA prison investigation.³⁴

The above reports, and information gathered by HFHR, strongly support the claim that secret CIA detention centers were located in Poland. The proceedings initiated by the Polish Prosecutor's office also provide additional support to this assumption. Consequently, one should seriously consider whether the above actions, if proven, could potentially give rise to legal responsibility on the part of Poland. If the answer is affirmative, one needs to analyze the scope of such responsibility and question of possible remedies.

The following section starts with an investigation into the issue of state responsibility, with the aim of focusing on possible Polish responsibility in context of its international obligations and domestic law. Attention will be paid to two specific issues with regard to state responsibility: the responsibility of state officials, and possible legal remedies available to victims.

³² See, Report of Amnesty International, *Open secret: Mounting evidence of Europe's complicity in rendition and secret detention*, p. 27 available at: http://amnesty.org.pl/uploads/media/Open_Secret_CIA_rendition_report.pdf (accessed August 20, 2011).

³³ Al-Nashiri's motion available at: <http://www.hfhrpol.waw.pl/cia/images/stories/Al%20Nashiri%20redacted%20application%20PL-3.pdf>, Abu-Zubaydah's motion, available at: <http://www.interights.org/userfiles/Documents/20101216AbuZubaydahApplicationforVictimStatusinPolishArticle231InvestigationEnglishTranslation.pdf> (accessed February 20, 2012)

³⁴ Cf., press releases: <http://www.interights.org/document/13/index.html>, http://wyborcza.pl/1,76842,11138133,Sledztwo_w_sprawie_wiezienia_CIA_przeniesione_do_Krakowa.html (both accessed March 12, 2012).

3. STATE RESPONSIBILITY FOR VIOLATIONS OF INTERNATIONAL LAW – AN OVERVIEW. THE ISSUE OF POLAND'S ROLE IN THE US SECRET PRISON SYSTEM

State responsibility is a crucial issue when it comes to violations of international law, which are attributable to a state as the subject of international law. The question of state responsibility has been addressed by the International Court of Justice (“ICJ”) and International Law Commission (“ILC”), as well as in the scholarly literature.³⁵ Before focusing on the potential responsibility of Poland, certain general observations must be made.

In the case of *Corfu Channel*³⁶ the ICJ stated that it cannot be deduced, from the mere fact of control exercised by a state over its territory (including territorial waters), that the state knew or should have known about illegal acts that were taking place on its territory, but that the knowledge of the state can be established from the fact of “exclusive territorial control exercised by the state” within its borders. In its conclusion the ICJ pointed out that every state has an obligation “not to knowingly allow its territory to be used for acts contrary to the rights of other States”. Therefore the question of knowledge is the *sine qua non* condition for establishing state responsibility. Judge Alvarez, in his individual opinion to the judgment, developed this observation by saying that a “State which fails to exercise this vigilance, or is negligent in its exercise, will find its responsibility involved in case of injury caused in its territory to other States or to their nationals.” Further in the opinion Alvarez pointed that it is a consequence of a state’s sovereignty that a State must know and has a duty to know of prejudicial acts committed in parts of its territory. The responsibility of a state can be limited only in one situation: “by the fact that the State was acting in the general interest, or that it took all proper precautions to prevent other States or their nationals from suffering injury in its territory.”³⁷

³⁵ J. Crawford, *The International Law Commission’s articles on state responsibility. Introduction, Text and Commentaries*, Cambridge University Press, Cambridge: 2002, M. Fitzmaurice, D. Sarooshi (eds.), *Issues of state responsibility before international judicial institutions*, Hart Publishing, Oxford: 2004, I. Brownlie, *International law and the use of force by states*, Clarendon Press, Oxford: 1963, H.P. Aust, *Complicity and the law of State Responsibility*, Cambridge University Press, Cambridge: 2011, p. 269, G. Lysen, *State responsibility and International Liability of States for Lawful Acts: A Discussion of Principles*, Iustus Forlag, Uppsala: 1997.

³⁶ *Corfu Channel (UK v Albania) (Merits)* [1949] ICJ Rep 4, pp. 18-22.

³⁷ Opinion of Judge Alvarez attached to the Judgement on merits in case of *Corfu Channel*, available at: <http://www.icj-cij.org/docket/files/1/1649.pdf> (accessed February 20, 2012), p. 44.

In order for a state to be held responsible for violations of international obligations two elements must be established. There must be a breach of international law, and this breach must be caused by the state. This fundamental idea is reflected, for example, in the judgment of the ICJ concerning diplomatic and consular staff in Tehran: “First, it must determine how far, legally, the acts in question may be regarded as imputable to the (...) State. Secondly, it must consider their compatibility or incompatibility with the obligations of Iran under treaties in force or under any other rules of international law that may be applicable.”³⁸ Additionally the ICJ underlined that the Iranian authorities took no action to prevent the violations, and that “this inaction of the Iranian Government by itself constituted a clear and serious violation of Iran’s obligations to the United States.”³⁹

These principles are reflected both in the literature⁴⁰ and in the works of the ILC.⁴¹ The ILC does not mention the primary obligations of states, as they are contained in the treaties, but “general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow therefrom”. According to the ILC’s Draft Articles on Responsibility of States for Internationally Wrongful Acts (“Draft Articles”), which can also in some ways be considered as a reflection of customary international law, every internationally wrongful act of a State entails its international responsibility (Article 1). The elements of such an internationally wrongful act are a breach of international law which is attributable to a state. The breach may be the result of either an action or an omission (Article 2).

A breach of international law however is also often a result of cooperation between States, rather than by one state acting alone. This means that responsibility for the violation(s) can be attributable to several states. Under Article 16 of the Draft Articles a state which aids and assist in the commission of a wrongful act is responsible if it is acting with knowledge about wrongfulness of the act and

³⁸ *United States Diplomatic and Consular Staff in Tehran (USA v. Iran) (Judgement)* [1980] ICJ Rep 3, available at: <http://www.icj-cij.org/docket/files/64/6291.pdf> (accessed February 28, 2012)

³⁹ *Ibidem*, p. 32.

⁴⁰ I. Brownlie, *System of law of nations: state responsibility*, part I, Oxford University Press, Oxford: 1983, p. 38; M. Shaw, *International Law*, 5th ed., Cambridge University Press, Cambridge: 2003, p. 697.

⁴¹ International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, 2001, p. 32, available at: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (accessed February 12, 2012).

the act would be wrongful if committed by that state. This means that a state must be aware of the wrongful conduct of another state, and there must be a link connecting the acts or omissions of that state and the state committing the wrongful act. A State assisting and aiding a state committing a wrongful act will not be responsible to the same extent as a state committing the act; its responsibility will depend on its contribution to the wrongful act.⁴² There are three crucial elements required to attribute responsibility to a cooperating state: 1) existence of a wrongful act; 2) aid or assistance to the state committing the wrongful act; and 3) knowledge by the aiding state that it is aiding or assisting in the commission of a wrongful act. The ICJ, interpreting the provisions of Article 16, stated that it reflects the rule of customary law.⁴³

Articles 40 and 41 of the Draft Articles regulate the issue of violation of a peremptory norm, but it seems disputable whether they can be used in the context of the violations described in this article, as Articles 40 and 41 relate only to violations which are systematic and gross. The ILC has not elaborated any test for determining whether a particular violation is of a gross and systematic character. Leaving the decision in this regard to the Security Council does not seem to be a good idea, as its permanent members are often involved in such violations, as for example the US in the case of extraordinary renditions.

The result of the attribution of responsibility to a state obviously should involve legal consequences. According to Article 30 of the Draft Articles, a State should cease the wrongful act and offer appropriate assurances and guarantees of non-repetition, for example by way of satisfaction. Moreover, in accordance with Article 31 "the responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act."

Full reparation may take the form of restitution, compensation, or satisfaction, and these types of reparation can be implemented separately or jointly. The question of reparations in the case of secret prisons, renditions, and torture should mainly be connected with compensation for the personal injuries suffered by the detainees. There are two obvious problems with the effective enforcement of such reparations, the first of which concerns potential claimants. While a state could seek compensation in respect of the injuries caused to its nationals, to the best of our knowledge so far neither Afghanistan, Pakistan nor Iraq has claimed

⁴² *Ibidem*, p. 38.

⁴³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, [2007] ICJ Reports, p. 43, para. 420, available at: <http://www.icj-cij.org/docket/files/91/13685.pdf> (accessed February 28, 2012).

compensation from Poland in the name of its nationals. Second, the problem arises of allocating the responsibility, i.e. how it should be shared between the responsible subjects (for example between Poland and the United States). There are no criteria defined yet, as international law is not yet developed enough in this regard.⁴⁴

As to the Polish responsibility, in context of detaining the prisoners there is a high probability that Poland bears some responsibility for the acts of the CIA. Dick Marty, in his second report (presented above), confirmed that American airplanes landed in Poland, that Poland allowed American officials to use its intelligence training base, and that the Polish local officials performed some logistical functions, although they were not aware of the character of the CIA activities. According to the report a few high ranking state officials knew about the illegal activities of the CIA in Poland. Torture, enforced disappearances, or inhuman and degrading treatment constitute acts which can be described as internationally wrongful acts. The question arises as to the extent of contribution of a state which allowed the prisoners being tortured and abused to be transported on and through its territory and airspace?

From the above considerations a few conclusions can be drawn in the context of Poland's alleged actions. Firstly, a state is internationally responsible if it knew or should have known about illegal acts that were taking place on its territory. While we are not aware of the scope of Poland's knowledge as to the conduct of the CIA in Poland (since we do not know the provisions of the agreement between Poland and the USA), certainly one can assume that Poland should have known about illegal acts concerning detainees conducted by the US, as it effectively controlled its own territory and could not have been unaware of the nature of the US's military operations.

Secondly, a state which is prevented from exercising its authority (for example, by a *de facto* military occupation by another state, or acts of rebellion or actions of separatists) still has jurisdiction over its territory and therefore is obliged to guarantee the freedoms and rights defined in the ECHR⁴⁵ or other international instruments, as such a situation does not suspend their enforcement. Following the *a minori ad maius* argument – if in the situation of a *de facto* regime a State preserves its jurisdiction concerning the Convention, then all the more so it preserves its competence in a situation of a *de jure* regime (probably defined in

⁴⁴ Aust, *supra* note 35, p. 276.

⁴⁵ *Ilașcu and Others v. Moldova and Russia* (48787/99) Judgement, ECHR 8 July 2004, para. 333, all the cited judgements of ECHR are available at: www.echr.coe.int.

the agreement between Poland and the US). No agreement can exclude the responsibility of a state in a situation concerning the violation of a *jus cogens* norm (such as the prohibition of torture). Therefore, Poland was obliged to protect human rights and particularly to take the necessary measures to prevent the crime of torture.

Certainly there is a difference between the responsibility of a state which performs illegal activities like torture or inhuman and degrading treatment, and a state which only aided and assisted in performing those activities and played only a supporting role. Poland was not a main actor in the American war on terror. According to the presented reports, Poland's responsibility could be assessed as complicity.⁴⁶ In the light of the report of Dick Marty, the three elements defined in Article 16 of the Draft Articles are fulfilled however: 1) the existence of a wrongful act (violation of international obligations such as torture, illegal transports), 2) aid or assistance to the state committing the wrongful act (Polish provision of airspace, airports, and performing some logistical functions), and 3) knowledge that the state is aiding or assisting in the commission of wrongful act – under the condition that Polish state officials knew or should have known about the illegal activities of the CIA.⁴⁷

When assessing the legal consequences of such complicity, it must be taken into account that the assisting state is only responsible to the extent of harm that its conduct caused. According to the commentary to the Draft Articles: "Thus, in cases where that internationally wrongful act would clearly have occurred in any event, the responsibility of the assisting State will not extend to compensating for the act itself."⁴⁸ In other words, a state will only be responsible for its own acts and will not be held responsible for indemnifying the victim for all the consequences of the illegal act, but only those which are caused by its own acts.

There are some acts in the international law that can be attributed both to the state and the individual,⁴⁹ for example acts of torture. Taking into account the facts presented above – in context of Poland as a State it is exposed to responsibility

⁴⁶ It should be noted that the notion of "complicity" is not used in the current terminology of the law of state responsibility, but is used by the ICJ, which has observed that this notion is similar to the category of "aid and assistance" used in the Draft articles, *supra* note 41, para. 419.

⁴⁷ According to the judgment of the ICJ in case of Bosnian genocide, if an organ of the State, or a person or group whose acts are legally attributable to the State, commits the crime international responsibility is incurred by that State, *supra* note 43, par. 179.

⁴⁸ Draft articles, *supra* note 41, Art. 16, para. 1, p. 66

⁴⁹ A. Nollkaemper, *Concurrence between Individual Responsibility and State Responsibility in International Law*, 52 (03) International and Comparative Law Quarterly 615 (2003), p. 617, R. Cryer, H. Friman, D. Robinson, E. Wilmhurst, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge: 2010, p. 15.

for complicity in acts of torture. As the International Criminal Tribunal for former Yugoslavia stressed: “[u]nder current international humanitarian law, in addition to individual criminal responsibility, State responsibility may ensue as a result of State officials engaging in torture or failing to prevent torture or to punish torturers. If carried out as an extensive practice of State officials, torture amounts to a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, thus constituting a particularly grave wrongful act generating State responsibility.”⁵⁰

The next section examines the potential responsibility of state officials in the context of international and domestic law.

4. RESPONSIBILITY OF STATE OFFICIALS IN CONTEXT OF DETENTION AND TORTURE OF PRISONERS

“Classical” international law was focused on the responsibility of states, and acts of individuals acting as state officials were traditionally attributed to the state.⁵¹ The responsibility of the individual was left to the national law.⁵² The establishment of tribunals *ad hoc*, and later the International Criminal Court, has led to the situation where the individual can now be prosecuted before an international court. A. Nollkaemper, commenting on this radical change, stated: “[i]nternational law leaves it no longer to the national legal order to determine which individuals are subjected to obligations and responsibilities and now directly confronts individuals with the legal consequences of their acts.”⁵³ Consequently, taking into account the allegations of Al Nashiri and Abu Zubaydah, the responsibility of Polish state officials must also be taken into consideration.

4.1. Domestic law

Killing, torture or other inhuman treatment against prisoners of war, including the deprivation of liberty of such prisoners, is treated as a violation of the Polish Criminal Code (“CC”)⁵⁴ and is punishable by imprisonment. These acts are criminal offences under Polish law, and anyone committing them can be judged and imprisoned.

⁵⁰ *Prosecutor v. Anto Furundzija, Judgement*, IT-95-17/1-T, 10 December 1998, para. 142.

⁵¹ Nollkaemper, *supra* note 49, p. 616.

⁵² *Ibidem*.

⁵³ *Ibidem*.

⁵⁴ Kodeks karny (Criminal Code), Dziennik Ustaw (Journal of Laws), 1997, No. 88, item 553, as subsequently amended.

The motions filed by the detainees Al-Nashiri and Abu Zubaydah contain several allegations within the context of acts performed by public officials. They accuse public officials of committing the following offenses: under CC Article 231 § 1 – a public official misusing his or her powers or exceeding their duties to the detriment of public or private interests; under CC Article 189 § 3 – deprivation of liberty with a special torment; under CC Article 240 § 1 – the crime of failing to report or give notification about the commission of forbidden acts, specifically the violation of the prohibition against torture and other inhuman and degrading treatment or punishment; under CC Article 246 – using violence, illegal threats or other misconduct in order to obtain evidence or testimony; under CC Article 247 § 3 – mental and physical abuse of an imprisoned person. Additionally, Al-Nashiri has made accusations concerning the infringement of: Article 123 § 2 CC – maltreatment of prisoners of war; Article 156 § 1 CC – causing permanent damage to health; Article 190 § 1 CC – using threats and violence to force a person to perform certain acts or omissions. These accusations are directed against both those persons who performed interrogations using enhanced techniques, and those persons which facilitated the performance of those acts by providing the infrastructure and resources. The latter of course concerns the services provided by Polish officials, which according to the motions filed facilitated the performance of illegal acts.

By taking into account one of the allegedly violated provisions of the CC, this article will now focus on the problems connected with its applications to the situations of those detained persons. In particular, Article 123 § 2 of the Polish CC states that whoever, in violation of international law, causes the prisoners of war to suffer serious detriment to their health, subjects such persons to torture, or cruel or inhuman treatment, makes them the objects of cognitive experiments (even with their consent), uses their presence to protect a certain area or facility or armed units from warfare, or keeps such persons as hostages, shall be subject to the penalty of deprivation of liberty. These provisions are a reflection of the provisions set forth in the Geneva Conventions.

The problem with applying the above provisions is that no Polish state official appears to have directly taken part in the inhumane treatment of prisoners. The reports confirm that Polish officials performed logistical functions, gave their consent to CIA actions, and provided the infrastructure. It is not clear to what extent they were aware of the illegality of the CIA actions. Based on the documentation known so far, they could only be accused of aiding and abetting the commitment of a crime. According to Article 18 § 3 of the CC

whoever, with an intent that another person should commit a prohibited act, facilitates by his behavior the commission of the act, particularly by providing the instrument, means of transport, or giving counsel or information, shall be

liable for aiding and abetting. Furthermore, whoever, acting against a particular legal duty to prevent a prohibited act, through his omission facilitates its commission by another person, shall also be liable for aiding and abetting.

The problem with using this particular provision is that it must be proved that the aider and abettor had the requisite intent to commit a crime. Mere knowledge of American activities does not make the state official criminally responsible for aiding and abetting if the requisite intent is not proven.

Because the investigation in the case is still pending, it is difficult to draw any general conclusions, which is why further considerations will be focused on other possible ways to find a state official responsible under domestic law.

According to Article 40 of the Polish Constitution⁵⁵ “no one may be subjected to torture or cruel, inhuman, or degrading treatment or punishment. The application of corporal punishment shall be prohibited.” The prisoners of the CIA were illegally transported to Poland where they were subjected to torture and other degrading treatment, including enhanced interrogation techniques. One may legitimately assume that this violated the provisions of Article 40 of the Polish Constitution. The consequences of an infringement of the Constitution can include the responsibility of state officials before the Polish Tribunal of State (in the case of the President, on the request of the entire Parliament; in other situations on the request of the lower house of Parliament (the Sejm). What this actually means in practice is that this decision is highly political and depends on the composition of Parliament. Constitutional responsibility is connected with those acts violating the Constitution which took place while the state official charged held the office (Article 3), and concerns only high level officials such as the president and ministers (compare Article 1).⁵⁶

So far, according to the press releases,⁵⁷ the former head of the intelligence service has confirmed that he has been charged with violation of international law and exceeding his powers by “unlawful deprivation of liberty” connected with the setting up of a secret CIA detention center. This is probably the most important message communicated to the public since the investigation started

⁵⁵ Konstytucja Rzeczypospolitej Polskiej (The Constitution of the Republic of Poland), *Dziennik Ustaw* (Journal of Laws), 1997, No. 78, item. 483, English version available at: <http://www.trybunal.gov.pl/eng/index.htm>

⁵⁶ Ustawa o Trybunale Stanu (Act concerning the Tribunal of State), *Dziennik Ustaw* (Journal of Laws), 2002, No. 101, item 925, as subsequent amended.

⁵⁷ See, http://wiadomosci.gazeta.pl/wiadomosci/1,114884,11425315,Siemiatkowski_z_zarzutami_za_wiezienia_CIA_To_potwierdza_.html (accessed March 28, 2012), also: <http://www.nytimes.com/2012/03/28/world/europe/polish-ex-official-charged-with-aiding-cia.html> (accessed 28 March 2012).

in 2008, and particularly surprising considering that for a long time public officials at various levels and from various parties have been denying that such prisons existed in Poland.

4.1. The international responsibility of a state official

Besides responsibility at the national level, the potential international responsibility of state officials should also be taken into consideration. Since Poland is a state party of the Rome Statute⁵⁸ of the International Criminal Court (“ICC”), the Polish Head of State and other high-ranking officials can be accused by the prosecutor of the ICC. The ICC has, *inter alia*, jurisdiction over war crimes (grave breaches of the 1949 Geneva Conventions) and crimes against humanity.⁵⁹ The Rome Statute demands that crimes against humanity be committed as a part of a widespread and systematic attack. As to war crimes – the ICC will have jurisdiction “in particular when [a crime is] committed as part of a plan or policy or as part of a large-scale commission of such crimes.” This may be interpreted to mean that the ICC will have jurisdiction over those crimes which achieve certain high degree of gravity.⁶⁰ On the one hand, this can constitute an obstacle to the prosecution of state officials (and the “impunity gap” could materialize if a national system will similarly not prosecute a responsible official⁶¹), while on the other hand this approach obviously limits number of cases before the ICC, and by so doing improves its operability and effectiveness.

The provisions of the Rome Statute are clear that a “person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission; or contributes to the commission of the crime” (Article 25). It is critical to determine whether the acts or omissions of such a person were intentional, as a person will be criminally liable only if acting with intent and knowledge. In other words, a person engaging in said criminal conduct must be aware that certain consequences will occur as a result of his or her actions or omissions.

In context of the potential responsibility of Polish state officials it would need to be proven that they acted with intent and knowledge of the wrongful acts that occurred in the course of their actions. It must be proven that they knew that

⁵⁸ Rome Statute of the International Criminal Court (adopted 17 July 1998; entered into force on 1 July 2002) 2187 UNTS 3.

⁵⁹ *Ibidem*, Articles 7-8.

⁶⁰ Nollkaemper, *supra* note 49, p. 619.

⁶¹ N. N. Jurdi, *The International Criminal Court and national courts. The contentious relationship*, Ashgate Publishing, London: 2011, p. 57.

acts of torture, secret renditions, or cruel and inhuman treatment would occur and meant to cause such consequences. In fact it is doubtful that their acts or omissions achieved such a degree of gravity that the prosecutor of the ICC would initiate an investigation in this case. While such a possibility exists in theory, it is quite hard to imagine in practice.

Additionally there is the problem of collecting evidence. In the case of state responsibility, we can deduce its responsibility from the mere fact of control over the territory. The state at least should have known of the illegal conduct taking place on its territory. In case of the responsibility of an individual, the facts must be certain. The “beyond reasonable doubt” standard must be met to convict a person,⁶² thus it must be directly established that any state official charged possessed both the knowledge and intent that a certain consequence in violation of international law would occur. This makes the process of collecting evidence much more complicated, if not impossible, in the situation analyzed herein.

5. POSSIBLE LEGAL REMEDIES FOR THE DETAINEES

5.1. Domestic law

One of the possible remedies for the illegally detained persons is based on their constitutional claim. It will be recalled that the Polish Constitution provides that “no one may be subjected to torture or cruel, inhuman, or degrading treatment or punishment. The application of corporal punishment shall be prohibited.”⁶³ Moreover, the Constitution states that “anyone deprived of liberty, except by sentence of a court, shall have the right to appeal to a court for immediate decision upon the lawfulness of such deprivation” also the person deprived of liberty shall be treated in a humane manner and everyone should be informed about the reasons for his or her detention, and that the family should also be notified of the deprivation of liberty. Every person deprived unlawfully of his or her liberty has the right to obtain compensation.⁶⁴ The Polish Constitution is the most fundamental source of protection of the rights and freedoms of all the individuals under the authority of the Polish State (Article 37). Its provisions should be applied directly (Article 8). This means that every person on Polish territory has the same rights and freedoms, and Poland has to provide for the effectiveness of these provisions. Additionally:

⁶² T. Buckles, *Laws of evidence*, The West Legal Studies Series, 2001, p. 30.

⁶³ The Constitution, *supra* note 55.

⁶⁴ *Ibidem*, Article 41.

everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution (Article 79 (1)).

It must also be underscored that the compensation can be obtained via proceedings in civil courts, as according to the provisions of Article 417 of the Polish Civil Code the Treasury of the State bears responsibility for the illegal acts of its organs committed during the performance of official powers.⁶⁵

5.2. Human rights violations in the course of operation of the secret detention centers

Poland is bound by all the major international obligations protecting human rights, and is a state party to the majority of fundamental treaties for the protection of human rights. It has ratified, *inter alia*, the International Covenant on Civil and Political Rights ("ICCPR"),⁶⁶ United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("UNCAT"),⁶⁷ the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("ECPT"),⁶⁸ and the European Convention on Human Rights ("ECHR"), as well as the series of accompanying protocols.

According to the above-mentioned acts torture is defined as

"any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity (Article 1 of UNCAT).

This definition should not be used as the definition of torture to punish an individual for the criminal offence, inasmuch as it lacks clarity – it does not explain

⁶⁵ Kodeks cywilny (Civil Code), Dziennik Ustaw (Journal of Law) 1963, No. 16, item 93, as subsequently amended.

⁶⁶ International Covenant on Civil and Political Rights (adopted December 16, 1966; entered into force on March 23, 1976), 99 UNTS 171.

⁶⁷ UNCAT, *supra* note 25.

⁶⁸ European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, (adopted November 6, 1987; entered into force on March 1, 2002).

the meaning of the notions used in its construction of the definition, and the acts of torture are not exhaustively listed. Nonetheless it can serve as an indicator of what can be called acts of torture. It lists the most fundamental elements of torture: it must involve pain or suffering; it must be caused with the certain intent (to force, to obtain information, to punish); it must be performed by a state and against a person who is deprived of his/her liberty.

In addition to the definition of torture, the above treaties also contain concrete provisions concerning the situation of the individual and obligations imposed on the state. The treaties prohibit torture and inhuman or degrading treatment (Article 7 of the ICCPR and Article 3 of the ECHR), and moreover the state is obliged to prevent all acts of torture under its jurisdiction (Article 2 UNCAT).

As is apparent even in the titles of the treaties, there is a difference between torture and degrading, inhuman treatment, but neither the ICCPR, UNCAT nor the ECHR contain definitions of these concepts, so sharp distinctions cannot be identified. The European Court of Human Rights has addressed this issue, indicating the distinction between torture and degrading, inhuman treatment in its 1978 judgment in the case of *Ireland v. The United Kingdom*, which concerned the issue of five interrogation techniques used by the British security forces on IRA suspects. According to the Court the “distinction derives principally from a difference in the intensity of the suffering inflicted.”⁶⁹ In that case the Court stressed that while the five interrogation techniques did constitute inhuman and degrading treatment, “they did not occasion suffering of the particular intensity and cruelty implied by the word torture as so understood.” The Court’s judgment indicates that torture must be interpreted as more intense and cruel than inhuman and degrading treatment, i.e. as its aggravated form.⁷⁰ It should also be kept in mind that the prohibition against torture is universally recognized as a norm of international customary law, and moreover it has the status of a peremptory norm.⁷¹

The UNCAT, in Article 3, states that “no State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds

⁶⁹ *Ireland v. The United Kingdom* (5310/71) Judgment, ECHR, 18 January 1978, para. 167.

⁷⁰ Two decades later, in the case *Selmouni v. France*, the Court called the European Convention a “living instrument which must be interpreted in the light of present-day conditions” pointed out that “certain acts which were classified in the past as “inhuman and degrading treatment” as opposed to “torture” could be classified differently in future”. Although the Court underlined the development of human rights and the standards of protection of human rights, it retained the difference between torture and inhuman and degrading treatment. *Selmouni v. France*, 25803/94, Grand Chamber, ECHR, 28 July 1999, para. 101.

⁷¹ E. de Wet, *The prohibition of torture as an international norm of jus cogens and its implications for national and customary law*, 15 (1) European Journal of International Law 97 (2004), p. 98.

for believing that he would be in danger of being subjected to torture". This *non-refoulement* rule was reflected in the judgment in the *Soering* case before the European Court of Human Rights. The Court confirmed that the decision to extradite a fugitive may violate Article 3 of the ECHR (prohibition of torture and other cruel and degrading treatment), and "engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country." The responsibility of a state in such a case is a "direct consequence of the exposure of an individual to the proscribed ill-treatment."⁷²

Under Article 4 of UNCAT a State party shall criminalize acts of torture, attempts to commit torture, and acts constituting complicity and participation in acts of torture. Such offences should be punishable by appropriate penalties.

Furthermore the above-mentioned treaties also contain prohibitions concerning the deprivation of liberty. Deprivation of liberty can only be the result of a lawful detention in prison following a judgment of a court, or lawful detention in arrest, in which case the person detained should be promptly informed of any charges against him/her (Article 5 of ECHR, Article 9 of ICCPR).

All these treaties contain special enforcement mechanisms providing for certain proceedings such as reports, individual complaints,⁷³ communications, or the complaint of a state. Any individual whose rights or freedoms were violated in Poland can act in accordance with the procedures provided for by said mechanisms. As long as these mechanisms are effective, general rules on state responsibility are excluded.⁷⁴ Additionally it must be emphasized that the Draft Articles on state responsibility are limited only to states. Only a state can invoke other state's responsibility. Mechanisms devoted to the protection of individuals by international treaties are of a different nature, as "[A]rticles on state responsibility are concerned with the legal consequences of concrete breaches. Reporting procedures before treaty bodies are not. Their function is to provide a comprehensive critique of the human rights situation in a particular member state."⁷⁵ This does not mean however that if a special regime of human rights' protection fails to protect human rights, the individual will be left without any remedy. The probable solution would

⁷² *Soering v. The United Kingdom* (14038/88), Judgement, ECHR, 7 July 1989, para. 91.

⁷³ The scope of protection of UNCAT or ICCPR is similar, but ICCPR, for example, provides more mechanisms of protection as it includes state responsibility for violations of the rights of an individual.

⁷⁴ B. Simma, D. Pulkowski, *Of Planets and the Universe: Self-contained Regimes in International Law*, 17 (3) *European Journal of International Law* 483 (2006), p. 525.

⁷⁵ *Ibidem*, p. 525.

be to commence an action based on general rules of state responsibility, as nothing could relieve the states from their obligation to “induce compliance with obligations under human rights treaties, once the collective enforcement mechanisms of the treaty have failed.”⁷⁶

In discussing state responsibility for the violation of human rights in terms of the concrete cases of Abu-Zubaydah’s and Al-Nashiri’s detentions, it must be mentioned that they should primarily exercise their rights through the provisions of the domestic law. If they do not succeed they can file a claim to the European Court of Human Rights indicating the violations of certain rights provided for in the European Convention on Human Rights (or in the case of rights arising under other international treaties, to other international bodies). Consequently, the most effective mechanism for obtaining compensation is the mechanism provided by the European Court of Human Rights. In contrast to mechanisms provided by other human rights’ treaties, this mechanism is a judicial procedure, but it can be activated only after all available national procedures have been exhausted. Currently there are two proceedings pending in Poland (as mentioned above, Abu Zubaydah and Al Nashiri).

CONCLUSION

On the basis of the above considerations, some general remarks may be made concerning the potential scope of Poland’s responsibility, and that of Polish state officials.

Poland presumably allowed CIA flights to land in Poland, allowed the use Polish territory to transport detainees, and Polish crew navigated these aircrafts. This means that Poland permitted the violation of human rights on its territory. One may apply a presumption, resulting from the fact that Poland enjoys effective control over its territory, that it must have known about the scope of the American activities.

The agreement between Poland and the USA is not publicly known, so we can only hypothetically postulate that Poland facilitated (aided and assisted) in the commission of crimes by the CIA. Poland delegated its local officials to assist the CIA functionaries. Although it is alleged that they performed only logistical functions without having contacts with detainees, this can also be held to be facilitating the commitment of a crime.

⁷⁶ *Ibidem*, p. 528

Furthermore Poland violated its primary human rights obligation to prevent acts of torture in the territory under its jurisdiction (Article 2 of UNCAT, Article 3 of ECHR, Article 7 of ICCPR), and the *non-refoulement* rule, as it allowed for transports to the territory of a state where there was a risk that a detainee might be tortured or subjected to other cruel, inhuman, or degrading treatment (Article 3.1. UNCAT).

Poland has so far neither punished the perpetrators of torture or other cruel, inhuman, or degrading treatment, nor even properly and effectively investigated the allegations relating to violations of human rights. But proceedings are still pending. So far one person has been charged with violating international law and exceeding his powers.

Consequently, one may argue that Poland, through its acts and omissions, aided and assisted in the commission of an internationally wrongful act (Article 16 of the ILC draft). It must be underscored that the scope of Poland's potential responsibility will depend on the scope of its knowledge about the wrongfulness of the committed acts, i.e. whether officials knew about the interrogations, application of enhanced techniques, torture, etc. Their actions, which led to the result of illegal detentions, torture and other inhuman acts, are also contrary to the Polish Constitution and other domestic acts such as the criminal code.

At the moment Polish international authority is at issue. It needs to sufficiently explain the extent of its acts and who bears the responsibility for any illegal acts. It is not only the legal but also the moral duty of the assisting state to reveal all that facts concerning its cooperation that led to torture, inhuman and degrading treatment, or extraordinary renditions.

Aleksandra Mężykowska* ■

DOES THE VICTIM OF A CRIME HAVE THE RIGHT TO A FAIR TRIAL? – REMARKS ON THE PROTECTION OF CRIME VICTIMS IN THE LIGHT OF THE GUARANTEES IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Abstract

None of the provisions guaranteeing the right to a fair trial contained in the principal international agreements were explicitly drafted to assure such a right to victims of crimes. Therefore, over the last two decades one could observe a shift in the attitude of the European Court of Human Rights towards the rights of victims, in order to extend the protection granted under the provisions of the European Convention on Human Rights to victims taking part in criminal proceedings. The Court directly extends the rights of victims by elaborating the procedural obligations of States (mainly under Articles 2 and 3 of the Convention), and through a broader understanding of the concept of civil rights and obligations, which enables the extension of the guarantees granted under Article 6 to victims participating in criminal proceedings. The purpose of this analysis is to attempt to answer the questions: under what circumstances in criminal proceedings may victims benefit from the right to a fair trial, and to what extent are they entitled to claim the protection of the guarantees provided for under the Convention?

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INTRODUCTION

None of the provisions guaranteeing the right to a fair trial contained in the principal international agreements were explicitly drafted to assure such a right to victims of crimes.¹ Victims, or their relatives, are entitled to protection in general terms when they are a party in civil proceedings. For a long period of time the only person involved in criminal proceedings who could rely on the provisions guaranteeing the right to a fair trial was the accused. In proceedings initiated before the reviewing bodies of the European Convention on Human Rights (ECHR or “Convention”), applications under Article 6 lodged by victims of crimes were rejected as inadmissible *ratione personae*.² At the same time, the Court consistently underlined that the Convention does not guarantee the right to “private revenge.”³ Such a strict interpretation of the provisions safeguarding the right to a fair trial, excluding the possibility of extending the protection granted under those provisions to victims taking part in criminal proceedings, was irreconcilable with the State’s general obligation under Article 1 of the Convention to “secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention.” Additionally, it did not reflect the general trend in criminal policy aimed at protecting the rights of the accused while at the same time recognising the rights of victims.⁴ Therefore, over the last two decades one can observe a shift in the Court’s attitude towards the rights of victims. A thorough analysis of the case law of the Court leads to the conclusion that the above-mentioned process is taking place in a twofold manner.⁵ Firstly, the rights of the victims are realised *indirectly*, as a result of the fact that the rights of the accused are no longer treated in an absolute manner and limits are set to the procedural guarantees afforded

¹ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended (ECHR), Article 6; International Covenant on Civil and Political Rights, Article 14; American Convention on Human Rights, Article 8.

² See also, S. Trechsel, *Human Rights in Criminal Proceedings*, Oxford University Press, Oxford: 2005, p. 37.

³ *Asociacion de victimas del terrorismo v Spain* (54102/00), ECHR 29 March 2001, Reports of Judgments and Decisions 2001-V. All judgments of the European Court of Human Rights referred to in the present article are available at <http://www.echr.coe.int>.

⁴ Trechsel, *supra* note 2, p. 38.

⁵ M. Wąsek-Wiaderek, *Prawo do rzetelnego procesu dla ofiar przestępstw na gruncie art. 6 Europejskiej Konwencji Praw Człowieka – rzeczywistość czy postulat?* (Right to a fair trial for the victims of crimes under Article 6 of the European Convention on Human Rights – reality or postulate?) in C. Mik (ed.), *Prawa człowieka w XXI wieku. Wyzwania dla ochrony prawnej* (Human Rights in the XXI century. Challenges for the legal protection), Toruń: 2005, pp. 145-159.

to them, while at the same time the interests of the victim are increasingly being taken into consideration *directly*. The latter occurs in criminal proceedings in two types of instances: when there is a need to guarantee protection to victims acting as witnesses for the prosecution, and when a minor is the victim of a sexually-related crime. Secondly, the Court directly extends the rights of victims by elaborating the concept of the procedural obligations of States in its case law, mainly under Articles 2 and 3 of the Convention, and through a broader understanding of the concept of civil rights and obligations, which enables the extension of the guarantees granted under Article 6 to victims participating in criminal proceedings.

Parallel with the development of the Court's case-law in regard to victims, for over thirty years a debate concerning the issue of the legal status of the victim in criminal proceedings has been taking place within the institutions of the Council of Europe. The main issue under consideration has been compensation for victims, which led to the adoption of the European Convention on the Compensation of Victims of Violent Crimes.⁶ There are also several other non-binding documents adopted in the framework of the Council of Europe concerning compensation and the position of victims in criminal proceedings. The most important are the following recommendations of the Committee of Ministers: Recommendation no. R (85) 11 on the position of the victim in the framework of criminal law and procedure;⁷ Recommendation no. R (87) 21 on the assistance to victims and the prevention of victimization,⁸ replaced by Recommendation Rec (2006) 8

⁶ European Convention on the Compensation of Victims of Violent Crimes, Strasbourg 24 November 1983, European Treaties – E.T.S. 116.

⁷ Recommendation no. R (85) 11 on the position of the victim in the framework of criminal law and procedure (28 June 1985), states, *inter alia*, the following:

“(...) 5. A discretionary decision whether to prosecute the offender should not be taken without due consideration of the question of compensation of the victim, including any serious effort made to that end by the offender;

6. The victim should be informed of the final decision concerning prosecution, unless he indicates that he does not want this information;

7. The victim should have the right to ask for a review by a competent authority of a decision not to prosecute, or the right to institute private proceedings.”

⁸ Recommendation no. R (87) 21 on the assistance to victims and the prevention of victimization (17 September 1987) states, *inter alia*, the following:

„(...) 4. Ensure that victims and their families, especially those who are most vulnerable, receive in particular:

(...) – information on the victim's rights;

– assistance during the criminal process, with due respect to the defence;

– assistance in obtaining effective reparation of the damage from the offender, payments from insurance companies or any other agency and, when possible, compensation by the state (...).”

on assistance to crime victims;⁹ and Recommendation Rec (2000) 19 on the role of the public prosecutor in the criminal justice system.¹⁰ Despite the fact that these documents were based on minimal assumptions with regard to the status of victims in criminal proceedings, they nevertheless have influenced to a significant extent on the direction of the Court's jurisprudence. The Court has referred on numerous occasions to the non-binding instruments of the Council of Europe as constituting important guidelines for the interpretation of the Convention.¹¹

This article analyses the case law of the Court that directly affords rights to victims under Articles 2 and 6 of the Convention. The purpose of the analysis is to attempt to answer the interlinked questions: under what circumstances in criminal proceedings may victims benefit from the right to a fair trial, and to what extent they are entitled to the guarantees provided for under the Convention?

The first part discusses the scope of the applicability of Articles 2 and 6 to crime victims; the second part provides an analysis concerning the specific rights guaranteed to victims by said provisions; and the third one compares the scope of protection under Articles 2 and 6.

1. LEGAL STATUS OF VICTIMS IN DOMESTIC PROCEEDINGS – APPLICABILITY OF ARTICLES 2 AND 6 TO VICTIMS

1.1. Limits on the application of Article 2 to victims – positive obligations of States

Under the European Convention, States' obligations are classified as two-fold: negative and positive.¹² The effect of negative obligations, requiring States' non-interference with the rights of the individual, is reinforced by positive obligations,

⁹ Recommendation Rec (2006) 8 on assistance to crime victims (14 June 2006).

¹⁰ Recommendation Rec (2000) 19 on the role of public prosecutor in the criminal justice system (6 October 2000).

¹¹ *Kauczor v Poland* (45219/06) ECHR judgment of 3 February 2009.

¹² See generally, A. Mowbray, *The Creativity of the European Court of Human Rights*, 5(1) Human Rights Law Review (2005), pp. 57-79; A. Mowbray, *The Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Rights*, Hart Publishing, Oxford: 2004; J.-F. Akandji-Kombe, *Positive obligations under the European Convention on Human Rights – A guide to the implementation of the European Convention on Human Rights*, Human Rights Handbooks, No. 7, Strasbourg 2007; M. Wąsek-Wiaderek, *O proceduralnych obowiązkach państwa na gruncie art. 2 i 3 Europejskiej Konwencji Praw Człowieka – wykładnia czy tworzenie prawa?* (Procedural obligations of the State under Articles 2 and 3 of the European Convention on Human Rights – interpretation or creation of rights?), Materiały Pokonferencyjne UKSW, II Warszawsko-Toruńskie Kolokwium Naukowe Praw Człowieka i Międzynarodowego Prawa Humanitarnego, Warszawa: 2011.

which require national authorities to take the necessary measures for safeguarding those rights. The European Court has consistently broadened the latter category of obligations, and distinguishes between two types of positive obligations: procedural and substantive. While in its negative aspect, for example, Article 2 requires States to refrain from the intentional and unlawful deprivation of life, by providing that “Everyone’s right to life shall be protected by law,” this provision simultaneously gives rise to a positive substantive obligation on the States-Parties to, e.g., “secure the right to life by putting in place effective criminal law provisions” and “to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.”¹³ In order to guarantee to individuals the effective enjoyment of the rights secured in the Convention, the Court has expanded States’ duties to include procedural obligations as well. Prominent among such obligations is the obligation to carry out an investigation.¹⁴ As the Court stresses, “the essential purpose of such an investigation is to secure the effective implementation of the domestic laws safeguarding the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility.”¹⁵

The effective enjoyment of the right to life requires that an effective official investigation be conducted in instances where there are doubts as to the cause of death.¹⁶ However, the scope of the obligations thus imposed on States with respect to the investigation depends on the specific circumstances of each case. It will be different in cases where the loss of life is the result of the use of lethal force by persons acting in an official capacity, in cases where the agents of the State potentially bear responsibility for the unintentional loss of life, e.g. in the sphere of medical negligence, and in cases of violations committed between individuals.¹⁷ The development, in the Court’s case law, of the doctrine of procedural obligations on the basis of Article 2, in particular the obligation to carry out an effective investigation, has wielded an enormous influence on the scope of the rights of victims. In fact, it first created and then gradually broadened the scope of States’ obligations

¹³ *Osman v UK* (23452/94), ECHR 28 October 1998, Reports 1998-VIII, para. 115.

¹⁴ See also, *Akandji-Kombe*, *supra* note 12, p. 32.

¹⁵ *Nachova and Others v Bulgaria* (43577/98 and 43579/98), ECHR 6 July 2005, Reports of Judgments and Decisions 2005-VII, para. 110.

¹⁶ *Kaya v Turkey* (22729/93), ECHR 19 February 1998, Reports 1998-I, para. 10; *Bazorkina v Russia* (69481/01), ECHR 27 July 2006, paras. 117-119.

¹⁷ *Ramsahai v the Netherlands* (52391/99), ECHR 15 May 2007, Reports of Judgments and Decisions 2007-II, para. 325; *Calvelli and Ciglio v Italy* (32967/96), ECHR 17 January 2002, Reports of Judgments and Decisions 2002-I, para. 51; *Rucińska v Poland* (33752/96), ECHR 27 January 2000.

towards victims by indicating that their involvement in the proceedings is indispensable for fulfilment of the efficiency requirement. One has to remember that the Court's first significant judgment under Article 2 was adopted only in 1995.¹⁸ A number of important judgments in this respect were issued by the Court against the background of the conflicts in Northern Ireland, Chechnya, and Turkey.

1.2. Limits on the application of Article 6 to victims

It follows from the wording of Article 6 that this provision is of a general nature, guaranteeing rights to everyone „[i]n the determination of his civil rights and obligations or of any criminal charge against him”. The guarantees set forth in this article are applicable to victims of crimes to the extent that it is possible to prove that their position in the proceedings can be qualified under one of the cited titles. The limits to the application of Article 6 to victims of crimes arise from the fact that the Convention does not create the right to „private revenge” or to an *actio popularis*.¹⁹ Already in the 1970s it had become a well-established principle in the case law of the Court that an injured party cannot rely on the guarantees provided for in the Article 6 provisions referring to criminal charges.²⁰ Under Article 6 it is not the victim of a crime, or his or her relative, that is entitled to a fair trial, but the person that is suspected or accused of having committed the offence. The Convention does not guarantee an independent right to demand the prosecution and punishment of third persons for the commission of a crime.²¹ The legal position of a victim in criminal proceedings may be governed by the guarantees laid down in Article 6 only when it can be established that that person's participation in the proceedings is related to the determination of his or her civil rights and obligations. Hence, the Court examines the motives that inclined the applicant to join the criminal proceedings. Article 6 shall not be applicable if the only aim of the applicant (victim) is to ensure the conviction of the accused, and not the protection of civil rights and obligations in relation to the offence committed.²² As a result, even if a given person participates in domestic criminal proceedings as a party, e.g. as an auxiliary prosecutor or a private prosecutor, if his or her purpose in joining the proceedings is only to ensure the sentencing of the persons responsible for the commission of the crime, applications concerning

¹⁸ *McCann v UK* (18984/91), ECHR 27 September 1995, A 324.

¹⁹ *Athanassoglou and Others v Switzerland* (27644/95), ECHR 6 April 2000, Reports of Judgments and Decisions 2000-IV.

²⁰ *Wallen v Sweden* (10877/84), ECHR 16 May 1985, D.R. 43; *Kuśmierk v Poland* (10675/02), ECHR 21 September 2004, para. 48.

²¹ *Asociacion de victimas del terrorismo*, *supra* note 3.

²² *Sigalas v Greece* (19754/02), ECHR 22 September 2005, paras. 27-30.

the conduct of those proceedings do not fall within the *ratione materiae* jurisdiction of the Court.²³ An exception was made for proceedings that concern the protection of reputation and have been initiated with a private indictment.²⁴ It should be noted that the position taken by the Court, which makes the application of the guarantees set forth in Article 6 dependent on the victim's motives, has been criticised in the legal doctrine for being too formalist.²⁵ It has been rightly emphasised that victims of crimes have a legitimate interest in participating in the proceedings against the offender, and their motivation should play a secondary role.

In exercising its supervisory role, the Court is guided by the general guidelines as to the object and purpose of the Convention.²⁶ By subjecting the legal situation of victims of crimes to the protections afforded under the Convention, the Court has pointed out the importance of ensuring victims their rights and an appropriate position in the criminal proceedings. Recognising the fundamental differences in the requirements posed for a fair trial in civil and criminal proceedings in accordance with Article 6, the Court has held that the fact that the guarantees differ may not lead to ignoring the difficult situation in which victims of offences find themselves, nor to diminishing the importance of their rights.²⁷ Therefore, in light of the object and purpose of the Convention, only in exceptional circumstances may the guarantees laid down in Article 6 not be applied.²⁸ For these reasons, the Court has found that proceedings conducted by the national authorities should be subjected to the scrutiny of public opinion, and in all cases the victims' relatives and/or the victims themselves must be involved in the proceedings to the extent necessary to ensure that their legitimate interests are respected.²⁹

²³ *Asociacion de victimas del terrorismo*, *supra* note 3.

²⁴ *Kuśmierek*, *supra* note 20, paras. 48-49.

²⁵ *See also*, Trechsel, *supra* note 2, p. 42.

²⁶ *Perez v France* (47287/99), ECHR 12 February 2004, Reports of Judgments and Decisions 2004-I, para. 57.

²⁷ *Ibidem*, para. 72.

²⁸ *Pellegrin v France* (28541/95), ECHR 8 December 1999, Reports of Judgments and Decisions 1999-VIII, para. 64.

²⁹ *Güleç v Turkey* (21593/93), ECHR 27 July 1998, Reports 1998-IV, para. 82; *Öğür v Turkey* (21594/93), ECHR 20 May 1999, Reports of Judgments and Decisions 1999-III, para. 92; *Gül v Turkey* (22676/93), ECHR 12 December 2000, para. 93.

1.3. Determining civil rights and obligations for the purposes of Article 6

1.3.1. Autonomous meaning

The victim of a crime is entitled to the guarantees set forth in Article 6 when his or her participation in the proceedings is related to the determination of his or her civil rights and obligations, irrespective of the type of proceedings in which he or she participates. However, the Convention does not directly ensure various forms of participation in court proceedings, and the guarantees set forth therein apply to persons who have been granted by domestic legislation the possibility to participate in a proceeding.³⁰ Furthermore, this matter may be regulated differently in the various legal systems. Thus the autonomous meaning granted to the notion of civil rights and obligations by the Convention reviewing bodies is meant to prevent differentiation in various member states between the guarantees provided to victims of crimes under the Convention. As has been underlined in the legal literature, Article 6 may be applied to proceedings in which civil rights and obligations are determined only when three criteria are fulfilled: a) the right or obligation stems from domestic law; b) there is a dispute, the outcome of which is directly decisive for that right or obligation; c) the right or obligation is of a civil nature.³¹

Article 6 will primarily be applicable to cases in which the adjudication of civil rights and obligations is the principal purpose and object of the proceedings.³² At the same time, Article 6 can also be the source of guarantees in proceedings in which the civil aspect is so closely connected to the main (e.g. criminal) aspect of the proceedings that the outcome of the case may be decisive for the adjudication of the civil rights and obligations.³³ In its early years the Court indicated that Article 6 could be used by victims as the basis for formulating an appeal for assessment of criminal proceedings only in situations where the outcome of

³⁰ Kuśmierek, *supra* note 20, paras. 48-49.

³¹ See, L. Garlicki, P. Hofmański, A. Wróbel, *Konwencja o Ochronie Praw Człowieka i Podstawowych Wolności. Komentarz do artykułów 1-18*, tom I (European Convention on Human Rights. Commentary to Articles 1-18, vol. 1), Warszawa: 2010, p. 254. Slightly different qualifications can also be found in the legal literature, according to which, in order for Article 6 to be applicable the following requirements should be met: a civil right or obligation should exist, there must be a dispute concerning a civil right, as well as a settlement of the dispute. P. Leach, *Taking a Case to the European Court of Human Rights*, Oxford University Press, Oxford: 2005, p. 244.

³² See also Garlicki et al, *supra* note 31, p. 260.

³³ *Ringeisen v Austria* (2614/65), ECHR 16 July 1971, A13, para. 94.

the proceedings was directly decisive for civil rights and obligations.³⁴ Over time however the Court began to apply broader terms, as a result of which a growing number of situations could be subject to review based on the guarantees set forth in Article 6. The Court therefore found that Article 6 could be applicable to proceedings that affect the adjudication of civil rights³⁵ or concern the settling of those rights or obligations.³⁶

1.3.2. Evolution of the Court's case law

In discussing application of the principles mentioned above to the situation of victims of crimes, one should note that the injured party shall enjoy the protection afforded by the Convention when asserting his or her civil rights, both of a material and non-material nature. From the case law it follows that the protection enjoyed under Article 6 shall be afforded primarily to a victim who is entitled under domestic law to bring a compensation suit against the offender, within the ambit of the criminal proceedings, for the damage caused by the offence. In such a situation the criminal proceedings are considered decisive for the civil rights of the victim. The Court's case law has evolved significantly as regards the form whereby a victim can participate in criminal proceedings if entitled to benefit from the guarantees laid down in Article 6. As a result, an increasing number of situations are covered by Article 6.

At the beginning of the 1990s, in the case of *Moreira de Azevedo v. Portugal*, the Court found that a person having the status of an “assistente” in criminal proceedings against the brother-in-law, who had shot the applicant in the head, may benefit from the guarantees laid down in Article 6. The Court noted that although the applicant had not formally filed a compensation claim, in light of the general principles concerning the participation in proceedings by victims, which had been formulated by the Portuguese Supreme Court in its case law, an intervention by a person having the status of “assistente” was equivalent to lodging a claim for damages in civil proceedings. The Court found that the applicant had shown in the course of the proceedings that it was not only important for him to bring about the conviction of the accused, but also to receive financial compensation for the damage sustained.³⁷ In its subsequent case law, however, the Court did not consistently maintain the same approach, although this may have been due to the fact that

³⁴ *Ibidem*, para. 94.

³⁵ *Winterwerp v. the Netherlands* (6301/73), ECHR 24 October 1979, A33, para. 75.

³⁶ *A.B. v. Slovakia* (41784/98), ECHR 4 March 2003, paras. 46-48.

³⁷ *Moreira de Azevedo v Portugal* (11296/84), ECHR 23 October 1990, A 189, paras. 63-67.

the qualification of the applicant's status in the *Moreira de Azevedo* case had been the subject of controversy among domestic lawyers. In a subsequent important judgment in the case of *Hamer v France*, the Court refused to grant the victim protection under Article 6 on account of the fact that she had not made a compensation claim in the criminal proceedings, even though she had been forced to wait until the end of those proceedings to initiate a civil case.³⁸ However, in another case, *Ait-Mouhoub v France*, the Court was of the view that Article 6 was applicable even though the applicants had not filed a claim for compensation, because the outcome of the criminal proceedings were decisive for the civil proceedings.³⁹ The Court found that in such situations one should accept that even if the criminal proceedings only decide the criminal accusation, in determining the applicability of Article 6 of the Convention, both as regards its criminal and civil component, the decisive issue is whether the civil branch of the proceedings remains closely connected to the criminal one, *i.e.* whether the criminal proceedings influence the civil proceedings. In the case of *Calvelli and Ciglio v Italy*, which concerned *inter alia* the length of criminal proceedings against a doctor who was allegedly responsible for delivering the applicant's baby in a negligent manner, the Court reached the conclusion, that the factor that had been decisive for its ruling that the guarantees stemming from the civil component of Article 6 were applicable to the criminal proceedings, had been the fact that from the moment the applicants joined the proceedings as civil parties until the conclusion of those proceedings by a final ruling, finding that prosecution of the offence was time-barred, the civil branch of the proceedings remained closely linked to the criminal one.⁴⁰

In its judgment in the case of *Perez v France* the Court undertook an attempt to homogenise its case law concerning the granting of protection under Article 6 to a victim participating in criminal proceedings. In accordance with the Court's earlier case law, a victim could rely on the guarantees stemming from Article 6 if he or she had claimed compensation, even if he or she had not specified the amount claimed, if the criminal proceedings were decisive for the applicant's chances of receiving compensation. In the *Perez* judgment the Court indicated that in the assessment of the nature of the given right it is guided not only by its legal classification but also its substantive content and effects under the domestic law of the State concerned.⁴¹ It observed that French law gave the victim of an

³⁸ *Hamer v France* (19953/92), ECHR 7 August 1996, Reports 1996-III, paras. 77-78.

³⁹ *Ait-Mouhoub v France* (22924/93), ECHR 28 October 1998, Reports 1998-VIII, para. 44; *Maini v France* (31801/96), 26 October 1999, paras. 28-29.

⁴⁰ *Calvelli and Ciglio*, *supra* note 17, para. 62.

⁴¹ *Perez v. France*, *supra* note 26, para. 57.

offence the option of choosing between civil and criminal proceedings. The criminal option is exercised by way of a civil-party complaint, in the framework of which the injured party may, above all, obtain compensation from the criminal courts for the damage he or she has suffered. In the light of this observation the Court stated that there can be no doubt that civil-party proceedings constitute, in French law, a civil action for the reparation of damage caused by an offence. The Court added that “by acquiring the status of civil parties, victims demonstrate the importance they attach not only to the criminal conviction of the offender but also to securing financial reparation for the damage sustained.”⁴² In the *Perez* case the Court found that the mere participation in proceedings as a civil party, without filing a formal compensation claim, is tantamount to bringing a claim for damages. This led the Court to the conclusion that under the French law “proceedings whereby someone claims to be the victim of an offence are decisive for his ‘civil rights’ from the moment he or she is joined as a civil party. In fact, Article 6 is applicable to proceedings involving civil-party complaints even during the preliminary investigation stage taken on its own.”⁴³

After the *Perez* judgment the Court underlined in its jurisprudence that in order to qualify for the applicability of Article 6 a case must fulfill two premises. Firstly, inasmuch as Article 6 § 1 under its “civil head” applies only to proceedings concerning the “determination of a civil right” the Court must ascertain whether there was a dispute over a “civil right” which can be said to be recognised under domestic law: the dispute must be genuine and serious; but even in the absence of a claim for financial reparation it was sufficient if the outcome of the proceedings was decisive for the “civil right” in question. In the Court’s words this meant that the victim’s participation in the criminal proceedings “must be indissociable from the victim’s exercise of a right to bring civil proceedings in domestic law, even if only to secure symbolic reparation or to protect a civil right such as the right to a ‘good reputation’.”⁴⁴ Secondly, the Court took into account domestic regulations concerning the status of the injured party in criminal proceedings. It examined whether the injured parties could join the proceedings as a civil party; whether they could exercise the rights and powers expressly recognised by law, whether the exercise of those rights might prove to be essential for their effective participation in the proceedings as a civil party, and whether the injured party was entitled

⁴² *Ibidem*, para. 64.

⁴³ *Ibidem*, para. 66.

⁴⁴ *Schwarkmann v France* (52621/99), ECHR, 8 February 2005, § 41; *Gorou v Greece* (N° 2) (12686/03), ECHR 14 February 2006; *Tormala and Others v. Finland* (41258/98), ECHR decision of 16 March 2004, p. 9; *Karlsson and Others v Finland* (13265/02), ECHR 5 September 2006; *Biszta v Poland* (4922/02), ECHR decision of 12 September 2006.

to submit pleadings at all stages of the proceedings.⁴⁵ The cumulative application of these premises leads the Court to the conclusion that Article 6 is applicable.

In its recent case law the Court has strongly underlined the fact that the applicants' claims for damages caused by the alleged offence has to be of pecuniary character. The Court has stated that "Article 6 § 1 under its 'civil head' applies to criminal proceedings involving a determination of pecuniary claims asserted by the injured parties (so-called 'civil-party complaints') and, even in the absence of such claims, to those criminal proceedings the outcome of which is decisive for the 'civil right' in question".⁴⁶

Thus, in practical terms, according to the Court's case law the guarantees of Article 6 will apply to: victims who join criminal proceedings as civil-parties with a view of claiming financial compensation for damages caused by the alleged offence, even if only to secure symbolic reparation; to victims who in their private prosecution claim compensation for the alleged offence;⁴⁷ to victims exercising in the criminal proceedings the right to protect a civil right such as the right to "good reputation"; and to victims participating in criminal proceedings without filling a pecuniary claim for damages if they sought damages in separate civil proceedings. In the latter situation Article 6 § 1 would be applicable under its "civil head" to the criminal proceedings at issue only when those civil proceedings were instituted due to the fact that the outcome of the criminal proceedings became relevant for the determination of the applicant's "civil right" to compensation.⁴⁸

Therefore, while taking into consideration the fact that the Convention does not guarantee victims the right to initiate criminal proceedings with the aim of securing the conviction of the persons responsible for the offence, it should be noted that the Court has gradually accepted that the guarantees laid down in the Convention shall apply to legal situations created as a result of the initiation of proceedings if the purpose of the victim participating therein had been at least the symbolic redress of harm, the protection of such a right as the right to reputation,⁴⁹ and as indicated in a general manner in the literature the protection of a right of a civil nature in another manner.⁵⁰

⁴⁵ *Sottani v Italy* (26775/02), ECHR 24 February 2005, Reports of Judgments and Decisions 2005-III (extracts).

⁴⁶ *Jaksevic v Croatia* (18584/05), ECHR decision of 10 January 2008.

⁴⁷ *Tormala*, *supra* note 44.

⁴⁸ *Butolen v Slovenia* (41356/08), ECHR decision of 9 June 2009, paras. 58-61; *Jaksevic*, *supra* note 46; *Jeans v Croatia* (45190/07), ECHR judgment of 13 January 2011, paras. 33-34.

⁴⁹ *Golder v UK* (4451/70), ECHR 21 February 1975, A18, para. 27; *Helmert v Sweden* (11826/85), ECHR 29 October 1991, A 212-A, paras. 27-30; *Tolstoy Miloslavsky v UK* (18139/91), 13 July 1995, A 316-B, para. 58; *Kuśmierk v. Poland*, *supra* note 20.

⁵⁰ See, D. J. Harris, M. O'Boyle, E. P. Bates, C. M. Buckley, *Law of the European Convention on Human Rights*, Oxford University Press, Oxford: 2009, p. 228.

1.3.3. New challenges for the Court's case law

In its previous case law the Court rarely pronounced itself on the issue of civil rights of a non-material nature (other than the right to a “good reputation”) claimed in criminal proceedings by persons who sustained damage as a result of an offence. The question arises whether the protection under the Convention encompasses the situation where the victim of an offence, or his or her relative, declares his or her will to participate in domestic proceedings as an injured party, being motivated solely by the desire to learn about the circumstances of the offence, or – in the case of the relative – the wish to obtain reliable, accurate and official information concerning the death of a family member, and sometimes even information about his or her place of burial. Some “victims” may wish to obtain access to the case investigation files, in particular the available evidence, such as mementos of the deceased, which may have great emotional value for the relatives. Moreover, information about the circumstances surrounding the relative's death, as well as the legal qualification of the action(s) that caused the death, may be useful for subsequent proceedings, e.g. relating to the rehabilitation of the deceased person's reputation, where the death occurred as the result of an offence of a judicial nature. In such situations one can argue that the injured party's participation in the proceedings is a way of protecting his or her personal right connected to the memory of the deceased relative. In assessing the nature of the rights the injured party demands to be protected, one must bear in mind that Article 6 is applicable to cases in which such civil rights of a non-material character are claimed, such as, e.g., the right to respect for private or family life.⁵¹ Therefore, the actions of the State that directly affect the scope of that right, as well as the ways in which it is realised, should be covered by the guarantees of Article 6. The right to respect for private and family life surely entails the protection of personal rights, hence there should be no doubt that proceedings in which this right is asserted are subject to the guarantees laid down in the Convention. It also needs to be noted that the list of personal rights contained in national legal systems is essentially a non-exhaustive list. Consequently, nothing precludes the recognition as a civil right, the protection of which is sought by the injured party in the course of criminal proceedings, of a whole series of personal rights, including *inter alia* the obtaining of information concerning the circumstances of death, the place of burial of the next-of-kin, or the identity of the perpetrators. In most cases, the only way to realise these rights is through participation in the procedural activities or through

⁵¹ See, M.A. Nowicki, *Wokół Konwencji Europejskiej, Krótki Komentarz do Europejskiej Konwencji Praw Człowieka* (Issues surrounding the European Convention on Human Rights), Zakamycze, Warszawa: 2006, p. 152.

access to the case-files. The Court's decision to include personal rights – even those related to the memory of the deceased – within the concept of civil rights within the meaning of the Convention would result in a significant broadening of the applicants' rights under Article 6.

In the case law of the Court one can find additional arguments in favour of a broad application of the guarantees of a fair trial with respect to the injured party in criminal proceedings. Where domestic law provides two paths for claiming compensation – *i.e.* within the ambit of the criminal proceedings or in separate civil proceedings – then when an appropriate motion has been filed in the course of the criminal proceedings it is considered that the applicant has met the requirement of exhaustion of domestic remedies before lodging an application with the Court.⁵² An aggrieved person taking part in the proceedings may motivate his or her participation by the aim of realising his or her civil rights, as well as the wish to support the criminal prosecution.

Also, among the objectives of criminal law and proceedings there are important arguments to be found which support the claim of a broader protection of victims under the Convention.⁵³ One of the modern theories used to justify punishment is that of communication. It assumes that criminal proceedings are “an opportunity for communicating with the offender, the victim, and wider society the nature of the wrong done”. Other justifications for providing the victim with an important participatory role in the conduct of criminal proceedings are the aims of justice for victims and recording history.

It is important to note that even when international criminal jurisdictions were established, different models of victims' participation were considered.⁵⁴ However, it is generally assumed that participatory rights may have different purposes and aims, *e.g.*, at ensuring that the truth is exposed. Thus the limitation of participatory rights to the narrow interests of seeking conviction and obtaining reparations seems to be a too narrow approach. It is said that “after all, the explicit general purpose is to enable the victims to present their views and concerns”.⁵⁵

Against this background, the Court's recent decision on admissibility, in the case *Janowiec and Others v Russia*, cannot be said to constitute a step forward in the development of victims' rights.⁵⁶ There the applicants, being relatives

⁵² *Zante-Marathonisi A.E. v Greece* (14216/03), ECHR 1 June 2006.

⁵³ For a broader discussion on this subject see: R. Cryer, H. Friman, D. Robinson, E. Wilmschurst, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge: 2010.

⁵⁴ *Ibidem*, p. 479

⁵⁵ *Ibidem*, p. 485.

⁵⁶ *Janowiec and Others v Russia* (55508/07 and 29520/09), ECHR 5 July 2011.

of prisoners killed in 1940, participated in criminal proceedings initiated in 1990 and discontinued in 2004, and in subsequent proceedings concerning rehabilitation. The part of the case-file and the decision discontinuing the proceedings had been declared a State secret and for that reason the applicants, as foreign nationals, could not have access to them. The applicants complained under Article 6 of the Convention that the Russian authorities had refused them victim status in the criminal case, that they had been denied access to the documents in the case, that the case had been classified secret without any particular reason, and that their appeals against the decisions by the prosecuting authorities had been rejected.⁵⁷ The Court denied the applicants' right to rely on Article 6, basing its decision on three arguments: 1) the outcome of the criminal proceedings was not decisive for the applicants' civil rights or obligations; 2) as the applicants' relatives were not the defendants in criminal proceedings, it was not apparent to the Court how the disclosure of the case materials could have been conducive to protection of their right to their reputation; and 3) the Court did not qualify as a civil right the applicants' right to obtain information about the circumstances of the death of their relatives and the place of their burial.

The position taken by the Court in *Janowiec* suggests that it is not yet ready to broaden the scope of situations in which victims' rights are protected under Article 6. While the extension of the protection offered by Article 6 § 1 with regard to victims' claims of a pecuniary character can only be welcomed, it is difficult to understand the Court's reluctance to follow the same path with regard to the situation where victims assert non-pecuniary claims.

2. RIGHTS GUARANTEED TO VICTIMS UNDER ARTICLES 2 AND 6

2.1. "Adequate proceedings" under Article 2 and "fair trial" under Article 6 – general remarks

The Court has underlined that proceedings conducted within the ambit of the State's fulfilment of the obligations imposed on it by Article 2 have to be "efficient/adequate", and proceedings subject to the guarantees of Article 6 have to be "fair". In order for an investigation concerning a person's death to be considered efficient under Article 2, a number of conditions need to be met. Hence, the proceedings should be: independent, effective, reasonably prompt, involve a sufficient element of public scrutiny, and engage the next-of-kin to the extent

⁵⁷ *Ibidem*, para. 76.

necessary.⁵⁸ The requirements of effectiveness and the involvement of relatives deserve special attention. The requisite of efficiency of a criminal proceeding means that “it must be capable, firstly, of ascertaining the circumstances in which the incident took place and, secondly, of leading to the identification and punishment of those responsible.”⁵⁹ States are obliged to conduct investigations into the circumstances of death conscientiously, though the Convention does not impute a duty to identify the perpetrators in every instance. The obligation does not refer to the result, but to the measures taken. Therefore, the lack of results in criminal proceedings may be justifiable only when the respondent Government can prove that the proceedings conducted were efficient.⁶⁰ Adversarial evidentiary proceedings constitute one of the key elements of an efficient investigation.

In accordance with the Court’s case law, pursuant to Article 2 “the authorities must have taken the reasonable steps and activities available to them to secure the effectiveness of the proceedings aimed at collecting evidence”.⁶¹ During the proceedings the authorities must examine all the facts and assess the case taking into account all the relevant circumstances. This may require measures to gather and record evidence concerning the incident, including *inter alia* taking statements from eye witnesses and other persons involved,⁶² accurately securing traces and evidence (e.g. attempts to find the fired bullet, taking of photographs at the alleged location, taking of fingerprints),⁶³ carrying out forensic tests (e.g. tests on weapons, tests for prints),⁶⁴ performing, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause and exact time of death,⁶⁵ identifying all the

⁵⁸ *Ibidem*, paras. 110-112.

⁵⁹ *Makaratzis v Greece* (50385/99), ECHR 20 December 2004, Reports of Judgments and Decisions 2004-XI, para. 74.

⁶⁰ *Hugh Jordan v UK* (24746/94), ECHR 4 May 2001, para. 107; *Nachova and Others*, *supra* note 15, para. 113.

⁶¹ *Hugh Jordan*, *supra* note 60, para. 107; *Ahmadov and Others v Russia* (21586/02), ECHR 14 November 2008, para. 107.

⁶² *Tanrikulu v Turkey* (23763/94) Grand Chamber, ECHR 8 July 1998, Reports of Judgments and Decisions 1999-IV, para. 109; *Velikova v Bulgaria* (41488/98), ECHR 18 May 2000, Reports of Judgments and Decisions 2000-VI, paras. 78-79; *Gül*, *supra* note 29, para. 90.

⁶³ *Gül*, *supra* note 29, para. 89; *Makaratzis*, *supra* note 59, para. 76.

⁶⁴ *Gül*, *supra* note 29, para. 89; *Baysayeva v Russia* (74237/01), ECHR 5 April 2007, para 136.

⁶⁵ *Salman v Turkey* (21986/93), ECHR 26 June 2000, Reports of Judgments and Decisions 2000-VII, para. 106; *Kaya*, *supra* note 16, para 89; *Öğür*, *supra* note 29, para. 89; *Giuliani and Gaggio v Italy* (23458/02), ECHR 24 March 2011, para. 249; *Velikova*, *supra* note 62, para. 79.

persons who took part in the events,⁶⁶ and establishing the sequence of events.⁶⁷ The national authorities must ensure that the evidentiary proceedings were fair. In many judgments the Court has pointed out in detail shortcomings in procedural actions that were performed.⁶⁸ The Court has concluded that any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible runs the risk of being considered as non-compliant with the requirements of Article 2 of the Convention.⁶⁹

The Court has underlined that the nature of the examination depends on the circumstances of the particular case. The question of which kind of investigative steps are necessary and may possibly be taken is conditioned upon the relevant facts and actual possibilities connected with the performance of investigative work. However, the Court is reluctant to indicate which procedural actions the authorities should perform, and concludes that “it is not possible to reduce the variety of situations which might occur to a bare check-list of acts of investigation or other simplified criteria.”⁷⁰ While the Court has stressed that it is not able to make a list containing the required investigation measures, it has at the same time however underlined that there are some “indispensable and obvious investigative steps” that must be taken in the course of the domestic proceedings, and that the failure to perform them without a reliable explanation by the Government may lead to a violation of procedural obligations under Article 2.⁷¹

The Court assesses differently the fairness of evidentiary proceedings under Article 6. It focuses on an assessment whether the proceedings in their entirety, including the way in which evidence and procedural decisions were taken, were fair.⁷²

The main guidelines concerning the right to a fair trial relate to the right to adversarial proceedings and the “equality of arms” principle. In accordance with these principles, the parties to the proceedings shall have the opportunity to “have knowledge of and comment on all evidence adduced or observations filed, (...), with a view to influencing the court’s decision”⁷³ and “be afforded a reasonable opportunity to present his case – including his evidence – under conditions that

⁶⁶ *Makaratzis*, *supra* note 59, para. 76; *Velikova*, *supra* note 62, para. 79.

⁶⁷ *Shanaghan v UK* (37715/97), ECHR 4 May 2001, paras. 122-125.

⁶⁸ For a list of examples of the Court’s findings concerning the inadequacies of specific aspects of criminal investigations, see *Leach*, *supra* note 31, p. 194.

⁶⁹ *Hugh Jordan*, *supra* note 60, para. 107; *Ahmadov*, *supra* note 61, para. 107.

⁷⁰ *Velikova*, *supra* note 6, para. 80; *Shanaghan*, *supra* note 67, para. 123.

⁷¹ *Ibidem*, para. 82.

⁷² *Tamminen v Finland* (40847/98), ECHR 15 June 2004.

⁷³ *Vermeulen v Belgium* (19075/92), ECHR 22 January 1996, Reports 1996-I, para. 33; *Nideröst-Huber v Switzerland* (18990/91), ECHR 27 January 1997, Reports 1997-I, para. 29.

do not place him at a substantial disadvantage vis-à-vis his opponent.”⁷⁴ In cases concerning the guarantees of Article 6 – as opposed to cases considered under Article 2 – the Court does not provide guidelines on how to take evidence in order for the evidentiary proceedings to be fair. An assessment under Article 6 of the fairness of the taking of evidence is limited to the Court’s consideration whether the parties in the proceedings had the opportunity to participate in the case, whether the adversarial and equality of arms principles were respected, whether evidence was collected in accordance with those principles, and that the decisions of the domestic authorities were not taken arbitrarily. The Court allows States a wide margin of discretion as to the rules governing the taking of evidence, and assumes that it is for national legislation and courts to specify the rules on the admissibility of evidence and the way it should be taken and assessed.⁷⁵ The Court has included more detailed considerations on this issue in its pronouncements on the admissibility of certain kinds of evidence (e.g. unlawfully obtained evidence, evidence obtained by torture or inhumane or degrading treatment or punishment, evidence from anonymous witnesses).⁷⁶ The Court’s competence to interfere with the outcome of evidentiary proceedings is restricted to cases where the reasoning and consequences drawn by national authorities were grossly unfair and/or arbitrary.⁷⁷ The Court may decide that minor shortcomings in the proceedings did not affect the fairness of the trial as a whole. However, it may also reach the conclusion that in spite of the fact that all the formal requirements had been met in a particular case, the proceedings in their entirety were not fair.⁷⁸ It has to be borne in mind that the Court has only limited power to examine alleged errors of fact or law imputed to national courts. The Court has repeatedly reiterated that it cannot act as an appeal court of “fourth instance” and that the domestic courts are best placed to assess the relevance of evidence and to interpret and apply the rules of substantive and procedural law.⁷⁹ Unless the relevant domestic decisions disclose manifestly arbitrary reasoning, the applicants cannot request the Court to assess whether the outcome of the domestic proceedings had been fair.⁸⁰

⁷⁴ *Dombo Beheer v the Netherlands* (14448/88), 27 October 1993, A 247, para. 33.

⁷⁵ *García Ruiz v Spain* (30544/96) Grand Chamber, 21 January 1999, Reports of Judgments and Decisions 1999-I, para. 28.

⁷⁶ *Schenk v Switzerland* (10862/84), ECHR 12 July 1998; *Jalloh v Germany* (54810/00), ECHR 11 July 2006, A 140.

⁷⁷ *Herbst v Germany* (20027/02), ECHR 11 January 2007, para. 83.

⁷⁸ E.g., Leach, *supra* note 31, p. 253.

⁷⁹ *Vidal v Belgium* (12351/86), ECHR 22 April 1992, A 235-B, pp. 32-33, para. 32; *Gurepka v Ukraine* (61406/00), ECHR 6 September 2005, para. 45.

⁸⁰ See also, Harris et al, *supra* note 50, p. 202.

2.2. Principle of subsidiarity

The assumption underlying the European system is the principle of subsidiarity, which in terms of the ECHR means that the domestic remedies be exhausted prior to appeal to the Court. The nature of those remedies has been specified in the requirement laid down in Article 13 of the Convention, which provides that the remedy must be effective. A further aspect of the principle of subsidiarity relates to the extent to which the Court may assess the domestic proceedings. In this regard the principle of subsidiarity is applied by the Court to a lesser extent with respect to Article 2 than Article 6.⁸¹ The special nature of the right laid down in Article 2 allows the Court to assess the scope and quality of the steps taken by the national authorities conducting the proceedings, while the assessment of the overall fairness of proceedings in light of the guarantees of Article 6 is handled differently. The Court adjudicating from the point of view of Article 6 interprets the subsidiarity principle broader and, in consequence, the right to a fair trial is treated as a procedural guarantee.⁸² The Court underlines that its role under Article 6 is limited to ensuring that the decisions taken by the national authorities were not affected by any element of arbitrariness and were not otherwise manifestly unreasonable. The assessment of the circumstances of the case however is left to the national authorities. The Court's role is not to substitute its view for that embodied in the case law of the domestic courts.⁸³ When adjudicating, the Court refers to the national law as interpreted and applied by the domestic authorities.⁸⁴ The Court confines itself to an assessment whether the guarantees of Article 6 were respected during the proceedings taken as a whole. Therefore, in the situation where the victim of a crime challenges the fairness and outcome of evidentiary proceedings, the Court may conduct a far more detailed assessment under Article 2 than under Article 6. Paradoxically, Article 6, which constitutes the core of the right to a fair trial, offers the parties to the proceedings, including victims or relatives, fewer possibilities than Article 2 to question the way in which the domestic proceedings were conducted.

2.3. Specific rights guaranteed to victims in criminal proceedings

The Court has consistently stressed in its case law that Article 6 does not include the right to have criminal proceedings brought against a third party with a view to securing his or her conviction.⁸⁵ At the same time, the obligations under

⁸¹ See also, Garlicki et al, *supra* note 31, p. 87.

⁸² Harris et al, *supra* note 50, pp. 14 and 202.

⁸³ *Bata v Czech Republic* (43775/05), 24 June 2008, para. 80.

⁸⁴ *Jantner v Slovakia* (39050/97), ECHR 4 March 2003, paras. 29–33.

⁸⁵ *Asociacion de victimas del terrorismo*, *supra* note 3.

Article 2 are satisfied if the domestic system makes it possible to identify the persons responsible for the death and to hold them accountable; not necessarily in the framework of criminal proceedings. Under certain circumstances an effective judicial system should however offer recourse to criminal law. The Court strongly underlines that in cases where the death was the result of the actions of State agents or bodies, the essential purpose of the investigation is to ensure accountability for the events occurring under their responsibility. Further, the Court states that in such cases the authorities “must act of their own motion, once the matter has come to their attention. They cannot leave it to the initiative of the next of kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures.”⁸⁶ In the opinion of some authors, the obligation to hold those responsible for a death accountable under criminal law is placed upon the State not only in the situation where the offence is committed by State agents or bodies, but also in serious cases where third parties are the perpetrators.⁸⁷ Therefore, a comparison of the rights enjoyed by victims under Article 2 and Article 6 of the Convention leads to the conclusion that the victims can, in practical terms, demand from the authorities the initiation of proceedings in the exercise of the State’s procedural obligations under Article 2, whereas they cannot benefit from this right under Article 6.

2.3.1. Article 2

An effective investigation under Article 2 requires that the public and the next-of-kin be able to obtain information about the conduct and outcome of the proceedings, and that the relatives can take part in the proceedings to the extent necessary. An issue that raises questions is the degree of involvement of the next-of-kin in the investigation and trial.

According to the Court’s case law, under Article 2 the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard their legitimate interests.⁸⁸ In practical terms this means that the relatives have to: be thoroughly and systematically informed about the progress and outcome of the investigation, including the procedural decisions taken in the course of the proceedings and the decisions concerning prosecution;⁸⁹ have access to the investiga-

⁸⁶ *Šilih v Slovenia* (71463/01) Grand Chamber, ECHR 9 April 2009, para. 194; *Hugh Jordan*, *supra* note 60, para. 105; *Al-Skeini and Others v UK* (55721/07), Grand Chamber, ECHR 7 July 2011, para. 165.

⁸⁷ See, Garlicki, et al, *supra* note 31, p. 137.

⁸⁸ *Hugh Jordan*, *supra* note 60, para. 109

⁸⁹ *Güleç*, *supra* note 29, para. 82; *Hugh Jordan*, *supra* note 60, para. 142.

tion and court documents, including statements of witnesses;⁹⁰ have full access to information used in the proceedings;⁹¹ be allowed to obtain legal representation;⁹² be able to participate in evidentiary proceedings, including the possibility to submit evidentiary motions;⁹³ and be interviewed by the investigating judge.⁹⁴ In the view of the Court, it is indeed contrary to the principles stemming from Article 2 for the national authorities to demand from the injured party (or next-of-kin of the deceased) the filing of a formal motion declaring their wish to be involved in the criminal proceedings. In the situation where the authorities receive information about a suspicious death, they should start an investigation on their own initiative, in which the deceased's next-of-kin should automatically be involved.⁹⁵

The Court has concluded that when the relatives are in practice hindered from participating in the proceedings, they are unable to have their legitimate interests upheld.⁹⁶ When this is the case, the Court may find that a violation of Article 2 of the Convention, under its procedural dimension, has taken place. The Court, however, does not make the efficiency of the proceedings conditional on the formal admission of relatives as victims to the criminal proceedings, and attaches immense importance to the practical aspects of participation.⁹⁷ Therefore, the refusal of the national authorities to grant an applicant the status of injured party (in the form provided by national law) – upon which the authorities make conditional the participation in the proceedings – may also constitute a violation of Article 2. In recent years the Court has indeed formulated the view that the inability of a victim's partner to take part in an investigation to establish the cause of death is sufficient to conclude that the investigation was not "effective".⁹⁸ Still, it is difficult to answer the question whether the refusal to admit the victim or relatives to the proceedings will have the same consequences under Article 6.

2.3.3. Article 6

It is not clear from the wording of the Convention whether the guarantees of Article 6 shall also apply to pre-trial proceedings, even though it is at that stage of the proceedings that the injured party may encounter particular difficulties in

⁹⁰ Öğür, *supra* note 29, para. 92.

⁹¹ *Yvon v France* (44962/98), ECHR 24 April 2003, Reports of Judgments and Decisions 2003-V, at para. 37.

⁹² *Hugh Jordan*, *supra* note 60, para. 142.

⁹³ *Rajkowska v Poland* (37393/02), ECHR 27 November 2007.

⁹⁴ *Slimani v France* (57671/00), ECHR 27 July 2004, para. 44.

⁹⁵ *Ibidem*, para. 47.

⁹⁶ *Ahmadov*, *supra* note 61, para. 115.

⁹⁷ *Ibidem*.

⁹⁸ *Slimani*, *supra* note 94, para 49.

the realisation of his or her rights. It follows from the way in which Article 6 itself has been formulated – and in particular from the autonomous meaning given to the notions “case” and “accusation” within the meaning of the Convention – that this provision is at least partially applicable to pre-trial proceedings.⁹⁹ However, the application of the guarantees contained in the latter provision to pre-trial proceedings must take into consideration the special nature of those guarantees. The mere possibility of including pre-trial proceedings within the scope of protection of Article 6 does not mean that the same degree of protection shall be granted automatically as for the trial proceedings.¹⁰⁰ In its case law the Court has accepted the application of the guarantees of Article 6 to the legal situation of the relatives of victims at the pre-trial stage of the proceedings, provided that the relatives are claiming civil rights.¹⁰¹ As a result, both during the pre-trial and trial proceedings the injured party benefits from the fair trial guarantees laid down in Article 6 of the Convention, subject of course to the nature of the specific guarantees defined in that provision. The victim can benefit from the guarantees of this provision only when he or she pursues rights of a civil nature in the criminal proceedings. Therefore, in cases in which applicants do not have the possibility under national law to join the criminal proceedings as civil parties, but there is nothing that prevents them from bringing a civil action for compensation either before or in parallel with the criminal proceedings, there will be no violation of Article 6.¹⁰² So far the Court has not answered the question whether there is a violation of Article 6 in the situation where the applicant has neither the possibility to participate in criminal proceedings nor can initiate civil proceedings. In a group of cases the Court has considered this problem under Article 13, stating that where both the criminal investigation and any other remedy that may have existed were ineffective, the State has not met its obligations under Article 13 of the Convention.¹⁰³ However, it would be desirable to consider this situation with regard to the guarantees contained in Article 6. If the domestic legal system does not provide a separate possibility of initiating civil proceedings or putting forward civil claims, or the alternative domestic remedies foreseen in the national law for the participation in criminal proceedings as an injured party are completely ineffective,

⁹⁹ *Imbrioscia v Switzerland* (13972/88), ECHR 24 November 1993, A 275, para. 36; *Rajkowska*, *supra* note 93.

¹⁰⁰ *See also*, Trechsel, *supra* note 2, p. 31.

¹⁰¹ *Perez*, *supra* note 26, para. 66.

¹⁰² *Giuliani and Gaggio*, *supra* note 65, paras. 335-337; *Sigalas*, *supra* note 22; *Assenov and Others v Bulgaria* (24760/94), ECHR 28 October 1998, Reports 1998-VIII, para. 111; *Tsalkitis v Greece* (11801/04), ECHR 16 November 2006, paras. 29-32.

¹⁰³ *Isayeva v Russia* (57950/00), ECHR 24 February 2005, para. 229.

the refusal to allow the victim, or in case of the victim's death – his or her relative – to participate in the criminal proceedings in which he or she wishes to realise the procedural entitlements due the injured party under national law with the aim of pursuing his or her civil rights, should be treated as a violation of the right of access to court set forth in Article 6.

To what extent the victim or relatives may participate in the proceedings depends largely on the applicable domestic law and the stage of the proceedings. However, a victim/relative that enjoys the status of a party in the domestic proceedings may benefit from all the rights due to a party. With respect to the injured party, Article 6 guarantees, *inter alia*, the following: the right of access to the case-files and all the documents concerning the case,¹⁰⁴ the right to be heard, the right to receive reasoned decisions, and the right to fair evidentiary proceedings.¹⁰⁵ This is a non-exhaustive list, and is constantly being developed in the case law. Hence, it can be concluded that the guarantees are largely similar to those provided for under Article 2.

3. COMPARING THE SCOPE OF PROTECTION UNDER ARTICLES 2 AND 6

3.1. Dividing the scope of application between Articles 2 and 6

The Court has developed a consistent line of case law in accordance with which, where it has already ruled that there was a violation of Article 2 in its procedural aspect, it has refrained from finding a violation of Article 6.¹⁰⁶ In such cases the Court assumed that the complaints raised by the applicants under Article 6 concerned the same issues as those discussed under the procedural aspect of Article 2 and Article 13. Therefore, there was no need to examine the applications under Article 6. At the same time, the Court dispelled doubts as to the basis under which the complaints should be adjudicated by ruling that issues concerning the effectiveness of criminal investigations shall be considered under Articles 2 and 13 of the Convention.¹⁰⁷ Against that background the question arises: in which circumstances do complaints raised by the victims/relatives have to be considered not only under Article 2, but also under Article 6?

¹⁰⁴ E.g., Garlicki, et al, *supra* note 31, p. 347.

¹⁰⁵ E.g., *ibidem*, p. 329.

¹⁰⁶ *Varnava and Others v Turkey* (16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90), ECHR 18 September 2009, Reports of Judgments and Decisions 2009, para. 211; *Bazorkina*, *supra* note 16, para. 153.

¹⁰⁷ *Hugh Jordan*, *supra* note 60, para. 149.

The first such situation would concern a case where the applicant participates in criminal proceedings, and at the same time in a different set of proceedings that are not subject to an assessment under Article 2. Proceedings not aimed at the identification and punishment of an alleged perpetrator cannot be taken into account in the assessment of the State's compliance with its procedural obligations under Article 2 of the Convention.¹⁰⁸ Such conclusions were formulated in relation to the situation where the death was the result of the use of lethal force by a police officer. Therefore, at least in such types of cases the fairness of the investigation can be assessed only under Article 2, and the charges concerning other proceedings under Article 6.

Secondly, Article 6 seems to be suitable to serve as a basis for applications in cases where limits on the Court's temporal jurisdiction might prevent an assessment under Article 2. The Court has indicated that in many instances it treats the obligation of conducting an efficient investigation as an obligation that is autonomous in its character and scope, and is not limited only to cases where the State is responsible for a violation of the law in its substantive aspect. A procedural obligation may be treated as a completely separate obligation stemming from Article 2, binding on States even in situations where the death occurred before the entry into force for that State of the Convention.¹⁰⁹ However, the ascertainment of the existence of this separate, "detachable" obligation depends on the occurrence of certain premises. Only acts or omissions that took place after a given State had become bound by the Convention lie within the Court's jurisdiction, and provided that there "exists a genuine connection between the death and the entry into force of the Convention in respect of the respondent State", which means e.g. that the main part of the procedural actions that needed to be performed were, or were to be, carried out after that date.¹¹⁰ Therefore, in cases where the Court does not establish – due to the lack of its temporal jurisdiction – the existence on the part of the State of procedural obligations under Article 2, any proceedings, including criminal proceedings, conducted after the date of ratification by the national authorities might be subjected to an assessment under Article 6.

Thirdly, it is not excluded that the applicants may raise complaints concerning the fairness of criminal proceedings related to crimes that do not fall under Article 2, but can be adjudicated with reference to the guarantees of a fair trial under Article 6. The problem is that neither of these provisions clarify what exactly the notions of an efficient and fair trial encompass. In its case law the Court has elaborated certain entitlements that fall within the general substance

¹⁰⁸ *Ibidem*, para. 141.

¹⁰⁹ *Šilih*, *supra* note 86, para. 159.

¹¹⁰ *Ibidem*, paras. 161-163.

of such rights. It must be noted that the Court's case law is constantly evolving and the current interpretation of the above-mentioned provisions differs significantly from the interpretations applied in the 1970s and 1980s. One cannot exclude that in the future the Court will extend the protection offered by Article 6 § 1 to victims' claims of a non-pecuniary character not covered by the guarantees of Article 2. In this regard it is interesting to refer to the new challenges to the Court's case law, referred to earlier in this article, concerning the protection of certain personal rights related to access to information about the circumstances of the crime.

In concluding this part of article it is interesting to consider the potential consequences to a domestic legal system of the finding of a violation under Articles 2 and/or 6 of the Convention. Many applicants complain about the ineffectiveness of an investigation conducted by national authorities and request the Court to order the State to conduct a new investigation. These demands have in some situations been reflected in the position taken by the Committee of Ministers, according to which in many instances the reopening of the proceedings would be an effective way of redressing the consequences of a violation of the Convention caused by unfair or inefficient national proceedings. The Committee of Ministers, in its guidelines concerning the execution of the Court's judgments, has encouraged states to ensure that there exist adequate possibilities to reopen proceedings in those instances where the Court has found a violation of the Convention, and has specified situations in which the reopening of proceedings is particularly desirable.¹¹¹

As to the question whether the authorities should be compelled to initiate a new investigation after the Court has found a violation of procedural obligations under Article 2, there is no agreement among the scholars in legal literature, nor has the Court pronounced itself unambiguously on this matter.¹¹² The Court has not entirely rejected the idea of an obligation to reopen the proceedings, and the position taken by it in the case of *Finucane v. UK* remains valid. In that case the Court stated that "it rather falls to the Committee of Ministers acting under Article 46 of the Convention to address the issues as to what may be required in practical terms by way of compliance in each case".¹¹³

¹¹¹ Recommendation No. R (2000) 2 of the Committee of Ministers to member states on the re-examination or reopening of certain cases at the domestic level following judgments of the European Court of Human Rights, adopted by the Committee of Ministers on January 19, 2000 at the 694th meeting of the Ministers' Deputies.

¹¹² See, J. Chevelier–Watts, *Effective Investigations under Article 2 of the European Convention on Human Rights: Securing the Right to Life or Onerous Burden on a State?*, 3 *European Journal of International Law* 21 (2010), p. 713.

¹¹³ *Finucane v UK* (29178/95), ECHR July 2003, Reports of Judgments and Decisions 2003-VIII, para. 89. It is important to note that in the case of *Akar v Turkey* the Court rejected the unilateral declaration of the Government, finding that apart from the acknowledgement

The issue of reopening proceedings is different when a violation of Article 6 is found. The recommendation of the Committee of Ministers encouraging States to create the possibility to reopen proceedings has been strengthened by the case law of the Court. In recent years one can observe a dynamic growth in the number of judgments in which the Court has found that “when an applicant has been convicted in breach of his rights as guaranteed by Article 6 of the Convention, he should, as far as possible, be put in the position in which he would have been had the requirements of that provision not been disregarded, and the most appropriate form of redress would, in principle, be trial *de novo* or the reopening of the proceedings, if requested”.¹¹⁴ The Court’s practice of including in its judgments an order that States reopen proceedings is limited to criminal cases. It has been rightly pointed out in the legal literature that the Court is reluctant to urge states to reopen the proceedings in civil cases due to the consequences that such a remedy might have for third parties.¹¹⁵ Most national legal systems provide for the possibility to reopen proceedings following a judgment of the Court at least in criminal matters.¹¹⁶ In a few national legal systems the possibility to reopen proceedings also exists for civil cases. However, in criminal cases it is usually only the accused that benefits from such a possibility.¹¹⁷ The domestic systems do not allow other parties or persons that were involved in the criminal proceedings to request that they be reopened following the Court’s judgment. Therefore, the Court’s finding of a violation of the rights of the victim or relatives under Article 6 would not result in reopening the proceedings at the national level.

3.2. Supplementing role of Article 13

The guarantees concerning victims’ rights stemming from the substantive articles of the Convention are supplemented by the rights enshrined in Article 13. The scope of obligations under Article 13 varies depending on the nature of the

of a violation such a declaration should contain the obligation to instigate a fresh examination subject to supervision of the Committee of Ministers, see *Tahsin Akar v Turkey* (26307/95), ECHR 6 May 2003, Reports of Judgments and Decisions 2003-VI, para. 84. See also, Leach, *supra* note 31, p. 100.

¹¹⁴ *Laska and Lika v Albania* (12315/04 and 17605/04), ECHR 20 April 2010, para. 74. Earlier judgments in which the Court reached this conclusion: *Akkaş v Turkey* (52665/99), ECHR 23 October 2003; *Çavuş and Bulut v Turkey* (41580/98 and 42439/98), ECHR 23 October 2003; *Dalgıç v Turkey* (51416/99), ECHR 23 October 2003; *Samogiyi v Italy* (67972/01), ECHR 18 May 2004; *Abbasov v Azerbaijan* (4271/05), ECHR 17 January 2008.

¹¹⁵ See also, Leach, *supra* note 31, p. 100.

¹¹⁶ Resolution (94) 84 of the Committee of Ministers, under the terms of Article 54 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

¹¹⁷ Cf., Art. 540 and 540a of the Polish Code of Criminal Procedure.

applicant's complaint under the Convention.¹¹⁸ The requirements of Article 13 are broader than a Contracting State's obligation under Article 2 to conduct an effective investigation.¹¹⁹ For the purposes of Article 13, in conjunction with Article 2, the applicants should be able firstly to avail themselves of effective and practical remedies capable of leading to the identification and punishment of those responsible, including effective access for the complainant to the investigation procedure (an obligation similar to that under Article 2), and secondly to an award of compensation.¹²⁰ As the Court has stated, the remedy required by Article 13 must be "effective" in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State.¹²¹

The Court has developed a line of case law according to which, where the Court finds a violation of the procedural aspects of Article 2, and at the same time considers that the victims were not afforded the possibility of claiming compensation in either criminal or civil proceedings, it must be concluded that there has been a violation of Article 13 of the Convention.¹²² In the situation where the respondent government has not submitted examples of court practice confirming that the civil courts are capable of considering the civil claim of an injured party on the merits when the investigation has rendered absolutely no results, e.g. as regards the identification of the possible perpetrators, the Court has found that a violation of Article 2 in conjunction with Article 13 occurred.¹²³ However, in cases where the Court has found that an effective domestic investigation under Article 2 had been conducted into the circumstances surrounding a death and the applicant had not been prevented from bringing a civil action (even if only in civil and not in criminal proceedings), the Court has ruled that the applicants had effective remedies available to them in respect of their complaint under Article 2 of the Convention and that there was no violation of Article 13 of the Convention.¹²⁴

¹¹⁸ *McKerr v UK* (28883/95), ECHR 4 May 2001, Reports of Judgments and Decisions 2001-III, at para. 169.

¹¹⁹ *Orhan v Turkey* (25656/94), ECHR 18 June 2002, para. 384; *Ahmadov*, *supra* note 61, para. 137.

¹²⁰ *Kaya*, *supra* note 16, para. 107; *McKerr*, *supra* note 118, para. 171; *Ahmadov*, *supra* note 61, para. 138; *Assenov*, *supra* note 82, para. 117.

¹²¹ *Kaya*, *supra* note 16, para. 106; *Paul and Audrey Edwards v the United Kingdom* (46477/99), ECHR 14 March 2002, Reports of Judgments and Decisions 2002-II, para. 96; *Gül*, *supra* note 22, para. 100; *İlhan v Turkey* (22277/93), ECHR 27 June 2000; *McKerr*, *supra* note 118, para. 107.

¹²² *Assenov*, *supra* note 82, paras. 114-118.

¹²³ *Baysayeva*, *supra* note 64, para. 106.

¹²⁴ *Giuliani and Gaggio*, *supra* note 45, para. 337. However, one should also note the dissenting opinion signed by four judges – Tulkens, Zupancic, Ziemele and Kalaydjieva, who did not agree with the view that there had been no violation of Article 13. In their opinion,

CONCLUSION

The lack of a general definition of the notion of civil rights and obligations inhibits precisely defining the scope of protection due to an injured party pursuant to Article 6 of the ECHR. The general principles concerning the application of Article 6 that have been formulated by the Court allow the victims of crimes to benefit, to a certain extent, from the protection afforded by this article. However, this concerns only those injured parties who can prove that the proceedings conducted by the domestic authorities affected their civil rights. The ground-breaking judgment adopted in 2006 by the Court in the *Perez* case, in which it specified that it is no longer necessary for the injured party, to be entitled to protection on the basis of Article 6, to establish separately that the criminal proceedings are decisive for the civil action, did not dispel all doubts in this regard. In its previous practice the Court awarded protection under Article 6 mainly to those aggrieved persons who demanded pecuniary compensation for damage caused by an offence, or sought the protection of their reputation through a criminal procedure. Such situations have been assessed by the Court as circumstances in which civil rights are “determined”. On the whole, the Court has treated the concept of civil rights rather narrowly. Only in recent years has it drawn attention to the frequently disadvantageous position of injured parties in proceedings, particularly in criminal cases, where they seek to realise other interests that are important to them and are connected to the crime that has been committed. In this context one should assess positively the fact that the Court has taken up the challenge of assessing, on the basis of Article 6, those actions of States which, while creating a legal framework whereby injured parties can participate in criminal proceedings for the purpose of realising their legal interests connected with cultivating the memory of the deceased (obtaining reliable information about the circumstances of death and

“the applicants were unable to join the criminal proceedings as civil parties because the investigating judge discontinued the case. They were thereby deprived of the support of the prosecuting authorities in seeking to establish the facts and obtain the evidence. To contend in that regard, as the judgment does, that ‘there was nothing to prevent the applicants from bringing a civil action for compensation either before or in parallel with the criminal proceedings’ (see paragraph 337 of the judgment) strikes us as not merely theoretical but also illusory, since in any event the Grand Chamber considers the entire policing operation to have been perfectly lawful.” However, it is also worth noting that the Court’s case law on the issue of accessibility of effective remedies is not quite consistent, as in some cases the Court has decided that “in view of the submissions of the applicant in the present case and of the grounds on which it has found a violation of Article 2 in relation to its procedural aspect (...), the Court considers that no separate issue arises under Article 13 of the Convention”, cf., *Makaratzis*, *supra* note 59, para. 86.

the burial site), do not put such provisions into practice. The Court's continuously evolving case law, which takes into consideration the fact that aggrieved persons may assert civil rights of a non-pecuniary nature in criminal proceedings, may be a partial response to the criticism raised in the legal literature that the Court seems to overestimate the importance of redressing material damage for injured parties.¹²⁵

The main provisions determining the scope of victims' guarantees stemming from the Convention will undoubtedly remain Articles 2 and 3 (the latter not having been discussed in this paper). The Court's case law has developed dynamically with respect to these provisions, and the concept of the procedural obligations of a State has undergone a significant evolution. From the point of view of the rights of victims, the aforementioned provisions play a crucial role. In this respect, the guarantees stemming from Article 6 may be of a complementary character to the procedural guarantees of Article 2, and together with this provision they may establish the framework for ensuring an ever more effective protection of victims' rights.

¹²⁵ Trechsel, *supra* note 2, p. 42.

Audrey Patten* ■

“EMPTY HUMAN RIGHTS LIP SERVICE”: FRANCE’S ROMA EXPULSIONS AND THE FAILURE OF THE EUROPEAN UNION TO EXERCISE ITS RACIAL EQUALITY DIRECTIVE**

Abstract

This article argues that the arrests and expulsion of large numbers of Roma carried out by the French government in 2010 violated the European Union’s human rights principles because non-French Roma were targeted collectively for removal. In response to the expulsions, the European Commission initiated infringement proceedings against France for procedural violations of European Union Directive 2004/38 (the Free Movement Directive). However such racially discriminatory state action should be challenged more properly as a substantive violation of Directive 2000/43 (the Racial Equality Directive). Because the European Union does not have its own separate body of human rights law that is binding within Member States, using the Racial Equality Directive to offer protection to vulnerable minorities by challenging discriminatory state practices may be an alternative method of achieving human rights objectives within Member States. Moreover, since the Racial Equality Directive lacks interpretation, a situation of race-based expulsion of EU migrants would be an opportunity to clarify and develop the scope and meaning of the Directive.

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INTRODUCTION

By the fall of 2010, the French government had expelled over 10,000 people from France. Men, women, and children living in camp settlements around the country were rounded up by armed police and told to pack on short notice. Many of their possessions and mobile homes were confiscated and destroyed before police authorities loaded the people onto buses, trains, and specially chartered flights and deported them into eastern European countries. These people were ethnic Roma, mainly from Bulgaria and Romania.¹ A July 28, 2010 announcement by French President Nikolas Sarkozy, which connected migrant Roma communities to crime, had triggered a high-profile crackdown on eastern European Roma in France, which hastened the deportations.² It was a government move colored by racial profiling³ and stereotype-based collective prejudice that threatened the European Union's human rights principles. It stands as an urgent example as to why

¹ By September 2010, 13,241 eastern European Roma had been deported from France. Human Rights Watch, Open Letter to French Senators on Immigration Bill, Annex: Detailed analysis of problematic measures in the immigration bill and recommendations for amendment (February 7, 2011), <http://www.hrw.org/en/news/2011/02/07/open-letter-french-senators-immigration-bill>, accessed March 1, 2011. In its 2009 State Party report to the United Nations Committee on the Elimination of all Forms of Racial Discrimination, the French government estimated that Roma population in France totalled 300,000 people. United Nations Committee on the Elimination of all Forms of Racial Discrimination, *Reports Submitted by State Parties under Article 9 of the Convention, seventeenth, eighteenth, and nineteenth Periodic Reports of State Parties due in 2008, France*, CERD/C/FRA/17-19 (December 16, 2009), para. 95 (the "State Party Report"). It is estimated that in 2010, 10,000-15,000 Roma in France were Romanian or Bulgarian citizens. Ligue des Droits de l'Homme, *Comité pour l'Élimination de la Discrimination Raciale Rapport Alternatif de la Ligue des Droits de l'Homme à Propos des Dix-Septième, Dix-Huitième, et Dix-Neuvième Rapports de la France 11 et 12 Aout 2010* (Alternative Report to the Committee for the Elimination of Racial Discrimination from the Human Rights League, regarding the Seventeenth, Eighteenth, and Nineteenth Reports by France), para. 97 (the "Ligue Report").

² See, Press Release, Elysée Présidence de la République, *Communiqué Faisant Suite à la Réunion Ministérielle de ce Jour sur la Situation des Gens du Voyage et des Roms* (Press Release Following the Ministerial Meeting of the Day on Travelers and Roma) (July 28, 2010), <http://www.elysee.fr/president/les-actualites/communiques-de-presse/2010/juillet/communiqué-faisant-suite-a-la-reunion.9381.html>, accessed March 1, 2011 (the "July Press Release").

³ The Open Society Justice Initiative has provided a useful definition of racial or ethnic profiling as: "the use, by law enforcement officers, of generalizations based on race, ethnicity, religion, or national origin rather than individual behaviour as the basis for making law enforcement and/or investigative decisions about who has been or may be involved in criminal activity." The Open Society Justice Initiative, *Submission to the European Commission Consultation on the Freedom, Security, Justice Priorities for 2010-2014*, p. 2.

the European Union (the “EU”) must be more proactive in enforcing its Directive 2000/43 “implementing the principle of equal treatment between persons irrespective of racial or ethnic origin” (the Racial Equality Directive, or “RED”).⁴

The French government’s actions focused on a particular racial group traditionally stereotyped in Europe as carriers of crime, disease, and other social ills.⁵ The Roma are also, ironically, the group most victimized by crime in Europe, and most subjected to discrimination in all aspects of social services across EU Member States.⁶ However, the legal and political justification advanced for the deportations was that too many Roma had taken advantage of EU free movement rights to overstay their entry permits to enjoy the social services and economic benefits of life in France. Many of the expelled Roma therefore fell into the category of “irregular migrants,”⁷ people who do not have legal status to enter or remain in a foreign state.⁸ However, a critical factor that helped push this crackdown from being an issue of a state’s immigration control (albeit a heavy-handed one) into a serious human rights violation was a government document revealing that priority would be placed on the Roma, as an ethnic group, for systemic “evacuation” of their camp settlements by the police, to be followed by deportations.⁹

The arrests and deportations in France displayed how irregular migrants world-wide are particularly vulnerable to abuse and exploitation, a problem

⁴ Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180.

⁵ See, Project on Ethnic Relations, *Roma and the Law: Demythologizing the Gypsy Criminality Stereotype* (1999), p. 9; see also, L. C. Deutsch, *The Spanish Gypsy: The History of a European Obsession*, Pennsylvania State University Press, University Park, Pennsylvania: 2004, pp. 9-15 (discussing the origins and persistence of Gypsy myths).

⁶ See, N. Banulescu-Bogdan & T. Givens, Migration Policy Institute, *The State of Antidiscrimination Policies in Europe: Ten Years after the Passage of the Racial Equality Directive* (2010), p. 6.

⁷ I use the internationally recognized term “irregular migration” in this article in lieu of “illegal immigration,” a term that denotes criminality (See, K. Koser, *Irregular Migration, State Security, and Human Security: A paper prepared for the Policy Analysis and Research Programme of the Global Commission on International Migration* (2005), p. 5); see also, International Labor Office, *International Labor Migration: A Rights-based Approach* (2010), p. 31 (the “International Labor Office”).

⁸ European legal scholar Elspeth Guild has pointed out that illegal immigration is a concept which encompasses a variety of issues. These include foreigners illegally entering the state; foreigners overstaying their entry permits, and foreigners working without proper authorization. E. Guild, *Who is an Irregular Migrant?*, in B. Bogusz, R. Cholewinski, A. Cygan, & E. Szyrsczak (eds.), *Irregular Migration and Human Rights: Theoretical, European, and International Perspectives*, Martinus Nijhoff Publishers, Leiden/Boston: 2004, p. 3.

⁹ *Circulaire du Ministre de l’Intérieur de l’Outre-mer et des Collectivités Territoriales à Monsieur le Préfet de Police* (Circular of the Ministry of the Interior and Overseas and Collective Territories to the Prefect of Police) (August 5, 2010) (the “August Circular”).

enhanced by national discourses that demonize the “illegal alien”. They also revealed the tension between state sovereignty and universal human rights. This tension exists between the exclusive territorial jurisdiction of the state and the concept of human rights norms that transcend international borders.¹⁰ The result is a fundamental paradox.¹¹ International human rights legal instruments, such as the International Covenant for Civil and Political Rights (the “ICCPR”) and the Convention on the Elimination of all Forms of Racial Discrimination (the “CERD”), which prohibit racial discrimination and profiling by State Parties, are designed to create an internationally recognized body of individual rights.¹² However, because these international human rights come with very limited international enforcement mechanisms, they depend on sovereign states to enforce them through their own national laws and to self-report their failures to do so to international human rights bodies.¹³ Standing alone, they do little to protect individuals suffering from state-sponsored racial discrimination.¹⁴

Because France is an EU Member State, and most of the expelled Roma are EU citizens, a body of regional law was available to intervene in the deportations. Regional human rights instruments, including the European Convention on Human Rights (“ECHR”) and the EU Charter of Fundamental Rights (“the Charter”) explicitly forbid racial and ethnic discrimination.¹⁵ Furthermore, the European Court of Human Rights (“ECtHR”) has made clear that state officials’ and police participation in racial discrimination is a human rights violation, even

¹⁰ A. An’Naim, *Global Citizenship and Human Rights: From Muslims in Europe to European Muslims*, in M.L.P. Loenen & J.E. Goldschmidt (eds.), *Religious Pluralism and Human Rights in Europe: Where to draw the line?*, Intersentia, Antwerpen/Oxford: 2007, p. 27.

¹¹ *Ibidem*.

¹² The ICCPR contains four Articles that specifically prohibit racial discrimination, including for reasons of public security (Article 4) and insists that all people are equal before the law, regardless of race (Article 26). See, International Covenant on Civil and Political Rights (adopted by the General Assembly of the United Nations Dec. 16, 1966) 999 UNTS 171, arts. 4, 20, 24 and 26. Meanwhile, the preamble to CERD declares, “all human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination.” International Convention for the Elimination of All Forms of Racial Discrimination (opened for signature December 21, 1965) 660 UNTS 211, preamble.

¹³ See, L. Henkin, *Human Rights and State “Sovereignty”*, 25 Georgia Journal of International and Comparative Law 31 (1995), pp. 32-33.

¹⁴ See, P. S. Pinheiro, *Sixty Years after the Universal Declaration: Navigating the Contradictions*, 9 International Journal on Human Rights 71 (2008), p. 71 (discussing the inability of most people to actually benefit from universal human rights instruments).

¹⁵ Article 14 of the European Convention on Human Rights reads: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground.” The EU Charter of Fundamental Rights states, “Any discrimination

if the victims are breaking the law.¹⁶ In 2005, the Court stressed that states must fight racism and racial violence, which the Court warned is “a particular affront to human dignity.”¹⁷ Yet, while Europe may have enough law prohibiting racial discrimination, lack of political will and public support have resulted in the failure to fully implement these legal protections.¹⁸

In October 2010, the European Commission initially seemed poised to bolster human rights principles by bringing legal sanctions against France for the expulsions. But what started out as a strong rhetorical condemnation of France’s policy, with an emphasis on condemning ethnic and racial discrimination, eventually turned into a focus on infringement proceedings under EU Directive 2004/38 “on the rights of citizens and their families to move and reside freely within the territory of the Member states” (the Free Movement Directive).¹⁹ It ultimately concluded with a comparatively low profile withdrawal of the proposed legal proceedings after France promised to amend its laws to allow more individual process before expelling EU citizens.²⁰ However, by shifting the legal focus onto EU procedural free movement rights, the EU approach left relatively untouched the substantive issue of racial discrimination that was occurring in France. It also avoided the question of how to set a minimum standard for protecting all people in a Member State’s jurisdiction from race or ethnicity driven ill-treatment, not just those with EU citizenship status.

Challenging France under the Racial Equality Directive, instead of only the Free Movement Directive, would have set a stronger example for other Member States that discriminatory law enforcement policies, especially under the guise of border protection, will not be tolerated in the EU. RED is an underdeveloped directive that needs to be exercised to turn it into a robust and effective deterrent to discriminatory state policies.²¹ The European Commission should consider infringement proceedings for failure to fulfill obligations under RED against Member States with national law enforcement policies or programs that single out

based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.”

¹⁶ See, *Bekos and Koutropoulos v. Greece* (15250/02) Fourth Section, ECHR 13 December 2005.

¹⁷ *Ibidem*, para. 63.

¹⁸ Banulescu-Bogdan & Givens, *supra* note 6, p. 12.

¹⁹ Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, [2004] OJ L 158.

²⁰ See *infra*, Section 2.1.2 and accompanying notes.

²¹ See *infra*, Section 3.1 and accompanying notes.

an ethnic group for discriminatory treatment, even if written national law adequately reflects RED.²² Were the Commission to take such a case before the EU's judicial body, the European Court of Justice (the "ECJ"), it would also provide the opportunity to develop more substantive case law interpreting RED. Such a development could better guide national and regional policymakers in respecting everyone's basic rights, regardless of citizenship, and can give the EU more power in the future to respond to violations. Because there are no EU laws specifically categorized as human rights laws that are internally binding on Member States, the need to deal with human rights violations by Member States through other legal tools, such as the EU directives, is particularly urgent. As, Livia Jaroka, a Hungarian member of the European Parliament, put it succinctly to European Commissioner Viviane Reding during a debate on the French Roma crisis, the "empty human rights lip service of the last decade [in the EU]" is "repulsive."²³

Part 1 of this article is a contextual explanation of the particular legal vulnerability of irregular migrants which highlights the need to supplement sovereign state protection of fundamental human rights. Part 2 provides an overview to the issue of racial discrimination against European Roma and argues that the resistance and ambivalence on the part of national governments in the EU to altering their laws and policies to protect Roma and other minority migrants from abusive treatment makes it critical for the EU to fight racial discrimination. Part 3 suggests some possible legal interpretations of the Racial Equality Directive the EU could take in the future to challenge discriminatory actions by states against vulnerable, non-citizen minorities.

²² Cf., The Open Society Institute, European Roma Rights Center, and Osservazione have argued in briefings to the European Commission for a similar interpretation of the Racial Equality Directive in challenging discriminatory policies by the Italian government, including requiring Roma to be fingerprinted and the information stored in a database. Open Society Institute, European Roma Rights Center & Osservazione Azione, *Memorandum to the Commission: Violations of EC Law and the Fundamental Rights of Roma and Sinti by the Italian Government in the Implementation of the Census in "Nomad Camps"* (May 4, 2009), pp. 7-11. See also, Open Society Justice Initiative, *Roma in Italy: Briefing to the European Commission* (October 18, 2010), p. 8.

²³ EUX.TV, *Strasbourg Hosts Heated EU Debate on Roma Expulsion*, (September 10, 2010), <http://www.youtube.com/watch?v=S4qkmPkqukU&feature=channel>, accessed March 1, 2011 (the "Strasbourg Debate").

1. GLOBAL CONTEXT: IRREGULAR MIGRATION AND DIMINISHED RIGHTS’ PROTECTIONS

Irregular migrants’ enhanced vulnerability comes in large part because they exist in a gray area. Irregular migrant groups like the eastern European Roma in France – who are not within the legal protections of their “home state” and not welcome and recognized as having a full gambit of legal rights in their “host states” – become susceptible to human rights abuses without adequate means to access protection. The worldwide trend in hostility toward irregular migrants is growing increasingly acute. The Global Migration Group (the “GMG”), a combination of 12 United Nations agencies, the World Bank, and the International Organization of Migration, issued a statement addressing this issue on September 30, 2010.²⁴ Pointing out that it is “deeply concerned about the human rights of international migrants in irregular situations around the globe,” the GMG recognized that irregular migrants are particularly vulnerable to exploitation, violence, arbitrary detention, exclusion and abuse by both state and private actors.²⁵ The GMG criticized the response of states, which have largely handled irregular migration “solely through the lens of sovereignty, border security or law enforcement,” and have often been pushed to do so by “hostile domestic constituencies.”²⁶

Sovereign state mistreatment of vulnerable minority groups like the Roma is a dilemma for the United Nations and regional organizations dependent on sovereign state enforcement of international human rights conventions. Unsurprisingly, these conventions are largely unable to protect irregular migrants.²⁷ The unwillingness of states to extend protections to migrants is in part because of the conventional belief that migrants are not entitled to the equal set of rights that citizens have.²⁸ Turkish legal scholar Bulent Cicekli points out that “[t]he common perception and treatment of immigrants as guests who would eventually return home” results in states’ lack of interest in including migrants (particularly irregular migrants) in their protective sphere.²⁹ This situation therefore underscores

²⁴ Statement of the Global Migration Group on the Human Rights of Migrants in Irregular Situation (September 30, 2010), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10396&LangID=E>, accessed December 28, 2011.

²⁵ *Ibidem*.

²⁶ *Ibidem*.

²⁷ See, J. A. Bustamante, *Immigrants’ Vulnerability as Subjects of Human Rights*, 36(2) International Migration Review 333 (2002), p. 338.

²⁸ *Ibidem*, p. 343.

²⁹ B. Cicekli, *The Rights of Turkish Migrants in Europe Under International Law and EU Law* 33(2) International Migration Review 300 (1999), p. 302.

the need for legal regimes that can supplement domestic law in ensuring fundamental human rights protections for all people within a state's territory.³⁰

A difficulty encountered by advocates for irregular migrants is the pre-eminence that border control has in public discourse.³¹ The popular demand for secure borders in many western countries makes it easier to portray those who violate immigration controls as dangerous enemies. As a consequence, even those states, like France, with strong civil societies, justify excluding irregular migrants from civil and labor rights by "conflat[ing] immigrants and asylum seekers with criminals and terrorists."³² This tactic has been used by French and European anti-immigrant factions in targeting the Roma for discriminatory legislation and harsh immigration requirements.³³

Politicians in rich states respond to constituents who, as European scholar Didier Bigo has put it, welcome the benefits of globalization, such as the mobility of "rich tourists" and "consumers in transit," but who do not want to extend freedom of movement "to the poor people, to the vagabonds, to the people fleeing ecological, economic, or political disasters."³⁴ This antipathy reflects a double standard by which migrants who might be ignored, or even accepted, during periods of economic growth, get accused of destroying countries' social fabric by draining the state of capital and services that should rightly go to citizens when economic times are hard.³⁵ Through negative labels such as "illegals," or "aliens," the image of migrants is easily transformed into that of "thieves" and "smugglers,"³⁶ and can then be more easily used by politicians to justify their removal.

Even in the EU, where there is a more tightly woven body of regional law, irregular migrants have had inadequate access to tangible human rights protections. University of Leicester law professor Erika Szyszczak has identified a predominantly, and "unashamedly," economic emphasis in the original EU migration

³⁰ See *ibidem*, p. 300.

³¹ See, L. Berg, *At the Border and Between the Cracks: The Precarious Position of Irregular Migrant Workers under International Human Rights Law*, 8 Melbourne Journal of International Law 1 (2007), p. 3 (arguing that "[t]hose who advocate for the rights of undocumented migrant workers are often blocked by the hold that the mantra of border control has on the popular psyche").

³² *Ibidem*, p. 6.

³³ See *infra*, section 2.1.1 and accompanying notes.

³⁴ D. Bigo, *Criminalisation of "Migrants": The Side Effect of the Will to Control the Frontiers and the Sovereign Illusion*, in B. Bogusz, R. Cholewinski, A. Cygan, & E. Szyszczak (eds.), *Irregular Migration and Human Rights: Theoretical, European, and International Perspectives* Martinus Nijhoff Publishers, Leiden/Boston: 2004, p. 63.

³⁵ See *ibidem*. p. 70.

³⁶ *Ibidem*; see also, Berg, *supra* note 31, p. 6.

frameworks,³⁷ but one that through European Court of Justice jurisprudence has become more intertwined with citizenship ideas and protections.³⁸ However, the ECJ has given little attention to human rights based ideas, framing fundamental EU rights, such as freedom of movement, more as conditional economic rights attached to citizenship.³⁹ There has been a tendency “to allow economic rights to trump other rights in the name of economic integration,”⁴⁰ which reflects broader tensions over whether the EU should remain economic in nature, or strive towards political integration.⁴¹

Where political and popular discourse have portrayed irregular migrants as reaping undeserved benefits that should go to hardworking citizens, it becomes politically easier for states to justify policies that violate human rights, such as the freedom from violence or arbitrary detention, by conflating their authority to do so with the state’s legitimate right to withhold citizenship rights, such as voting or tax benefits. Dealing with this challenge does not require abolishing distinctions between citizens and non-citizens, but rather is about setting the minimum standards for decent treatment and respect for fundamental human rights.⁴² Irregular migrants cannot easily access sovereign state protection, and therefore, as the treatment of the Roma in France shows, pose an important challenge to the universal application of human rights norms – including the freedom from racial and ethnic discrimination.

2. THE 2010 FRENCH EXPULSIONS AND MIGRANT ROMA IN EUROPE

The first ever EU-wide survey of immigrants and minority groups, conducted in 2009 by the EU Fundamental Rights Agency, revealed that the 12 million Roma in Europe outstrip all other European minority groups in their experience

³⁷ E. Szyszczak *Regularizing Migration in the European Union*, in B. Bogusz, R. Cholewinski, A. Cygan, & E. Szyszczak (eds.), *Irregular Migration and Human Rights: Theoretical, European, and International Perspectives* Martinus Nijhoff Publishers, Leiden/Boston: 2004, p. 408.

³⁸ *Ibidem*, pp. 408-409.

³⁹ *Ibidem*, p. 412.

⁴⁰ *Ibidem*.

⁴¹ See, S. Nello *Preparing for Enlargement in the European Union: The Tensions between Economic and Political Integration*, 23(3) *International Political Science Review* 291 (2002), pp. 291-292.

⁴² See, An’Naim, *supra* note 10, p. 14.

of discrimination.⁴³ The Roma are also the most economically impoverished ethnic minority in Europe.⁴⁴ Although southeastern European states, such as Slovakia, Hungary, and Romania, historically have the highest concentration of ethnic Roma, large numbers of Roma have moved into western states since the late nineteenth century in search of better livelihoods.⁴⁵ The Cold War restrictions on movement largely cut off this flow, but the 1990's saw an upswing in East-West Roma migrations, driven by a combination of push and pull factors. Push factors in the 1990's included a fall in living standards in eastern Europe,⁴⁶ which would have disproportionately impacted the already severely impoverished Roma, and an increase in nationalist activity in post-Communist states, which largely excluded Roma leading to heightened discrimination towards them.⁴⁷

As more Roma left behind poverty and discrimination in search of economic opportunity in western Europe, public opinion in western states responded defensively. According to a 2008 joint report prepared by the Council of Europe (the "COE") and the Organization for Security and Cooperation in Europe (the "OSCE"), politicians' and media's use of words like "deluge," and "wave" to describe Roma movement "distorted the scale of the issue" in western Europe.⁴⁸ The Roma migrations into western Europe also resulted in incidents of high profile and hostile media coverage.⁴⁹ Scholar Eva Sobotka has argued that such public

⁴³ European Agency for Fundamental Rights, *EU-MIDIS: European Union Minorities and Discrimination Survey Main Result Report* (December 9, 2009), p. 8. See also, European Agency for Fundamental Rights, *Data in Focus Report 1: The Roma* (April 22, 2009), http://fra.europa.eu/fraWebsite/eu-midis/eumidis_roma_en.htm, accessed March 1, 2011.

⁴⁴ See, J. D. Wolfensohn & G. Soros, *Roma People in an Expanding Europe*, <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/ECAEXT/EXTROMA/0,,contentMDK:20341647~menuPK:648308~pagePK:64168445~piPK:64168309~theSitePK:615987,00.html>, accessed December 15, 2011.

⁴⁵ C. Cahn & E. Guild, *Recent Migration of Roma in Europe* (December 10, 2008), p. 9.

⁴⁶ E. Sobotka, *Romani Migration in the 1990's: Perspectives on Dynamic, Interpretation, and Policy*, 13(2) *Romani Studies* 79 (2003), p.102.

⁴⁷ See, E. Sobotka, *Human Rights and Roma Policy Formation in the Czech Republic, Slovakia and Poland*, in R. Stauber & R. Vago (eds.), *The Roma – A Minority in Europe: Historical, Political and Social Perspectives*, Central European University Press, Budapest/New York: 2007, pp. 140-141; See e.g. L. Kurti, *Right-wing Extremism, Skinheads, and Anti-Gypsy Sentiments in Hungary* (2000), p. 20.

⁴⁸ Cahn & Guild, *supra* note 45, pp. 9-10. National leaders have also at times succumbed to media pressure and "inflamed public opinion," to implement "draconian measures to stop Roma from arriving" (*ibidem*, p. 10).

⁴⁹ An example of the media's role in perpetuating Roma stereotypes is the 1997 Roma asylum crisis in England. A thousand Czech and Slovak Roma had arrived at the port of Dover claiming political asylum from institutionalized racism at home. For weeks the media reviled their claims as "bogus," and continually recycled old-fashioned stereotypes of

rhetoric about Roma helped turn “Romani asylum seekers” into a “buzz word for the problem of migration *per se*.”⁵⁰ The perception that western Europe was being flooded by Roma migrants, in turn, caused western states to increasingly view the Roma migrations as a security problem.⁵¹ Western European public antipathy towards Roma migration was therefore exacerbated when in 2004 and in 2007 the EU expanded to include more eastern European states, including Bulgaria, Romania, Hungary, and Slovakia which have large Roma communities.⁵² When these countries joined the EU, all of their citizens, including members of their Roma communities, also became EU citizens, and could now freely enter other Member States’ territory.⁵³

2.1. The French Roma crisis: July – October 2010

Aside from social tensions created by the influx of eastern European Roma in the last decades, France has also long struggled with integrating Roma who are French citizens.⁵⁴ The 2007 EU expansion which brought Bulgaria and Romania

“Gypsies”. See, C. Clark & E. Campbell, ‘Gypsy Invasion’: A critical analysis of newspaper reaction to Czech and Slovak Romani Asylum Seekers in Britain in 1997, 10 *Romani Studies* 23 (2000), p. 42; see generally, J. A. Goldston, *Roma Rights, Roma Wrongs*, Foreign Affairs (March/April 2002) (describing western reactions to Roma migrants in the early 2000s).

⁵⁰ Sobotka, *supra* note 46, p.89.

⁵¹ Sobotka, *supra* note 47, p. 140.

⁵² European Commission Directorate General for Enlargement, *Understanding EU Enlargement: The European Union’s Enlargement Policy* (2007), p. 5. Romania and Bulgaria are estimated to have the largest Roma populations in Europe. A. Tanner, *The Roma of Eastern Europe: Still Searching for Inclusion* (May 2005), <http://www.migrationinformation.org/feature/display.cfm?ID=308>, accessed March 1, 2011.

⁵³ Since the 1992 Maastricht Treaty, all citizens of EU Member States are EU citizens.

⁵⁴ Approximately one third of French Roma are “travellers”, by custom, often living in mobile homes. See, State Party Report, *supra* note 1, para. 95. French travellers have often been the victims of facially neutral laws that burden them disproportionately. For example, the “Borloo Law” passed on August 3, 2003 exempts twenty-eight French cities from the prior “Besson Law” which protected travelling Roma by obligating cities to establish a designated “halting area” where people travelling in mobile homes could camp. European Roma Rights Center, *Always Somewhere Else: Anti-Gypsyism in France* (2005), p. 99. The Borloo Law applies, even if travelling Roma are stopping in the municipality for medical related reasons, or to seek professional assistance (*ibidem*). Another example is the requirement that all people over the age of sixteen who do not have a permanent address possess a circulation card, without which they are unable to access services. These cards are notoriously difficult for French Roma to obtain. Commission Nationale Consultative des Droits de l’Homme, *Etude et propositions sur la situation des Roms et des gens du voyage en France* (Studies and Proposals on the Situation of Roma and Travelers in France) (2008), p. 8 (hereinafter CNCDH). The French National Consulting Commission on Human Rights, a government body, has characterized the cards as being motivated exclusively for the purpose of police control, and has told the French government that the cards stigmatize traveler lifestyles, and are discriminatory (*ibidem*, p. 8).

into the EU was followed by official French concerns over more migrant, non-French, Roma into France,⁵⁵ which exacerbated existing ethnic tensions.⁵⁶ In its 2010 concluding observations on France, the United Nations Committee on the Elimination of Racial Discrimination expressed concern at the “increase in manifestations of violence and racist violence against Roma” in French territory.⁵⁷ These tensions climaxed in heavy-handed government action after a riot in Saint Aignan, France in the summer 2010. The events forced the EU to intervene politically, and tested its ability to confront a Member State engaged in large-scale racial discrimination.

2.1.1. The response to collective “Roma Crime”

On July 18, 2010, the small French village of Saint Aignan erupted in riots, as youth, mainly ethnic Roma, smashed store windows, set cars on fire, and attacked police and gendarmerie.⁵⁸ In response to the riots at Saint Aignan, an aggressive plan was announced in a July 28 press release from French President Nicolas Sarkozy’s office.⁵⁹ It emphasized that the President was committed to bringing those responsible for the riots to justice.⁶⁰ The decree, however, went far beyond suggesting that only those involved in the Saint-Aignan incident would be punished, but rather promised that all Roma causing trouble would be “severely sanctioned” as a reminder that while the Roma have the same rights as French citizens, “they also have the same duties.”⁶¹ However, while it stated that measures would be taken to ensure that only those acting “irresponsibly” would be targeted, the statement claimed that it was clear that too many Roma from eastern Europe were living in France in “inadmissible conditions.”⁶² To that end, the statement pointed out that 200 “illegal camps,” had already been “evacuated” and that they

⁵⁵ See *ibidem*, p 17.

⁵⁶ See, Ligue Report, *supra* note 1, paras. 97-99.

⁵⁷ United Nations Committee on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by State Parties under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination, France*, CERD/C/FRA/CO/17-19 (September 23, 2010), para. 14.

⁵⁸ The riots were in response to the shooting death of 22-year old Luigi Duquetnet, an ethnic Roma. In circumstances that were unclear, Duquetnet was shot by gendarmerie when he failed to stop his vehicle at a police checkpoint. See, Q&A: France Roma Expulsions (BBC News October 19, 2010), <http://www.bbc.co.uk/news/world-europe-11027288>, accessed March 1, 2011; See also, L. Davies, *Nicolas Sarkozy Gets Tough on France’s Itinerant Groups*, The Guardian July 27, 2010.

⁵⁹ Press Release, *supra* note 2.

⁶⁰ *Ibidem*.

⁶¹ *Ibidem*.

⁶² *Ibidem*.

had been the source of illicit trafficking, exploitation of children, prostitution, and delinquency.⁶³ The statement contained no further details as to the alleged crimes committed by any individual Roma, or within specific Roma communities. Nor did it reference any studies or reports supporting its assertions that too many Roma were living substandard lifestyles.

Leaders in France publicly justified the collective deportations in humanitarian terms. Frederic LeFebvre, spokesman for President Sarkozy’s UMP party, explained that “France should be admired” for carrying out deportations.⁶⁴ The reason he gave was that because the Roma are living in France illegally, they cannot find adequate work.⁶⁵ The inability to find work, in turn, causes them to live in squalor and turn to crime.⁶⁶ Echoing the larger theme that irregular migrants are so often associated with criminality in popular discourse, he continued, “illegality breeds illegality. And it’s a country’s duty to prevent slums from sprouting downtown. That is how France is becoming charitable and generous.”⁶⁷ Statements such as these reflect the broader antipathies towards irregular migrants by placing the Roma into the paradigm of dangerous migrants who threaten to take something away from true citizens.

⁶³ *Ibidem*. Roma expulsions had been going on systemically in France since at least 2006, in anticipation of the increased Roma migration into France predicted to accompany the Bulgaria and Romania accession to the EU in 2007. CNCDH, *supra* note 54, p. 18. These expulsions were forceful, even violent in nature, and often involved intense levels of psychological pressure to get Roma to leave without protest (*ibidem*, pp. 18-19). What was new in July 2010, however, was the energized and highly publicized vigor with which Sarkozy vowed to go forward with “camp evacuations,” and to work with Romanian and Bulgarian authorities in the relocation of individuals to their countries of legal citizenship.

⁶⁴ PBS Broadcast, *French Expulsions Lead to Tensions in Europe* (September 27, 2010), available at http://www.pbs.org/newshour/bb/social_issues/july-dec10/roma_09-27.html, accessed March 1, 2011 (the “PBS Broadcast”).

⁶⁵ *Ibidem*.

⁶⁶ *Ibidem*.

⁶⁷ *Ibidem*. LeFebvre’s reference to collective deportation as a charitable gesture was a reflection of the government’s “voluntary humanitarian returns program,” under which Roma were paid modest sums to leave France without protest. The practice of voluntary “humanitarian returns,” whereby Roma who lacked personal resources to support themselves in France were paid to leave, was created by a French circular on December 7, 2006. CNCDH, *supra* note 54, p. 19. It had continually garnered criticism from certain EU politicians and activists who complained that fundamental EU rights cannot be bought or sold and who have questioned the extent to which the returns were voluntary. European Parliament Session Document (B7-0500/2010) (2010), p. 6; *see also*, European Roma Rights Center, *Submission in Relation to the Analysis and Consideration of Legality Under EU Law of the Situation of the Roma in France* (August 27, 2010), p. 2 (arguing that Roma had effectively been coerced into leaving because of police harassment and government rhetoric).

The European Commission refrained from intervening in the situation throughout the summer.⁶⁸ That changed, however, on September 14, 2010 after a leaked circular from the French Ministry of Interior, dated August 5, 2010, directly stated that Roma were being targeted for expulsion, not on the basis of individual immigration or criminal violations, but on the basis of ethnic identity. The August 5 circular, sent to the national Police Prefect, called for the police to “evacuate” 300 camps or illicit gathering sites, “with priority on those of the Roma.”⁶⁹ It also called on the gendarmerie to block the growth of any new camps.⁷⁰ A second circular released publicly by the Ministry of Interior on September 13 seemed to mitigate the instructions of 5 August by reminding law enforcement that it must carry out the “evacuations” within the strict parameters of law so that legal Roma settlements were not targeted.⁷¹ However, this purported clarification did not prevent the situation from gaining high profile European attention.

The day after the August 5 circular became public, European Commissioner for Justice, Fundamental Rights, and Citizenship Viviane Reding used strong language to denounce the circular and the French policy. At the Commission’s meeting in Brussels on September 14, Reding stated that she was personally appalled at the removal of a group from an EU Member State because of their status as an ethnic minority.⁷² Reding declared that the French Roma deportations were a situation she “thought Europe would not have to witness again after the Second World War.”⁷³ At the moment Reding conjured up images of World War II deportations, it seemed that the EU Commission would recognize an ongoing human rights violation in France and legally combat the substantive discrimination occurring against the Roma. The statement was welcomed by human rights and Roma advocacy organizations. Human Rights Watch applauded this “powerful message against discrimination” bringing confidence “that the EU’s new human

⁶⁸ On September 10, Viviane Reding, the EU’s Justice Commissioner, explained to members of the European Parliament in Strasbourg that she had met with Eric Besson, the French Minister of Immigration, and that he had publicly assured her that the Roma were not being singled out for deportation. Despite charges from various parliamentarians that she was failing to defend the European Charter of Fundamental Rights, Reding remained firm. “I see this insurance [sic] given by the French minister,” she explained, “as a very positive development.” Strasbourg Debate, *supra* note 23.

⁶⁹ August Circular, *supra* note 9.

⁷⁰ *Ibidem*.

⁷¹ *Circulaire du Ministre de l’Intérieur de l’Outre-mer et des Collectivités Territoriales à Monsieur le Préfet de Police* (Circular of the Ministry of Interior and Overseas and Collective Territories to the Prefect of Police) (September 13, 2010).

⁷² PBS Broadcast, *supra* note 64.

⁷³ *Ibidem*.

rights architecture may fulfill its promise.”⁷⁴ Predictably, however, Reding’s words were met with indignation from France and other EU Member State governments. The next day at a summit meeting in Brussels, President Sarkozy declared that Reding’s use of the historical parallel was “outrageous,” and that: “It is an insult. It is a wound. It is a humiliation.”⁷⁵

Rhetoric soon shifted from talk of racial discrimination to that of whether the EU Free Movement Directive had been violated. José Manuel Barroso, President of the EU Commission, explained to reporters that while the Commission stood ready to start proceedings against France for any infringement of EU law, Reding’s comments were made in the “heat of the moment,” and that she did not mean to cite any historical parallels.⁷⁶ When Reding next spoke on September 29, it was with a focus on EU procedural rights, meaning concerns over whether Roma had been deported from France in a manner that violated the rules of the Free Movement Directive. She explained that the Commission had found that France had not applied in its law the procedural free movement guarantees required for all EU citizens.⁷⁷ She announced that infringement proceedings had been initiated against France under the Free Movement Directive, for expelling EU citizens without adequate process.⁷⁸

2.1.2. The threatened legal action and its shortcomings

The French actions against the Roma implicated at least two possible violations of EU directives: infringement of the Free Movement Directive and of the Racial Equality Directive.

In the fall of 2010, the European Commission did threaten legal action under the Free Movement Directive, which provides certain procedural safeguards

⁷⁴ Human Rights Watch, *EU: A Key Intervention in Roma Expulsions*, (September 14, 2010), <http://www.hrw.org/en/news/2010/09/14/eu-key-intervention-roma-expulsions>, accessed March 1, 2011.

⁷⁵ L. Cendrowicz, *Sarkozy Lashes Out as Roma Row Escalates*, Time, September 17, 2010. Meanwhile, Guido Westerwelle, the German foreign minister, denounced Reding’s comments saying “[t]o put France into the same category as the crimes of World War II is totally unacceptable, very hurtful.” J. Dempsey & S. Castle, *France and Germany Spar Over Policies on Roma*, New York Times, September 17, 2010.

⁷⁶ EUX.TV, *Roma Expulsion: Barroso Follows up on Reding’s Criticism of France* (September 5, 2010), <http://www.youtube.com/watch?v=DHTFT2NcOns&feature=channel>, accessed March 1, 2011.

⁷⁷ Reuters Broadcast, *Belgium: EU to Begin Proceedings Against France over Roma* (September 9, 2010) <http://www.itnsource.com/shotlist/RTV/2010/09/30/RTV2485510/> (the “Reuters Broadcast”).

⁷⁸ *Ibidem*.

for EU citizens to access any Member State. However it took no action, neither threatened nor direct, under the Racial Equality Directive, which requires that states refrain from enacting, carrying out, or tolerating racially discriminatory laws, policies, or treatment within their jurisdictions.

Despite the Commission's inaction, the Racial Equality Directive does provide a potential avenue for individuals to challenge the legality of the French policy. Article 7 stipulates that Member States must ensure that individuals wronged by the state's failure to apply RED, or those with a legitimate interest in the enforcement of RED, have access to judicial and administrative remedies in the state.⁷⁹ However, bringing an initial action as an individual in the same state that is forcibly removing the wronged individual may not be practical for those who do not have the time, money, or means to stay and access the courts. Conversely, in a situation where a state program is causing large-scale and immediate harm, the Commission's ability to initiate proceedings and then bring a recalcitrant state before the ECJ,⁸⁰ without relying on an individual's resources, is better poised to quickly confront state violations of RED and to send a broader political message.

2.1.2.1. The Free Movement Directive

The Free Movement Directive was made binding EU law by the European Parliament and European Council on April 29, 2004.⁸¹ The directive reflects the rights introduced by the 1992 Maastricht Treaty, which had formally created European Union citizenship, including the right to circulate freely.⁸² The concept was an innovation in that it granted supranational citizenship along with a set of rights for each individual who was a citizen of a Member State.⁸³ The subsequent Free Movement Directive was therefore a legal instrument to "simplify and strengthen the right of free movement and residence of all EU citizens."⁸⁴

The directive guarantees EU citizens the right to enter any EU country with a valid passport or identity card along with family members even if they are not EU citizens.⁸⁵ The entry right is coupled with a right of residence for up to three months in the state.⁸⁶ After three months, Article 7 of the directive provides

⁷⁹ Directive 2000/43/EC, *supra* note 4, art. 7(1)-(2).

⁸⁰ *See*, Treaty of Lisbon, art. 258.

⁸¹ Council Directive 2004/38/EC, *supra* note 19.

⁸² Maastricht Treaty, art. 8.

⁸³ *See*, M. Condinanzi, A. Lang, & B. Nascimbene, *Citizenship of the Union and Freedom of Movement of Persons*, Martinus Nijhoff Publishers: Leiden, 2008, p. 2.

⁸⁴ Council Directive 2004/38/EC, *supra* note 19, preamble, para. 3.

⁸⁵ *Ibidem*, art. 5(1).

⁸⁶ *Ibidem*, art. 6(1).

a checklist of conditions which, if the individual fulfills, grants the right to remain in the state.⁸⁷ Being an employed person, including self-employment, is included in the checklist.⁸⁸

The Free Movement Directive, although bestowing a set of residential rights alongside procedural safeguards to ensure those rights are not unjustly denied, is therefore not adequate by itself to fight state-sponsored racial discrimination on a substantive level. The preamble to the directive states that “Member States should implement [the] [d]irective without discrimination,” including on race or ethnicity based grounds.⁸⁹ However, this non-discrimination only applies to EU citizens exercising their free movement rights, and there is no substantive provision in the directive itself addressing racial discrimination. Furthermore, the rights in this directive are not absolute. They can be rescinded “on grounds of public policy, public security, or public health.”⁹⁰ The directive prescribes narrow procedural circumstances by which an individual can be removed for these reasons.⁹¹ However, these removal provisions could potentially be misused by a state as pretext for deporting individuals based on underlying racial prejudices.

2.1.2.2. The Racial Equality Directive

The Racial Equality Directive was adopted in 2000 by the European Parliament and Council, and gave Member States until July 19, 2003 to integrate its provisions into their national laws.⁹² It was passed on the heels of the 1999 Treaty of Amsterdam which expanded individuals’ rights in the EU.⁹³ The Amsterdam Treaty granted explicit authority for the first time to the EU to actively prevent discrimination in Member States. The EU used this authority to create RED as a common framework for national laws in Member States to prevent racial and ethnic discrimination.⁹⁴ RED is the most important legislation in the EU for fighting racial discrimination.⁹⁵

RED recognizes that “the right to equality before the law and protection against discrimination for all persons” is a universal right. The fact that

⁸⁷ *Ibidem*, art. 7(1).

⁸⁸ *Ibidem*, art. 7(1)(a).

⁸⁹ *Ibidem*, preamble, para. 31.

⁹⁰ *Ibidem*, art. 27(1).

⁹¹ *Ibidem*, art. 27(2-3).

⁹² Council Directive 2000/43/EC, *supra* note 4, art. 16.

⁹³ European Commission, *Treaty of Amsterdam: What has changed in Europe?* (2000), pp. 9-10.

⁹⁴ Banulescu-Bogdan & Givens, *supra* note 6, pp. 3-4.

⁹⁵ European Agency for Fundamental Rights, *Annual Report* (2010), p. 13 (the “FRA Annual Report”).

the preamble to RED states “it is important to protect all *natural* persons”⁹⁶ (emphasis added) is significant because it means that the protections guaranteed by RED are not exclusive to EU citizens. While many of the Roma expelled from France in 2010 may have been EU citizens, not all European Roma are citizens of EU Member States.⁹⁷ Furthermore, providing that racial discrimination is prohibited regardless of nationality brings RED closer towards international human rights norms,⁹⁸ which should, in turn, help underscore freedom from racial discrimination as a fundamental human right in the EU. RED also declares that protection from discrimination should include “social protection,” and “social advantages.”⁹⁹ It forbids both direct and indirect forms of discrimination.¹⁰⁰ It has no “public security” derogation exception like the Free Movement Directive does.¹⁰¹ It also requires that each state set up monitoring bodies to provide assistance to discrimination victims, conduct surveys, and make recommendations to their governments.¹⁰²

RED has had very little case interpretation by the European Court of Justice, and its terms and scope of application have been criticized as vague and lacking in definition.¹⁰³ However, that is precisely a reason why it should be used in a high-profile case of state-sponsored discrimination so that it develops more legal clout. Furthermore, it is clear in RED that an “instruction to discriminate”¹⁰⁴ for reasons of race fall within the concept of discrimination and that the directive applies to public bodies as well as private.¹⁰⁵ RED can therefore be used to show that Member States must remain faithful to honoring and fulfilling anti-discrimination legislation in practice, not just in written law.

⁹⁶ Council Directive 2000/43/EC, *supra* note 4, preamble, para.16.

⁹⁷ See e.g., Human Rights Watch, *Rights Displaced: Forced Returns of Roma, Ashkali and Egyptians from Western Europe to Kosovo* (2010) (detailing discrimination towards of Kosovar Roma, who are not EU-citizens, in Germany).

⁹⁸ An’Naim, *supra* note 10, p. 14.

⁹⁹ Council Directive 2000/43/EC, *supra* note 4, art. 3(1)(e)-(f).

¹⁰⁰ *Ibidem*, art. 2(1).

¹⁰¹ RED does not cover different treatment based solely on nationality or on the legal status of non-EU citizens. For example, denying an American citizen access to certain benefits reserved for EU citizens, because the American is a third country national, is not prohibited by RED. However, denying that American certain benefits because the American is African-American, would be forbidden by RED. See *ibidem*, art. 3(2).

¹⁰² *Ibidem*, art. 13.

¹⁰³ For example, a 2010 study by the EU Fundamental Rights Agency revealed that discrimination against Roma in employment sectors was generally not recognized as a form of racism, and that there was little awareness that Roma are covered by RED. European Union Agency for Fundamental Rights, *The Impact of the Racial Equality Directive: Views of Trade Unions and Employers in the European Union* (2010), p. 12.

¹⁰⁴ Council Directive 2000/43/EC, *supra* note 4, art. 2(4).

¹⁰⁵ *Ibidem*, art. 3(1).

2.1.2.3. Substantive vs. procedural rights

The EU Commission never publicly threatened to bring proceedings against France under the Racial Equality Directive.¹⁰⁶ Meanwhile the legal steps initiated under the Free Movement Directive were suspended once France agreed to revise its laws to create more process before removing Roma.¹⁰⁷ However, as Robert Kushen, the director of the European Roma Rights Center, explained to Voice of America, France had only addressed one set of concerns, which was that “French law, as written,¹⁰⁸ did not properly reflect the protections that need to be provided to EU citizens before they can be expelled.”¹⁰⁹ The substantive question of racial discrimination had been, in effect, dropped.

The cautious approach of the European Commission, and its willingness to step back from the issue is in a part a reflection of the difficulty in drawing consensus on dealing with Roma issues in the EU. In a November 2011 speech, the European Commissioner for Employment, Social Affairs, and Inclusion, László Andor, emphasized that Roma inclusion was dependent on a positive political atmosphere in Member States combined with a recognition that “[s]ocieties where Roma do well will be more cohesive.”¹¹⁰ But building such a consensus is quite difficult because Member States’ national laws and policies regarding migrants

¹⁰⁶ When a reporter asked Reding whether the Commission had considered violations against France under the Racial Equality Directive, the Commissioner answered with a flat no, and declined to give further explanation beyond ambiguously stating that “we have only looked at what has gone on in French territory over the last few weeks.” Reuters Broadcast, *supra* note 77.

¹⁰⁷ Emphasizing the importance of EU procedural rights, which “serve to protect EU citizens against arbitrary, discriminatory, or disproportionate decisions,” Reding announced in a video statement that France had met its legal obligations through its promise to re-structure its laws. EUX.TV, *Viviane Reding Issues Video Statement on Roma*, (October 20, 2010), <http://www.youtube.com/watch?v=qKowYcUoTt8>, accessed March 1, 2011.

¹⁰⁸ An example of French law that the EU has identified in the past as problematic for the Free Movement Directive is Article L121-2 of Law no. 2006-911 which requires EU citizens in France to register *within* three months of entry or face a fine. This wording is in tension with the Free Movement Directive’s provision in Article 8 which allows Member States to require registration for periods of residence *longer than* three months. See Directorate General, Internal Policies of the Union, *Comparative Study on the Application of Directive 2004/38/EC of 29 April 2004 on the Right of Citizens of the Union and their Families to Move and Reside Freely within the Territory of Member States* (March 2009), p. 64.

¹⁰⁹ Voice of America, *3 Questions: Roma Rights and Roma Wrongs*, (October 21, 2010), <http://www.voanews.com/english/news/europe/3-Questions-Roma-Rights-and-Wrongs-105435603.html>, accessed March 1, 2011. Kushen went on to say that the issue that the Commission had downplayed “the basic question of whether France [was] discriminating against a group on the basis of ethnicity in its practice of expulsions” (*Ibidem*).

¹¹⁰ L. Andor, *Getting Member States to draw up their Roma integration strategies – Opening of Roma Platform Brussels Speech/11/771* (17 November 2011).

can shift quickly and dramatically.¹¹¹ Moreover, a 2009 study published by the European Policy Institutes Network, shows that the European Commission has been struggling to maintain its relevance against national perceptions that it is a weak institution.¹¹²

Nevertheless, for the Commission to treat France's agreement to revise its laws to grant migrants with EU citizenship more process before expelling them as the end of the matter is short-sighted. On the one hand, ensuring procedural rights against deportation is an important tool for fighting racial discrimination because they can safeguard against collective expulsion of entire groups. Analyzing whether an individual has become an irregular migrant in the country subject to removal should be conducted on a case-by-case basis. There should also be adequate opportunities to challenge removal. However, by themselves, procedural rights do not directly attack the underlying substantive racial discrimination that may be occurring in a given context.

Simply adding more process, or strengthening existing procedural rights, without addressing the underlying discrimination, can become circular because the state can always set higher standards for a group's desired goal that in the end remain unattainable for the disadvantaged group no matter how many chances its individual members get to explain that they deserve it. If, for example, institutionalized racism in France results in Roma being denied opportunities to find employment within three months of arrival in France (the necessary condition for EU workers to remain in France legally), then the opportunity to contest their deportations becomes futile. This logic was detailed in the 2008 joint OSCE and COE report on Roma migration which pointed out that the inability of Roma to access goods and services, has "concrete implications for the exercise of EU freedom of movement rights."¹¹³ Public antipathy towards the Roma can result in their diminished ability to access key goods and services in healthcare, education, employment, and housing.¹¹⁴ While it is regular in the EU for Member States to place restrictions on the ability of new Member States' citizens to find work, the additional factor of latent racism against the Roma can make it impossible for Roma to ever achieve the required living and personal security standards to remain legally in a host country.

¹¹¹ See, T. Givens, *Immigrant Integration in Europe: Empirical Research*, 10 Annual Review of Political Science 67 (2007), p. 75.

¹¹² P.M. Kaczynski, Rapporteur, *The European Commission 2004-09: A Politically Weakened Institution? Views from the National Capitals*, Working Paper No. 23 (May 2009), pp. 1-3.

¹¹³ Cahn & Guild, *supra* note 45, p. 63.

¹¹⁴ *Ibidem*.

Furthermore, in discrimination cases, procedural violations lack the stigma of substantive violations and are often met with procedural, rather than substantive remedies that can effect more meaningful, long-term change.¹¹⁵ By placing the legal focus only on procedural rights in the 2010 confrontation with France, the Commission failed to set a precedent that discriminatory state policies are actionable, even if they do not implicate free movement rights. Meanwhile, although the Commission’s commitment to developing Roma integration strategies should rightly be seen as a welcome step, it will require a great deal of political will on the part of the Member States to see the Commission’s suggestions turn into reality. Therefore, sending a powerful message to France, and by implication the rest of Europe, that Roma ethnic targeting and discrimination will not be tolerated because it is a substantive human rights violation, not merely a procedural infringement, would have been critical to the EU in establishing a forceful stance against racial discrimination.

2.2. Implications for all migrants in the European Union

The shared ambivalence among EU states towards respecting Roma rights, of which the 2010 French expulsion program is an example, poses a serious challenge to the universality of human rights. The expulsions were an example of a trend of European states collectively judging Roma and singling them out for police scrutiny, leading to the denial of basic rights. For example, in 2008 the Italian government began mandatory finger-printing of all Roma men, women, and children living in Italian camp settlements.¹¹⁶ Meanwhile, the German government announced plans in 2010 to increase returns of Roma war refugees from Kosovo which, according to Human Rights Watch, puts at least 12,000 Kosovar Roma in Germany at risk of persecution once back inside Kosovo.¹¹⁷ Other countries have also been engaged in collective Roma expulsions on a smaller scale, including Sweden, Italy, Germany, Denmark, and Belgium.¹¹⁸ Common trends in these actions

¹¹⁵ *European Court of Human Rights Finds Bulgaria Liable for Failure to Investigate Racially Motivated Killings*, 119(6) *Harvard Law Review* 1907 (2006), p. 1913.

¹¹⁶ The justification for the *en masse* fingerprinting was to empty the camps of irregular migrants that allegedly posed a health risk. Then – Interior Minister Roberto Maroni claimed that the finger-printing, and subsequent deportation, would allow Italian Roma to “live in decent conditions,” rather than with “rats.” *Italian Gypsies Find Echoes of Nazism in Fingerprinting Move*, *The London Times*, July 2, 2008; see also Open Society Institute et al., *Security a la Italiana: Fingerprinting, Extreme Violence, and Harassment of Roma in Italy* (2008), p. 19.

¹¹⁷ Human Rights Watch, *supra* note 97, p. 7.

¹¹⁸ Deutsche Welle Inside Europe, *European Governments Cracking Down on Roma* (August 5, 2010), http://www.dw-world.de/popups/popup_single_mediaplayer/0,,5868452_type_audio_struct_3067_contentId_5703103,00.html, accessed March 10, 2011.

and policies in various European states since the 2004 and 2007 EU enlargements include vilification of Roma in the national press and public discourse, an insistence by the government that Roma are dangerous and spread crime, and a lack of interest in, or explanation for, the circumstances Roma will face once deported.

Whatever truth arguments about Roma connections to poverty and crime may hold, in terms of the international legal prohibitions on racial discrimination they are irrelevant. An important idea behind protection from racial discrimination and profiling is that an individual will not be judged or singled out for negative treatment by the state because of his or her affiliation with a racial group. Arguing that Roma cause social problems which justify racial profiling or collective treatment threatens the entire sanctity of both regional and international human rights structures. Furthermore, leaving such discrimination unchallenged also makes it easier and more likely that states inside and outside Europe will continue to enact even more harsh and ethnically discriminatory laws and policies toward unwanted people in the future, and to justify their policies in terms of an ongoing fight against irregular migration.

Economic migration, both regular and irregular, into developed countries is a by-product of globalization that will increasingly be a challenge to states in upholding their commitments to human rights.¹¹⁹ Challenging such discrimination requires recognizing that no one anti-Roma or anti-immigrant policy in Europe is unique, and that the widespread nature of such policies requires the EU to act.¹²⁰ Otherwise, the uncomfortable question remains, if EU states cannot uphold basic rights for Roma and other unwanted migrants, how can the current international system of human rights obligations dependent on sovereign state enforcement protect anyone?

3. TOWARDS A STRONGER REGIONAL LAW RESPONSE TO RACIAL DISCRIMINATION

The threat of legal proceedings under the Racial Equality Directive could send a stronger message to other governments in Europe which are discriminating against Roma and other migrants. EU law has superior enforcement mechanisms

¹¹⁹ International Labor Office, *supra* note 7, pp. 13-14.

¹²⁰ The Open Society's Institute's Justice Initiative has recommended that the EU Commission provide guidance and uniformity throughout Member States on prohibiting racial and ethnic profiling through a framework decision, provide more safeguards against racial and ethnic profiling, and devote more resources into research and projects to reduce discrimination. Open Society Justice Initiative, *Submission to the European Commission consultation on the Freedom Securities and Justice Priorities 2010-2014* (2010), pp. 1-2.

to international human rights law when it comes to being able to respond to state breaches of regional law.¹²¹ This advantage might actually lead to tangible alternative enforcement if a Member State is not upholding human rights protections within its jurisdiction. Even so, human rights mechanisms in both the European Union and Council of Europe have significant limitations in their current form. Developing jurisprudence around specific, targeted laws, like the Racial Equality Directive, may be the best legal solution to the problem of racial discrimination against non-citizens in European states.

3.1. Limitations on current European human rights mechanisms

There had been considerable debate prior to the 2009 Treaty of Lisbon as to the degree to which the EU is under a positive obligation to enforce human rights norms, and the extent to which the existing protections of the European Convention on Human Rights were adequate for Europe.¹²² One line of argument is that since all members of the EU have ratified the European Convention on Human Rights, there is no need for a separate EU Bill of Human Rights to bind the Member States.¹²³ However, this argument does not account for the fact that the ECHR exists as a treaty body without the level of enforcement that the EU can provide.¹²⁴ The European Court of Human Rights interprets the ECHR in resolving cases brought by individuals against State Parties. The ECtHR can order a state that violates the ECHR to pay monetary compensation to individual victims of violations, and execution of the Court’s decisions has generally been effective due to diligent monitoring mechanisms.¹²⁵ However, it does not have direct practical power to force the state to change its laws or alter its policies.¹²⁶ In contrast, the EU

¹²¹ See e.g., Cicekli, *supra* note 29, p. 303.

¹²² See, D. Shelton, *The Boundaries of Human Rights Jurisdiction in Europe*, 13 *Duke Journal of Comparative and International Law* 95 (2003), p. 95 (explaining that while no one questions the need for regional human rights bodies in Europe, there is disagreement as to how to divide jurisdiction between states, the EU, and other regional bodies); cf., T. Ahmen & I. Butler, *The European Union and Human Rights: An International Law Perspective*, 17(4) *European Journal of International Law* 771 (2006), pp. 771-772.

¹²³ V. Miller, *Human Rights in the EU: The Charter of Fundamental Rights*, House of Commons, Research Papers No. 2000/32, pp. 13-14.

¹²⁴ See, S. Besson, *The European Union and Human Rights: Towards a Post-National Human Rights Institution*, 6(2) *Human Rights Law Review* 323 (2006), p. 353 (explaining that the EU’s legislative and executive power allow it to expand beyond judicial remedies to take on a policymaking role when developing a human rights solution).

¹²⁵ Rt. Hon. J. Arden, *Peaceful or Problematic: The Relationship between National Supreme Courts and Supranational Courts in Europe*, 30(1) *European Yearbook of International Law* 3 (2011), p. 7.

¹²⁶ See, Shelton, *supra* note 122, pp. 147-148.

Commission is empowered under Article 258 of the Treaty of Lisbon to bring an action against Member States whose national laws and policies are not in compliance with EU law in the ECJ.¹²⁷ The ECJ, in turn, has been empowered since 2009 to directly lay fines and penalties on States that it finds to be in non-compliance with EU laws.¹²⁸ The relationship between the ECJ and the Commission therefore has a special advantage for enforcing directives because these cases against a state do not have to be brought by individuals who may not have the time, money, or opportunity to enforce their rights.

However, these EU institutions are restricted in their ability to deal directly with human rights violations through judicial channels because of the limited nature of EU human rights law. The 2000 European Charter of Fundamental Rights lists the social justice norms to which all Member States are supposed to be committed, but it does not bind any of them, unless they are applying EU law.¹²⁹ On December 1, 2009, the Treaty of Lisbon came into effect.¹³⁰ The Lisbon Treaty required that the EU, as an institution, will accede to the ECHR.¹³¹ Among other structural changes, the Lisbon Treaty elevated the European Charter of Fundamental Rights to treaty status, making it binding law on the EU as an institution.¹³² The change means that all legislation, directives, and decisions made by EU institutions must comply with the human rights standards set forth in the Charter.¹³³

The Charter explicitly states that it does not apply to Member States unless they are specifically implementing EU laws.¹³⁴ Therefore, although the Charter provides a human rights guideline within the EU, it does not empower the Commission to bring an action against Member States for human rights infringements that do not involve the direct application of EU law. The Commission noted in an October 2010 strategy paper that because it has no power to intervene when Member States violate the principles in the Charter outside the application of EU law, it must rely on Member States' "own systems to protect fundamental rights" and "to take the necessary measures in accordance with their

¹²⁷ Treaty of Lisbon, art. 258.

¹²⁸ *Ibidem*, art. 260(2-3).

¹²⁹ Charter of Fundamental Rights, art. 51; *see also*, Communication from the Commission, European Commission, *Strategy for the Effective Implementation of the Charter for Fundamental Rights by the European Union*, (October 19, 2010), p. 3 (the "Communication from the Commission").

¹³⁰ Europa, *Treaty of Lisbon: Taking Europe into the 21st Century*, http://europa.eu/lisbon_treaty/index_en.htm, accessed March 1, 2011.

¹³¹ Treaty of Lisbon, art. 6(2).

¹³² *Ibidem*, art. 6(1).

¹³³ Communication from the Commission, *supra* note 129, p. 3.

¹³⁴ Charter of Fundamental Rights, art. 51.

national laws.”¹³⁵ As the French Roma crisis demonstrates, however, such reliance on sovereign state enforcement to ensure fundamental rights for all people in a jurisdiction is an inadequate response to serious human rights violations.

3.2. Developing the RED as a tool for human rights enforcement

Another approach to reliance on regional human rights conventions or broad, general declarations promoting human rights in Europe is to use specific European directives as a method of realizing human rights. The Racial Equality Directive is not a human rights law, *per se*. However, if used as a robust enforcement mechanism against racial discrimination, it will help achieve human rights implementation in practice. Past European case law can suggest ways for conceptualizing the ways in which RED can be interpreted in the future to create an enforcement regime against racial discrimination. In particular, the European Court of Justice’s first case using RED and analogous discrimination cases in the European Court of Human Rights provide potential models for how to flesh out the Racial Equality Directive.

3.2.1. The ECJ’s first RED interpretation

In the first substantive ECJ case under the Racial Equality Directive,¹³⁶ *Belgian Centre for Equality and Against Racism v. Feryn* (2008), the ECJ issued a preliminary ruling on a case referred to it from the Brussels Labor Court of Appeals.¹³⁷ The defendant was a company that had publicly announced a policy by which it would not hire “immigrants” in Belgium.¹³⁸ The ECJ decided that Member State courts would be correct to interpret such an employer policy as a violation of RED.¹³⁹ Kristin Henrard has concluded however that the ECJ failed to adopt a clear ruling with sound reasoning that could be used in the national courts.¹⁴⁰ The ECJ’s failure lies in part because its ruling was too narrow and highlights the need for the ECJ to adopt systemic level rulings that give body and definition to RED.¹⁴¹

However, *Feryn* did establish that a public statement announcing a discriminatory hiring policy creates a presumption of direct discrimination, even if there

¹³⁵ Communication from the Commission, *supra* note 129, p. 10.

¹³⁶ K. Henrard, *The First Substantive ECJ Judgement on the Racial Equality Directive: A Strong Message in a Conceptually Flawed and Responsively Weak Bottle*, Jean Monnet Working Paper 09/09, p. 3.

¹³⁷ Case C-54/07, *Centrum voor gelijkheid van kansen en voor racismebestrijding v Firma Feryn* [2008] ECR I-05187, para. 18.

¹³⁸ *Ibidem*, para. 16.

¹³⁹ *Ibidem*, para. 41.

¹⁴⁰ Henrard, *supra* note 136, pp. 24-25.

¹⁴¹ *Ibidem*, p. 35.

are no identifiable victims.¹⁴² A discriminatory announcement therefore puts the burden on the defendant to disprove direct discrimination.¹⁴³ The ECJ should apply this same logic when dealing with public statements by politicians and government officials. In the case of France, for example, because legal proceedings could be brought against the state itself, the ECJ also would have had the opportunity to make the broader, systemic clarification of the law.

The ECJ found in *Feryn* that illegal direct discrimination can exist even if there is no single identifiable victim.¹⁴⁴ This precedent is important to the situation in France and others like it because it means that individual Roma would not have to come forward and prove that they were personally harmed by the discriminatory treatment to show that a government policy amounted to illegal discrimination. Furthermore, it is significant that the ECJ found a presumption of discrimination under RED because the company's statement referred to "immigrants." RED does not prohibit discrimination based on nationality,¹⁴⁵ and so the ECJ's ruling can be used to argue that discrimination towards "immigrants" may be a proxy for forbidden race or ethnicity based discrimination. This reading of *Feryn* would allow the ECJ to broaden the scope of RED to use it to challenge Member States' treatment of migrants.

3.2.2. European Court of Human Rights case law

As a threshold matter, neither the fact that the EU has not yet acceded to the ECHR nor that the Charter of Fundamental Rights and Freedoms is not directly binding on Member States, negates the relevance of ECtHR jurisprudence for guidance in formulating interpretations of EU law.¹⁴⁶ The ECJ Court of First Instance itself, while acknowledging that it is not bound by ECtHR case precedent, has stated that the "special significance of the Convention on Human Rights as a source of inspiration concerning general principles has long been recognized by Community [EU] Courts."¹⁴⁷ Also, the Charter's preamble states that the EU will

¹⁴² *Feryn*, *supra* note 137, para. 41.

¹⁴³ *See ibidem*, para. 34.

¹⁴⁴ *Ibidem*, paras. 24-25.

¹⁴⁵ Directive 2000/43/EC, *supra* note 4, art. 3(2)

¹⁴⁶ It should be acknowledged that the ECtHR jurisprudence on racial discrimination is neither fully developed nor free of controversy. However, it is much further along than that of the ECJ. *See*, E. Sebok, *The Hunt for Race Discrimination in the European Court* (May 2002) http://www.soros.org/resources/articles_publications/articles/discrimination-european-court-20020301/discrimination-european-court-20020301.pdf, accessed March 1, 2011.

¹⁴⁷ Case T-253/04, *Kongra-Gel v. Council*, [2008] ECR II-46, para. 69.

recognize rights derived from ECtHR case law.¹⁴⁸ Although the ECtHR’s case law is not binding on the EU, it is highly influential because the ECHR’s provisions are recognized as general principles by the Commission.¹⁴⁹ Given the expectation that the EU will accede to the ECHR, the relevance of ECtHR jurisprudence to the ECJ is likely to increase. Because ECtHR case law is grounded in human rights, which apply to everyone, and not just EU citizenship rights, it can potentially be expansive for the ECJ in formulating its human rights jurisprudence. It is therefore a source of substantive case law useful to interpreting the Racial Equality Directive. Of special importance are those ECtHR judgments which combine a substantive human rights violation of the Convention with Convention Article 14, prohibiting racial discrimination.¹⁵⁰ In particular, ECtHR jurisprudence is helpful in two key areas: its flagship decision on collective deportations (*Conka v. Belgium*); and its Article 14 decisions, which place responsibility on states that either directly or indirectly condone racial or ethnic discrimination, particularly those that deal with anti-Roma discrimination.¹⁵¹

3.2.2.1. *Conka v. Belgium* – collective deportations

In *Conka v. Belgium*, the ECtHR dealt directly with immigrant deportations. Decided on 5 February 2002, it has valuable lessons for formulating a human rights argument against countries engaged in ethnically targeted deportations. In *Conka*, four Slovakian asylum-seekers brought a claim against Belgium alleging that the circumstances surrounding their arrest and deportation to Slovakia constituted an infringement of Convention Article 5,¹⁵² which protects the right to liberty.¹⁵³ In September 1999, police in Belgium had sent a notice to a number of Slovakian families requiring them to report to a police station to complete their asylum applications.¹⁵⁴ However, upon arrival they were served with deportation

¹⁴⁸ European Charter of Fundamental Rights, preamble.

¹⁴⁹ Miller, *supra* note 123, p. 13.

¹⁵⁰ Convention for the Protection of Human Rights and Fundamental Freedoms, art. 14.

¹⁵¹ Additional Protocol 12 was added to the ECHR in 2000, and creates a stand alone prohibition on race discrimination. The ECtHR’s first interpretation of Protocol 12 on the merits was handed down in December 2009. The Court found that while Protocol 12 may be wider in scope than Convention Article 14, the meaning of its general prohibition on discrimination is intended to be identical in meaning to that of Article 14. *Sejdic & Finci v. Bosnia and Herzegovina*, (27996/06 & 34836/06) Grand Chamber, ECHR 22 December 2009, para. 55; See also, Human Rights Watch, *European Court: Landmark Ruling on Racial and Religious Discrimination* (December 22, 2009), <http://www.hrw.org/en/news/2009/12/22/european-court-landmark-ruling-racial-and-religious-exclusion>, accessed March 1, 2011.

¹⁵² *Conka v. Belgium* (51564/99) Third Section, ECHR 5 February 2002, para. 2.

¹⁵³ Convention for the Protection of Human Rights and Fundamental Freedoms, art. 5.

¹⁵⁴ *Ibidem*, para. 18.

orders and taken to a detention center.¹⁵⁵ Several days later they were placed on a military plane and forcefully returned to Slovakia.¹⁵⁶ Significantly in the eyes of the ECtHR, the Belgian Minister of Interior issued a public statement on December 23, 1999 announcing that because of the large number of Slovakian asylum seekers in the city of Ghent, “arrangements ha[d] been made for their collective repatriation....”¹⁵⁷

In deciding *Conka*, the Court identified three factors about the Belgian deportation it considered inappropriate, and which would be useful in future proceedings to rule that collective deportations violate basic principles of justice and fairness: (1) the migrants involved were not informed of available remedies to stall or prevent the deportation, except for paperwork forms written in miniscule print and not in their language;¹⁵⁸ (2) only one interpreter was available for a large number of families;¹⁵⁹ and (3) even though they had a legal right to a lawyer, the arrested Slovakian migrants were practically unable to contact a lawyer because of the circumstances in which they were confined.¹⁶⁰ No legal assistance was offered at the police station or at the detention center.¹⁶¹ In effect, the Court established that individuals, whether illegally present or not, have a right to effective communication with the state if they are going to be held in custody or expelled.¹⁶²

Conka is of particular relevance because it also found a violation of Article 4 of Convention Protocol No. 4, which prohibits collective expulsion of aliens.¹⁶³ The *Conka* Court defined collective expulsion as “any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group.”¹⁶⁴ The Court put the burden of proof on Belgium to prove that the expulsion was not collective, and listed four more factors that persuaded it that the action was collective and therefore illegal. First, the Minister of Interior, a high level government official, had made public announcements admitting that the government was undertaking collective repatriation.¹⁶⁵ The second factor was

¹⁵⁵ *Ibidem*, paras. 19-20.

¹⁵⁶ *Ibidem*, para. 22.

¹⁵⁷ *Ibidem*, para. 23.

¹⁵⁸ *Ibidem*, para. 44.

¹⁵⁹ *Ibidem*.

¹⁶⁰ *Ibidem*.

¹⁶¹ *Ibidem*.

¹⁶² Cahn & Guild, *supra* note 45, p. 43.

¹⁶³ *Conka*, *supra* note 152, para. 56.

¹⁶⁴ *Ibidem*, para. 59.

¹⁶⁵ *Ibidem*, para. 62.

that all the affected Slovakian asylum-seekers had been required to attend the police station at the same time.¹⁶⁶ Third, all the written deportations orders served on them were written in identical boilerplate language.¹⁶⁷ Finally, they were expelled before their asylum applications had even been completed.¹⁶⁸

The *Conka* factors defining collective and discriminatory deportations are a useful baseline for categorizing state actions against vulnerable minority immigrants. Nearly all of the elements the ECtHR identified in *Conka* are present in the French deportations, but they are magnified because they occurred on a massive scale. The police raids on Roma camps that have been documented by NGOs and journalists in France left little room for informing each arrested Roma of his or her rights to contact an attorney or to seek interpreters.¹⁶⁹ The European Roma Rights Center has reported that many of the arrested Roma in France were coerced into signing a form, which they could not read, and which French authorities did not disclose to NGOs.¹⁷⁰ Furthermore, their deportations were coupled with very high level rhetoric, coming even from the French President himself, justifying the arrests and deportations as a needed policy response to increased Roma crime.

At first glance, *Conka* might be read as simply another call for more procedural rights. However, the ECtHR’s logic in *Conka* can buttress an analysis of racial discrimination. The French situation has the added element that the deportations were occurring, not because of an overflow of asylum-applications, as was the purported reason in the Belgian case, but specifically because the Roma were accused as an ethnic group of collectively contributing to crime. Therefore the link between racial discrimination and the deportations is far stronger and more obvious than it was in *Conka*. Were the ECJ to take another case under RED, it could look to *Conka* not merely for an outline of factors that define prohibited collective deportation, but also as a building block upon which to argue that collective deportations that are racially motivated are a substantive violation of RED. It can further support this logic by drawing from other ECtHR cases that deal with state responsibility to prevent and to investigate racial discrimination claims, under ECHR Article 14.

¹⁶⁶ *Ibidem.*

¹⁶⁷ *Ibidem.*

¹⁶⁸ *Ibidem.*

¹⁶⁹ See, European Roma Rights Center, *Submission in Relation to the Analysis and Consideration of Legality Under EU Law of the Situation of the Roma in France: Factual Update* (September 27, 2010), p. 2 (detailing the alleged nature of the expulsion process, based on interviews with Roma in France).

¹⁷⁰ *Ibidem.*

b. Article 14 cases – discrimination and state responsibility¹⁷¹

Bekos v. Greece stands for the principle that a state's failure to investigate a credible complaint that police torture was racially motivated is a violation of Article 14 as well as Article 3, the prohibition against torture.¹⁷² In *Bekos* two young Roma men had been caught burglarizing a kiosk.¹⁷³ At the police station, the men were severely beaten, and one was sexually assaulted.¹⁷⁴ The men claimed the police were shouting racial slurs at them throughout the abuse.¹⁷⁵ The ECtHR stopped short of finding a substantive violation of Article 14, finding that it had not been proved beyond a reasonable doubt that the police beat and shouted at the men because they were Roma.¹⁷⁶

However, the ECtHR considered relevant the wide range of international organization and non-governmental organization reports documenting Roma abuse by law enforcement in Greece and throughout Europe.¹⁷⁷ In particular, it quoted extensively from findings by the European Commission against Racism and Intolerance¹⁷⁸ that Roma were regularly subjected to disproportionate police force in Greece.¹⁷⁹ In this context, the ECtHR found that where racially tinged verbal abuse happens in conjunction with an Article 3 violation, there is a duty to investigate the motivations behind the abuse.¹⁸⁰ This failure by the state to investigate a credible complaint¹⁸¹ of a causal link between racism and the police beatings amounted to an Article 14 procedural violation.¹⁸² *Bekos* thus reaffirms that the state is responsible for taking all reasonable steps in investigating racially motivated violence carried out by its law enforcement,¹⁸³ and that this responsibility may

¹⁷¹ These cases do not comprise an exhaustive list of ECtHR Article 14 jurisprudence involving Roma-targeted discrimination, but rather serve as examples highlighting key concepts.

¹⁷² *Bekos*, *supra* note 17, para. 75.

¹⁷³ *Ibidem*, paras. 8-9.

¹⁷⁴ *Ibidem*, paras. 11-13.

¹⁷⁵ *Ibidem*, para. 14.

¹⁷⁶ *Ibidem*, para. 67.

¹⁷⁷ *Ibidem*, paras. 33-37.

¹⁷⁸ This commission is an independent human rights monitoring body in the Council of Europe. It specializes in fighting racism and xenophobia. Council of Europe, Welcome to the Website of the European Commission against Racism and Intolerance (ECRI), http://www.coe.int/t/dghl/monitoring/ecri/default_en.asp accessed March 1, 2011.

¹⁷⁹ *Bekos*, *supra* note 17, para. 33.

¹⁸⁰ *Ibidem*, para. 75.

¹⁸¹ The plaintiff's had provided sworn affidavits and a letter of support from the Greek Helsinki Monitor and the Greek Minority Rights Group (*ibidem*, para. 72).

¹⁸² *Ibidem*, para. 75.

¹⁸³ *Ibidem*, para. 69.

be heightened when the alleged victims are members of a minority, like the Roma, known to suffer disproportionately from discriminatory abuse.

The ECtHR expanded its Article 14 interpretation in *Moldovan and others v. Romania*. Although decided earlier, that 2005 case goes a step beyond *Bekos* by affirming that the state has a duty to investigate racially motivated crimes by non-state actors engaged in community violence. In *Moldovan* an angry mob burned thirteen Roma homes,¹⁸⁴ murdered three men after one had stabbed to death a non-Roma man during a bar fight, and severely beat multiple Roma men.¹⁸⁵ Police officials stood by watching, and reports indicated that the police chief personally joined the carnage.¹⁸⁶ Police also watched, and participated in, mob harassment of Roma in the days following the pogrom and allegedly arranged a cover up for civilian villagers. The Court found that the victims’ Roma ethnicity was decisive in them being targeted for violence.¹⁸⁷ In addition, the authorities had made anti-Roma remarks throughout the whole case history in the national courts, which was a factor in the survivors’ inability to get redress and compensation.¹⁸⁸ An Article 14 violation attached to the underlying Convention Articles 8 and 6 violations, guaranteeing protection of home and family, and the right to a fair hearing respectively.¹⁸⁹

Moldovan bolsters the message in *Bekos* by insisting that the state, in addition to having direct responsibility for the behavior of its police, must ensure that its law enforcement actively protects people in its jurisdiction from racially motivated violence. *Moldovan* is relevant because it reinforces the seriousness of police complicity in racial discrimination and stresses the duty of the state to prevent it. Moreover, the logic in *Moldovan* indicates that governments actually risk inciting community racial hatred and potential violence by directly empowering its police to discriminate. By extension, high-level government rhetoric that demonizes a group, such as that characterizing the Roma as threats to community security in France, may be an extreme form of incitement found unacceptable in *Moldovan*.

In *D.H. v. the Czech Republic* (2007), eighteen Czech nationals of Roma origin¹⁹⁰ complained that the Czech Republic was disproportionately assigning Roma children to schools for students with special needs and learning disabilities,

¹⁸⁴ *Moldovan and others v. Romania*, (41138/98) former Second Section ECHR 12 July 2005, para. 19.

¹⁸⁵ *Ibidem*, paras. 45-47.

¹⁸⁶ *Ibidem*, para. 18.

¹⁸⁷ *Ibidem*, para. 139.

¹⁸⁸ *Ibidem*.

¹⁸⁹ European Convention on Human Rights, arts. 6 and 8.

¹⁹⁰ *D.H. and Others v. the Czech Republic* (57325/00) Grand Chamber, 13 November 2007 ECHR, para. 1.

even though many of the children were of average or above average ability.¹⁹¹ In doing so, the state was depriving them of a right to an equal education.¹⁹² Like in *Bekos*, the judgment in *D.H.* directly recognized that the enhanced vulnerability of the Roma requires that they receive extra protection from discrimination. The Court referred to a set of recommendations by the ECRI that used the EU's Racial Equality Directive to define discrimination, and to eventually help it find that the Czech Republic had engaged in indirect discrimination by treating Roma children less favorably than non-Roma children in similar situations.¹⁹³

Of particular interest, the Court denied that a state could simply rely on Roma's voluntary waiver of protection, throwing aside the Czech Republic's argument that the students' parents had signed forms agreeing to place them in the special needs schools.¹⁹⁴ The Court indicated that waivers of fundamental rights are to be interpreted very narrowly and that the burden is on the state to show that the waiver was "equivocal" and that it was "given in full knowledge of the facts."¹⁹⁵ It articulated a standard that "whenever discretion capable of interfering with the enjoyment of a Convention right is conferred on national authorities, the procedural safeguards available to the individual will be especially material."¹⁹⁶ This reasoning means that states cannot use other means of pushing out unwanted migrants, such as offering financial incentives for people to leave.

The ECtHR cases mentioned here are not authoritative ends in themselves, but they are efforts to develop the contours around what counts as substantive racial discrimination that a state is failing to mitigate or is contributing to. Since the ECJ lacks significant case law clarification of the Racial Equality Directive beyond *Feryn*, the ECtHR jurisprudence may be the most practical reference to expand the meaning of the RED so that it can be a more potent tool to combat egregious state behavior like what has occurred in France and other powerful EU states in their treatment of vulnerable minorities.

Taken together these cases suggest the following factors to determine state complicity in racial discrimination that can be imported into standards for the Racial Equality Directive: (1) collective targeting of any racial group for deportation purposes is absolutely forbidden; (2) when state action results in abusive treatment of vulnerable populations, the state must investigate the extent to which racial discrimination played a role in the abuse; (3) the state has both a duty to

¹⁹¹ *Ibidem*, para. 18.

¹⁹² *Ibidem*, para. 207.

¹⁹³ *Ibidem*, para. 60.

¹⁹⁴ *Ibidem*, para. 203.

¹⁹⁵ *Ibidem*, para. 202.

¹⁹⁶ *Ibidem*, para. 206.

protect its people from racial discrimination and to refrain from inciting such discrimination; and that (4) fundamental rights, including the right to be free of racial discrimination by the state, cannot be waived. They therefore offer a useful paradigm with which to sculpt the contours of the Racial Equality Directive.

CONCLUSION

The 2010 French Roma expulsions are an example of severe racial discrimination that is recurrent throughout the European Union. Placed in the context of worldwide hostility toward irregular migrants, discrimination against European Roma is an urgent issue the EU must address. However, given the great disconnect between human rights norms on the international level, and implementation of those human rights in practice, acknowledging the seriousness of the problem alone is not enough either. In terms of European regional law, the Racial Equality Directive is an underdeveloped tool that could, if exercised, become a robust enforcement mechanism against states engaged in race-based discrimination. As a starting point, existing jurisprudence in the European Court of Justice and the European Court of Human Rights suggest ways in which the Racial Equality Directive can be interpreted in the future.

The European Union is constantly evolving in its development of regional law and social justice policies. To strengthen those available tools to combat racial discrimination and other human rights violations, the EU must be willing to push Member States harder to protect the fundamental rights of all people within their jurisdiction, including those migrants considered unwelcome by the state. Those that fail to do so should be sanctioned. Only in this way can the EU live up to its promise as a world leader in practical human rights protection and implementation.

POLISH PRACTICE IN INTERNATIONAL LAW

The Supreme Court (Criminal Chamber) decision of 30 November 2011, Ref. No. I KZP 15/11*

The Supreme Court – Criminal Chamber at the court, presiding over the case of Jakub T. has examined, pursuant to Article 441 § 1 of the Criminal Code Proceedings, the legal question presented by the Court of Appeal in P. in its decision of 30 August 2011, requiring a fundamental interpretation of the Act in order to determine: whether the reservation formulated by the court of the State issuing the European Arrest Warrant regarding the concurrent (parallel) execution of custodial sentences, which were not subjected to aggregation, constitutes an element of the sentence which binds the Polish court under Article 607s § 4 in conjunction with Article 607t § 2 of the Criminal Code Proceedings; or whether such reservation only determines the manner of enforcing the sentence pursuant to Article 607s § 5 of the Criminal Code Proceedings.

The decision:

To refuse to adopt a resolution. In its current wording the second sentence of Article 607s § 4, in conjunction with Article 607t § 2 of the Criminal Code Proceedings, provides that in order to enforce a sentence imposed by a judgment of a court of another EU Member State which has been forwarded to Poland under the European Arrest Warrant, the adaptation of such judgment for the purpose of its enforcement is possible only in respect of duration of the sentence and only if that sentence exceeds the statutory maximum penalty for the offence or offences in Poland. The adaptation can only consist in imposing, instead of the sentence handed down, the statutory maximum penalty or punitive measure provided for that offence in Polish law according to the adopted legal characterization. Any modification of other parts of the judgment is not possible.

* The decision of the Supreme Court is available at http://www.sn.pl/orzecznictwo/uzasadnienia/ik/I-KZP-0015_11.pdf (in Polish).

Facts:

The legal issue which required interpretation of the Act, as presented by the Court of Appeal, appeared in the following procedural situation:

By the decision of the Regional Court in P. dated 15 March 2007, Jakub T. – as a subject of the European Arrest Warrant (hereinafter sometimes “EAW”) issued by the Magistrates Court for the City of Westminster – was surrendered to the United Kingdom of Great Britain and Northern Ireland, under the condition that in the event of imposition of a custodial sentence or measure involving deprivation of liberty he should be returned to Poland in order to serve the sentence passed against him. On 28 January 2008 the Exeter Crown Court found Jakub T. guilty of two offences: rape defined under § 1(1) of the Sexual Offences Act of 2003, and causing grievous bodily harm with intent, defined under § 18 of the Offences Against the Persons Act of 1861. As a result of these findings, on 29 January 2008 the court sentenced him to a life sentence for the first of these acts with a recommendation that he served at least 9 years before he could be entitled to conditional release, accompanied by the imposition of a life sentence for the second of the assigned offences with a recommendation that he served at least 6 years before he could be entitled for conditional release. The court held that the sentences shall be executed concurrently and that the convicted could therefore apply for conditional release after serving at least 9 years in prison.

When Jakub T. was re-surrendered to Poland in order to serve the sentences, the Regional Court in P., by its decision of 3 October 2008, stated that the assigned acts satisfy the premises stipulated respectively in the provisions of Article 197 § 1 and Article 156 § 1 point 2 of the Criminal Code, and it determined – having regard to the then wording of the second sentence of Article 604s § 4 of the Criminal Code Proceedings – that the sentence to be enforced in Poland for the offence of rape under Article 197 § 1 of the Criminal Code is life imprisonment with a possibility to apply for conditional release after serving at least 9 years in prison, and that the sentence to be enforced in Poland for the offence of causing grievous bodily harm under Article 156 § 1 point 2 of the Criminal Code was also life imprisonment, but with a possibility to apply for conditional release after serving at least 6 years in prison. The Court added that Jakub T. could apply for conditional release in both of the sentences imposed and forwarded for enforcement after serving at least 9 years imprisonment.

After examination of the complaints lodged by the counsels of the convicted Jakub T., the Court of Appeal in P. upheld the judgment by its decision of 24 March 2009. But on 27 April 2009 the Regional Court in P. resolved, under Article 13 § 1 of the Executive Penal Code, that it had doubts regarding the enforcement of its – already final – decision, stating that the life sentences passed against Jakub T. should be executed concurrently.

As a result of a modification of the content of Article 607s § 4 of the Criminal Code Proceedings, implemented by the Act of 20 January 2011 amending the Act – Criminal Code, Criminal Code Proceedings and Fiscal Penal Code (Official Journal 2011, No. 48, item 245) in force from 22 March 2011, the possibility was created to re-open the proceedings, which had finally ended, when the imposed custodial sentence or measure involving deprivation of liberty exceeded the statutory maximum penalty for an offence according to the adopted legal characterization and including conditions of aggravation of penalty. In this regard, following the request of counsels for the defence, a proceeding for instituting a trial *de novo* was launched. On 24 March 2011 the Supreme Court granted the request, quashing the above-mentioned decision of 3 October 2008 issued by the Regional Court in P. with respect to that part regarding the determination of the sentence to be enforced, and it re-opened the proceeding within this scope, transferring it to the latter court.

On 25 July 2011, following its reconsideration of this issue, the Regional Court in P. stated that the sentences to be enforced against Jakub T. were: for the offence under Article 197 § 1 of the Criminal Code, a penalty of 12 years imprisonment subject to the possibility to apply for conditional release after serving at least 9 years in prison; and for the offence under Article 156 § 1 point 2 of the Criminal Code, a penalty of 10 years imprisonment subject to the possibility to apply for conditional release after serving at least 9 years in prison. In justification of this decision, the Regional Court in P. noted that since, pursuant to Article 607s § 5 of the Criminal Code Proceedings the enforcement of a sentence shall be governed by Polish law, a Polish court is not bound by the decision of a court of another EU country as to the manner of the enforcement of a sentence, and that this issue also relates to the concurrence in executing both sentences, as ordered by the judgment forwarded to Poland for purposes of enforcement. Thus the Regional Court claimed that the custodial sentences, currently adopted to Polish law, “will have to be served consecutively, pursuant to Article 80 § 1 of the Executive Penal Code”, as the provisions of domestic law do not provide the possibility of their concurrent execution, and according to well-established principles of enforcing sentences which have not been aggregated in the State of the judgment, impose an obligation to execute each of them separately.

The counsels of convicted Jakub T. lodged a complaint against this decision, claiming a violation of Article 607s § 4 of the Criminal Code Proceedings by virtue of its misinterpretation and the unjustified assumption that the issue of concurrent execution of the sentences does not constitute an element of sentence, but rather refers to the manner of enforcing the sentence. They also alleged a violation of Article 607s § 5 of the Criminal Code Proceedings in conjunction with Article 80 § 1 of the Executive Penal Code, by virtue of their misapplication and

the assumption that the custodial sentences should be executed consecutively; and a violation of the second sentence of Article 607s § 4 of the Criminal Code Proceedings in conjunction with Article 78 § 1 of the Criminal Code by virtue of the court's failure, in its adaptation of the length of the period required to apply for conditional release, to refer to the provisions of the latter Article; and violation of Article 85 in conjunction with Article 86 § 1 of the Criminal Code by virtue of their misapplication in the imposition of a collective penalty of 12 years imprisonment. On these grounds, the counsels requested to amend the decision and order that both custodial sentences should be executed concurrently and that the convicted Jakub T. may apply for conditional release after serving at least 6 years of imprisonment; or alternatively to impose a collective penalty of 12 years imprisonment with a similar period to apply for conditional release.

Examining the complaints submitted by the counsels, the Court of Appeal in P. found, following the suggestion of the counsels, that a legal issue had emerged in this case requiring a fundamental interpretation of the Act in order to determine the nature of the reservation formulated by the court of the issuing State that the custodial sentences shall be executed concurrently. Thus the Court of Appeal passed to the Supreme Court the legal question mentioned at the outset.

In substantiating its decision, the Court of Appeal submitted that the legal question may be resolved in two ways. One is that the reservation formulated by the court of the issuing State is an element of the sentence, and therefore Article 607s § 4 in conjunction with Article 607t § 2 of the Criminal Code Proceedings shall be applied. The other method for resolving the legal question would be to conclude that this reservation only determines the manner of enforcement of the sentence and that Article 607s § 5 of the Criminal Code Proceedings, which provides that a sentence shall be governed by Polish law, is then applicable.

Reasoning:

Considering the legal question presented by the Court of Appeal, the Supreme Court came to the conclusion that it did not conform to the requirements specified in Article 441 § 1 of Criminal Code Proceedings, and that therefore a requested resolution of the question could not be provided.

According to well-established case-law of the Supreme Court, a legal issue presented under Article 441 § 1 of the Criminal Code Proceedings shall comply with following requirements:

- it constitutes a “legal issue”, i.e., an interpretative problem related to a provision interpreted divergently in judicial practice or to a provision of obviously defective or vague wording; and
- it requires a “fundamental interpretation of the Act”, and not an indication of how to resolve a particular case, which means it shall refer

- to a provision which leads to divergent interpretations, and not to one which is clearly formulated and does not cause particular difficulties in its interpretation; and
- it emerged while examining an appeal that is linked to a factual case in such a way that the adopted manner of interpretation determines the resolution of the case.

None of the above requirements were considered fulfilled in the present case. The only thing that occurred is that the presented issue arose in the appeal. However the point is that a legal question is supposed to conform also with two previous requirements specified in Article 441 § 1 of the Criminal Code Proceedings in order to be considered as a legal issue, the determination of which requires a fundamental interpretation of the Act, and not as any legal issue which occurs in front of the Court of Appeal.

It would seem that the Polish Supreme Court should have confined itself to that conclusion. However, having regard to the fact that the legal question referred to a provision which had been in force for only few months and that it concerned the issue of cooperation in criminal cases between EU Member States, and furthermore in light of the fact that this cooperation is expanding and is based on the mutual recognition of judgments, the Supreme Court went on to state that a few observations would be made in the case.

The second sentence of Article 607s § 4 of the Criminal Code Proceedings, in its previous wording before the amendment made by above-mentioned Act of 20 January 2011, read that “the Court is bound by the imposed sentence”, which also applied to cases of re-surrendering a convicted person from another EU country, who had been surrendered there previously under the EAW (Article 607t § 2 of the Criminal Code Proceedings). Therefore the Supreme Court, while expressing itself in an earlier appeal in the case of Jakub T., resolved the legal question presented at that time, which referred to the issue of application of the exequatur procedure under the EAW, by stating that an element of a sentence, which binds a Polish Court, includes also the determination of conditions upon which the convicted person can apply for conditional release made by the court of another EU Member State (see: the Supreme Court’s decision of 3 March 2009, IKZP 30/08). In its justification of its decision, the Supreme Court expressed the view that “sentence”, as specified in the Article in question, shall be understood as the determination of all consequences, within the scope of punishments provided by the legislator, made by the court assigning criminal liability for an offence as necessary or possible to apply to a perpetrator, and thus it determines not only a penalty or other measures of coercive nature, their type and duration, but also all other matters related to this penalty or the measure. Without a doubt, the decision of the

Court in Exeter regarding the concurrent execution of the custodial sentences constituted the “sentence” in above sense, since it determined the punishment which the Court had chosen, rejecting at the same time the other possible decision (as the court documents indicate) to require consecutive execution of the sentences.

The Polish legislator, in amending Article 607s § 4 of the Criminal Code Proceedings in 2011, referred to the Framework Decision of 2008 on application of the principle of mutual recognition of judgments in criminal matters imposing custodial sentences, Article 8 section 2 of which reads that when the sentence is incompatible with the law of the executing State in terms of its duration, the competent authority of the executing State may decide to adapt the sentence only where the sentence exceeds the maximum penalty provided for similar offences under its national law, and that the adapted sentence shall not be less than the maximum penalty provided for similar offences under the law of the executing State. The current wording of the provision in question conforms to the requirements of that decision.

This means that the current wording of the second sentence of Article 607s § 4 of the Criminal Code Proceeding provides that, due to the principle of mutual recognition of judgments adopted in EU member states, in order to enforce the sentence imposed by a judgment of a court of another EU Member State which has been forwarded to Poland under the European Arrest Warrant, the adaptation of such judgment for the purpose of its enforcement is possible only in respect of duration of the sentence and only if that sentence exceeds the statutory maximum penalty for the same offence or offences in Poland. The adaptation can only consist in imposing, instead of the original sentence, the statutory maximum penalty or punitive measure provided for that offence in Polish law according to the adopted legal characterization. Thus, any modification of other parts of the judgment is not possible. In this regard, a Polish court is bound by the judgment adopted in terms of its enforcement, even if it adapts the duration of the sentence or sentences. Thus it is not the “sentence” and its elements – including the manner of serving the sentence determined in the judgment, if the law of a foreign country so provides – that may be adapted, but only its duration that may be adapted to comply with Polish law, and then only under the conditions specified in the second sentence of Article 607s § 4 in conjunction with Article 607t § 2 of the Criminal Code Proceedings.

Although unchanged, Article 607s § 5 of the Criminal Code Proceedings assumes that the enforcement of a sentence shall be governed by Polish law, but it pre-supposed that the enforcement of sentence imposed by a judgment which has been forwarded to Poland for the purpose of its enforcement could be modified only as to its duration, and not as to other matters relating to the sentence which

a court of a foreign state ordered in its judgment of sentence against the convicted, including the conditions of its serving, if according to the law of that state a court is entitled to rule in this matter. It is also worth noting that the Polish Criminal Code provides a court with the possibility to determine, in its judgment, certain additional requirements for serving a sentence, which constitute a specific punishment (for example Article 95a or Article 96 of the Criminal Code), so such a solution is not unfamiliar to Polish regulations, and the latter situation is not treated as belonging to the sphere of enforcement of a sentence, but as a separate ruling with regard to the sentence or other measure.

The fact that the concurrent serving of several sentences imposed by a judgment of a court of a foreign country is not known to Polish law is irrelevant, because under British law – as the court files indicate – the decision in this regard belongs to the court which imposes those sentences and which has a choice between ordering that the sentences be executed consecutively or concurrently, or by turns concurrently and consecutively, and the court has to decide this issue in the same judgment which imposes the sentence. This means that the judgment in this regard cannot be subject to modification based on Article 607s § 4 of the Criminal Code Proceedings.

For these reasons the Court held as at the outset.

Prepared by Ewa Dąbrowska

**The Supreme Court (Criminal Chamber) decision of 4 August 2011,
Ref. No. II KK 42/11 in the case of Andrei S.,
prosecuted by the Republic of Belarus**

The decision:

To dismiss the cassation appeal. The condition of double criminality of the act, determining *inter alia*, the extradition of the prosecuted person between Republic of Poland and Republic of Belarus for the purpose of a criminal prosecution and the execution of a sentence was expressed only in actual form (Article 66 § 2 and § 3 of the Agreement of 26 October 1994 between the Republic of Poland and the Republic of Belarus on legal assistance and legal relations in civil, family, employment and criminal matters, Official Journal 1995, No. 128, item. 619, hereinafter the “Agreement”). The act that a prosecuted person is accused of in the summoning State, or the act that this person was convicted for therein, must constitute a crime in the understanding of the summoned State. This means that the above-mentioned act must be directed against legal goods protected by the criminal law in the summoned state. An act that violates only the common goods of the Republic of Belarus’s fiscal interests does not constitute a fiscal offence under Polish criminal fiscal law.

The facts:

On 17 October 2010 the prosecutor of the Regional Prosecutor’s Office in W. requested the Regional Court in W. for the issuance of a decision on the legal admissibility of the extradition of Andrei S. to the authorities of the Republic of Belarus, and on passing the above-mentioned decision after its validation, together with the records of the case, to the Ministry of Justice for the purpose of deciding on an extradition request. The Regional Court in W., by its decision of 25 October 2010, declared the legal inadmissibility of the extradition of Andrej S. to the Republic of Belarus, quashing at the same time the preventive detention of Andrei S. Inasmuch as it was not appealed by any party to the proceeding, this decision became final. The General Prosecutor filed a cassation from the above-mentioned decision to the disadvantage of the prosecuted person, within the time set forth in Article 524 § 3 of the Criminal Code Proceedings. He claimed that the decision violated the provisions of the criminal proceedings law, particularly Article 66 § 2 and Article 68 § 1 of the Agreement. The alleged violation consists in the failure to apply these provisions and in basing the judgment on Article 604 § 1 and § 2 of the Criminal Proceedings Code and Article 60 § 1 of the Agreement, despite the fact that these provisions were not applicable, which eventually led

to an unjustified claim of legal inadmissibility of the extradition of Andrej S. on the grounds that there was an absolute obstacle to extradition in the form of lack of the double criminality prerequisite of the act charged under the Article 231 part 2 of the Belarusian Criminal Code.

In the justification of the cassation there was an additional allegation, though it was indirect and did not point out a violation of any other provision of Polish law. Namely, it was noted that the Regional Court stated, without grounds, that the act which the prosecuted person was accused of in the Republic of Belarus does not fulfil the features of a criminal offence under Article 270 § 1 of the Polish Criminal Code, inasmuch as the criminal proceedings in Belarus accused the prosecuted person of “*inter alia* using forged documents but not forging documents, and this behaviour may not fulfil the features of Article 270 § 1 of the Criminal Code.” In bringing these allegations the General Prosecutor requested that the decision in question be quashed and the case remanded to the Regional Court in W. for re-examination. In response to the cassation the counsel for the defendant petitioned for its dismissal.

Reasoning:

The submitted cassation is groundless. Admittedly, the rules of procedure were misapplied in the present case, as the decision was based on Article 60 § 1 of the Agreement, instead of Article 66 § 2 thereof. Nevertheless, taking into consideration the circumstances of present case, this infringement of regulations did not have any influence on the merits of the decision and therefore the cassation is dismissed.

It shall be agreed with the General Prosecutor that the aforementioned Article 60 of the Agreement was not applicable to the present case, since this provision, contained in Part Three of the bilateral agreement in Chapter One, entitled “Taking over the criminal prosecution”, regards only the interstate cooperation in the form that was described in the Chapter’s title. Therefore it is not applicable in extradition proceedings, especially since the latter are regulated by separate provisions of aforementioned agreement with the Republic of Belarus (Articles 66-82, which are contained in Chapter Two of Part Three, entitled “Extradition for the purpose of prosecution and execution of the sentence.”)

However the foregoing defectiveness of the decision in question, in the circumstances of present case, is only of a technical nature (regarding which provision was cited in the legal assessment of the judgment), and is without a substantive effect. The Regional Court in W., in its written substantiation of the decision, refers to all the relevant prerequisites from the standpoint of Article 66 § 2 of the Agreement, and also in view of Article 604 of the Criminal Proceedings Code, including in particular the condition of the double criminality of the act.

This issue constitutes the core of the cassation, the justification of which presents contradictory viewpoints. On one hand it is indicated that Article 66 § 2 of the Agreement does not establish the condition that extradition for the purpose of criminal prosecution is admissible only if the prosecuted act is a criminal offence under the law of both parties thereto. In the view of the party filing the cassation, the condition as such was introduced only in respect of an extradition for the purpose of execution of a sentence under Article 66 § 3 of the Agreement. This is also supposedly confirmed by the content of Article 68 § 1 of the Agreement, which lists a catalogue of obstacles to extradition. On the other hand it is stated that this agreement, in respect of extradition for the purpose of criminal prosecution, provides the condition of double criminality of the act, even if not *sensu stricto* as specified in Article 604 § 1 point 2 of the Criminal Proceedings Code and Article 60 § 1 and Article 66 § 3 of the Agreement, but in the sense that there are categories of criminal offences which, under the law of both parties, are punishable under Article 66 § 2 thereof.

In this context it should be pointed out that Article 66 § 2 of the Agreement states that “Extradition for the purpose of calling to criminal responsibility takes place only for the offences that (...) are punishable (...)”. Furthermore § 3 of above-mentioned provision provides that “Extradition [for the purpose of the execution the sentence takes place only as for the acts, that constitute a criminal offences under the law of both parties (...)]. Thus in both types of extradition it is required that the condition of double criminality of the act be fulfilled. The difference in wording of these provisions results not from the intention to give them a different content, as is argued by the General Prosecutor, but is the result of purely linguistic aspects, and so is purely technical in nature.

Moreover, no reasons are offered to support the assumption that the parties to the Agreement wanted to regulate differently the basic prerequisite for the extradition, i.e. the condition of double criminality of the act, with respect to whether it was extradition for the purpose of criminal prosecution or for the purpose of the execution of a sentence.

Besides, in the present case the real question is not whether the bilateral agreement in respect of extradition for the purpose of criminal prosecution provides the condition of the double criminality of the act, but whether the alleged behaviour of the prosecuted person met the features of a prohibited act, i.e. one which in Poland constitutes an offence or a fiscal offence. The Prosecutor is also misreading the content of the cited decision of the Court of Appeal in Kraków dated 27 October 1999 (Ref. No. II AKz 244/99, KZS 1999, p. 10, item 45). The conclusion of this decision is that an act which forms the basis for an extradition request must fulfil features of a type of crime, but the features do not have to be identical with the features in the legally comparative area.

The point is that the act committed by Andrej S. which constitutes the subject of his accusation by Republic of Belarus does not fulfil the features of any kind of offence or fiscal offence under Polish law, in particular of offences described in Article 86 and Article 87 of the Criminal Fiscal Code. This has already been pointed out by the Regional Court in W. The intended subject of the protection provided by the Polish provisions of the criminal fiscal law is solely the wide-ranging fiscal interests of the Polish State and the fiscal interests of the European Union, which is admitted also by the General Prosecutor. This means that an act directed against other legal goods (in this case, the fiscal interests of the Republic of Belarus) does not constitute a fiscal offence under the Polish provisions, because it does not fulfil all the features of this type of prohibited act. This leads to the conclusion that the extradition of Andrej S. to the Republic of Belarus is legally inadmissible, due to the non-fulfilment of the condition of double criminality of the act.

Such a conclusion may not be altered by the arguments of a systemic nature brought by the General Prosecutor.

Firstly, although indeed the catalogue of obstacles to extradition specified in Article 68 of the Agreement does not recognise as an obstacle the lack of double criminality of the act, this premise was put in Article 66 § 2 [“extradition takes place only because of following crimes (...)”].

Secondly, the rest of the provisions of the bilateral agreement that were relied upon by the General Prosecutor do not support the statement of the cassation. Quite to the contrary – they prove the correctness of the contested decision. Articles 92 and 93 of the Agreement relate to the institution of taking over to enforce a judgement passed in the other State, and not to extradition. Moreover, these regulations directly refer to the issue of offences against goods of the State, including fiscal offences. Article 92 § 2 provides, as a prerequisite of such a takeover, fulfilment of the condition of the double criminality of the act, including also in its hypothetical aspect – “the act for which a penalty was imposed (...) would have been punishable at law, if had been committed on its territory” (Article 92 § 3 *in fine*). Article 93 points out that in the cases of the fiscal offences as widely understood, the refusal to take over is unacceptable if it is made only on the grounds that the law of the executing State does not provide the same type of public charges. Therefore both provisions explicitly allow for the possibility of taking over the enforcement of a judgement passed in the other country for a fiscal offence, even if that offence was not directed against national interests of summoned State (State of execution of the sentence). Since the parties to the bilateral agreement foresaw this kind of possibility in respect of taking over the enforcement of the judgement and did not introduce it with regard to the extradition of a prosecuted person, therefore the hypothetical extension of the condition of double criminality of the act, as specified in Articles 92 and 93, is inadmissible to the extradition procedure.

Thirdly, in the process of interpretation of the provisions of the bilateral agreement, it is inadmissible to refer to the Second Additional Protocol to the European Convention on Extradition, drawn up in Paris on 13 December 1957 (Official Journal 1995, No. 70 pos. 307), as it would be contrary to the principles of interpreting international agreements, as set forth in Articles 31-33 of the Vienna Convention on the Law of Treaties, drawn up in Vienna on 23 May 1969. Besides, the Republic of Belarus is not a party to the aforesaid Protocol; it has not even ratified the Convention on Extradition itself.

Moving on to the last issue, namely the accusation formulated in the substantiation of the cassation, it is necessary to point out that it is not supported with any argumentation and moreover it is not placed in the factual and legal circumstances of this case. According to the documents in the case files, the prosecuted Andrej S. is not accused in the Republic of Belarus of either forging or using forged documents (within the understanding of Article 270 § 1 of the Criminal Code). As was correctly noted by the Regional Court in W., he is only charged with presenting to the customs officials untrue (“forged”) information.

The above reaffirms (which was also noted by the Court in the contested decision) that the only legal basis for the act that Andrej S. is charged with is Article 231 part 2 of the Criminal Code of the Republic of Belarus, concerning the offence of evasion of customs duties, and not the provision that would penalize the offence of substantial falsification (within any meaning specified in Article 270 § 1 of the Criminal Code). These features are also not contained in the above-mentioned Article 231 of the Criminal Code of Republic of Belarus.

For these reasons, the cassation must be dismissed as groundless.

Prepared by Ewa Dąbrowska

**The Judgment of the Constitutional Tribunal of 16 November 2011,
Ref. No. SK 45/09 concerning the exclusion of a debtor from
proceedings before the court of first instance, in the case
of proceedings regarding the enforceability of a ruling issued by
a court from another EU Member State***

The Constitutional Tribunal adjudicated that Article 41, second sentence, of the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters was consistent with Article 45(1), as well as Article 32(1) in conjunction with Article 45(1), of the Constitution of the Republic of Poland. (Moreover, pursuant to Article 39(1)(1)-(2) of the Constitutional Tribunal Act of 1 August 1997, the Tribunal decided to discontinue the proceedings as to the remainder of the case.)

Due to the special character of the legal act whose constitutionality was challenged, the Constitutional Tribunal began by examining whether legal acts enacted by EU institutions might constitute the subject of review proceedings commenced by way of constitutional complaint as specified in Article 79(1) of the Polish Constitution. The Tribunal stated that the *ratione materiae* scope of normative acts – i.e. those which might be subject to a review of their conformity to the Constitution in proceedings commenced by way of constitutional complaint – had been set out in Article 79(1) of the Polish Constitution autonomously and independently from Article 188(1)-(3). The examination of constitutional complaints constitutes a separate type of proceeding. Arguments in favour of this position are twofold.

Within the meaning of Article 79(1) of the Constitution, a constitutional complaint may concern a statute or another normative act. According to the Constitutional Tribunal, a normative act, within the meaning of Article 79(1) of the Constitution, may be not only a normative act issued by one of the organs of the Polish state, but also – after fulfilling further requirements – a legal act issued by an organ of an international organisation, provided that the Republic of Poland is a member thereof. This primarily concerns those acts of EU law which have been enacted by the institutions of that organisation. Such legal acts constitute part of the current Polish legal system.

Pursuant to Article 288, second paragraph, of the Treaty on the Functioning of the European Union, a regulation shall have general application, and it shall

* The decision of the Constitutional Tribunal is available at http://www.trybunal.gov.pl/eng/summaries/documents/SK_45_09_EN.pdf (in English)

be binding in its entirety and directly applicable in all Member States. The norms of a regulation are general and abstract in character. The addressees of the norms of a regulation are not only the Member States and the organs of those States, but also individuals (private parties). The Constitutional Tribunal stated that an EU regulation bears the characteristics of a normative act within the meaning of Article 79(1) of the Polish Constitution.

The Constitutional Tribunal also concluded that EU regulations might contain norms which constitute the basis for a court or organ of public administration to make a final decision on the freedoms, rights, or obligations of individuals or legal entities, as specified in the Constitution. The regulations may constitute a legal basis of administrative decisions and court rulings in the Member States, including Poland. When participating in proceedings before national courts, individuals may rely on the norms of EU regulations and derive their rights therefrom.

For these reasons, the Tribunal adjudicated that an EU regulation might be the subject of review proceedings commenced by way of constitutional complaint, as specified in Article 79(1) of the Constitution. However, the fact that an EU regulation is an act of EU law, even though it also constitutes part of the Polish legal system, affects the character of the review of its conformity to the Constitution conducted by the Constitutional Tribunal.

The Constitutional Tribunal stated that EU regulations are legal acts whose position in the Polish constitutional system is indicated in Article 91(3) of the Constitution. One of the systemic principles of EU law is the principle of the primacy of the EU law (formerly Community law) over the national law of the Member States. It follows from Article 91(3) of the Constitution that the norms of EU regulations take precedence in the event of their nonconformity with statutes. By contrast, the Constitution retains its superiority and precedence over all legal acts which are in force in the Polish legal system, including the acts of EU law. This position of the Constitution is enshrined in Article 8(1) of the Constitution, and has been confirmed by the previous jurisprudence of the Constitutional Tribunal. Due to the position of the Constitution as the supreme law of the Republic of Poland, it is therefore admissible for the Constitutional Tribunal to review the constitutionality of norms contained in EU regulations.

The Constitutional Tribunal pointed out that it was necessary to draw a distinction between an examination of the conformity of acts of EU secondary legislation to the EU Treaties, i.e. the EU primary law, on the one hand, and examining their conformity to the Polish Constitution on the other. The body that ultimately determines the conformity of EU regulations to the EU Treaties is the Court of Justice of the European Union, and as regards their conformity to the Polish national Constitution – the Polish Constitutional Tribunal. It is crucial to take into account the indicated differences between the roles of the European

Court of Justice and the Polish Constitutional Tribunal. In accordance with the jurisprudence of the Court of Justice, national courts have no jurisdiction to adjudicate as regards the invalidity of acts of EU secondary legislation.

In allowing for the possibility of examining the conformity of acts of the EU secondary legislation to the Polish Constitution, the Tribunal emphasised the need to maintain due caution and restraint in that regard. The EU law binds all Member States. One of the systemic principles of EU law is the principle of sincere cooperation, as referred to in Article 4(3) of the Treaty on the European Union (TEU). A grant of powers to particular Member States to decide upon the legally binding nature of norms of EU law would be difficult to reconcile with that principle. By contrast however, Article 4(2) of the TEU provides that the Union shall respect the national identities of the Member States, which are inherent in their fundamental political and constitutional structures.

In the opinion of the Tribunal, any contradictions should be eliminated by applying the interpretation that respects the relative autonomy of both EU law and national law. Moreover, said interpretation should be based on the assumption of mutual loyalty between the EU institutions and the Member States. This assumption gives rise to an obligation, on the part of the Court of Justice, to be favourably inclined towards national legal systems; whereas the Member States have the obligation to approach EU norms with the utmost respect.

Additionally, a review of the conformity of an EU regulation with the Polish Constitution, conducted by the Polish Constitutional Tribunal, should be regarded as independent, and also subsidiary, in relation to the jurisdiction of the Court of Justice. When acceding to the EU, the Republic of Poland accepted the division of powers within the system of the EU institutions. An element of that division is the jurisdiction of the Court of Justice to provide the final interpretation of EU law and to ensure that the interpretation is observed consistently in all Member States, as well as to have an exclusive power to determine the conformity of acts of the EU secondary legislation to the Treaties and to the general principles of EU law.

Also, the Polish Constitutional Tribunal considered the effects of a judgment issuing from it in the event of an adjudication that the norms of EU secondary legislation were inconsistent with the Polish Constitution. In the context of acts of Polish law, any such non-conformity would result in a declaration that the unconstitutional norms are no longer legally binding. With regard to acts of the EU secondary legislation, such a result would be impossible to implement, as it is not the organs of the Polish state that decide whether such acts are legally binding or not. Therefore, the consequence of such a ruling by the Constitutional Tribunal would be to rule out the possibility that the acts of the EU secondary legislation would be applied by the organs of the Polish state and would have any legal effects in Poland.

Undoubtedly, a ruling declaring the non-conformity of EU law to the Constitution should be a last resort and ought to appear only when other ways of resolving a conflict between the norms of different legal systems have failed. In its judgment concerning the Treaty of Accession, the Constitutional Tribunal indicated three possible reactions in Poland to the occurrence of a conflict between the Constitution and EU law: amending the Constitution; taking up measures aimed at amending the EU provisions, or taking a decision to withdraw from the EU. Such a decision should be made by the Polish sovereign, i.e. the Polish Nation, or the organ of the state which, in accordance with the Constitution, is entitled to represent the Nation.

Leaving aside the last solution, which should be reserved for exceptional cases of the most serious and irreconcilable conflicts between the constitutional orders of the Republic of Poland and EU law, following the issuance by the Constitutional Tribunal of a ruling declaring the non-conformity of particular norms of EU secondary legislation to the Polish Constitution, measures should be undertaken in order to eliminate the conflict. The constitutional principle of favourable predisposition of the Republic of Poland towards the process of European integration and the Treaty's principle of loyalty of the Member States towards the Union require that the effects of any such ruling by the Tribunal be deferred in time, pursuant to Article 190(3) of the Polish Constitution.

In examining the constitutionality of the challenged provisions of Council Regulation (EC) No 44/2001, the Tribunal stated that the complainant had made an allegation concerning the infringement of the right to a fair and public hearing in first instance proceedings in the Republic of Poland to determine the enforceability of a ruling of a foreign court issued against the complainant. In the end, as the subject of review in the present case, the Tribunal found that Article 41, second sentence, of Council Regulation (EC) No 44/2001, provided that a debtor against whom enforcement was sought should not, at the stage of first instance proceedings in Poland, be entitled to make any submissions on the application. In considering the higher-level norms for constitutional review indicated by the complainant, the Constitutional Tribunal recognised that it was admissible and justified to carry out the review of the challenged norm from the point of view of its conformity to Article 45(1) (the right to a fair trial) as well as Article 32(1) in conjunction with Article 45(1) of the Polish Constitution (the principle of equality in the context of the right to a fair trial). With regard to the other provisions indicated by the complainant, and also due to the withdrawal of part of the constitutional complaint, the Tribunal decided to discontinue the proceedings as to the remainder of the issues.

The Constitutional Tribunal stated that a fair judicial procedure should ensure that parties enjoy procedural rights which are relevant to the subject of the pending proceedings. The requirement of a fair trial implies that the principles of the trial are adjusted to the specific character of particular cases under examination. Constitutional guarantees related to the right to a fair trial may not be regarded as a requirement to provide – in every type of proceedings – the same set of procedural instruments which would uniformly specify the position of the parties to proceedings and the scope of procedural measures available to them.

In the view of the Tribunal, the proceedings regulated in the Council Regulation (EC) No 44/2001 aim at balancing the rights and conflicting interests of the applicant (creditor) and the debtor. In order to achieve that goal, the EU legislator provided for a two-stage procedure. The procedure reflects a general assumption that underlies proceedings to determine the enforceability in one Member State of a ruling issued by a court from another Member State, meant to reconcile the effect of a debtor's surprise, which is indispensable in the proceedings, with respect for his/her right to a hearing.

What is significant is the fact that proceedings to determine the enforceability of a ruling of a court from another Member State are secondary in character in relation to the court proceedings which ended with the issuance of the ruling in the Member State of origin. In proceedings to determine the enforceability of the ruling, there is a presumption that, in proceedings before the court of the Member State of origin, both parties were granted procedural rights which corresponded to the guarantees of a fair procedure. This presumption is based on mutual trust in the administration of justice in the EU Member States. The right to a fair trial is guaranteed in the constitutions and statutes of those States. Moreover, it also arises from Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The right to a fair trial is also guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union. In addition it is a general principle which constitutes part of EU law.

The Constitutional Tribunal also noted that the legal construct of *ex parte* proceedings, i.e. proceedings without the participation of the other party – being analogous to the construct adopted in Article 41, second sentence, of the Council Regulation (EC) No 44/2001 at the first stage of proceedings to determine enforceability – occurs also in relation to some proceedings at a later stage, which are regulated in the Polish Code of Civil Procedure. Particular attention should be drawn to special proceedings aimed at the expedient examination of certain types of civil cases, i.e. injunction proceedings and proceedings concerning orders to pay. The character of proceedings without the participation of a defendant (debtor) is also shared, at the first stage, by proceedings concerning precautionary

measures and proceedings to issue an enforcement clause. The exclusion of defendants (debtors) at the first stage of the above-mentioned proceedings has not been challenged before the Constitutional Tribunal so far.

For the above reasons, the Tribunal stated that excluding the debtor from making a statement at the first stage of proceedings to determine the enforceability of a ruling of a foreign court pursuant to Article 41, second sentence, of the Council Regulation (EC) No 44/2001, was consistent with the above-mentioned significant goals, was not arbitrary in character, and did not infringe upon the right to a fair trial. On the one hand, the said procedural solution implements the principle of the free movement of judicial decisions within the EU and the principle of mutual trust in the administration of justice in the EU Member States, which also applies to rulings issued by Polish courts. On the other hand, it facilitates the effective enforcement of court rulings issued to applicants (creditors). Therefore, there are no grounds to conclude that the adopted model of proceedings employed to determine the enforceability of a ruling of a foreign court, together with the existing restrictions imposed on a debtor in first instance proceedings, infringe upon the right to a fair trial guaranteed by the Constitution.

As regards the alleged infringement of Article 32(1) in conjunction with Article 45(1) of the Constitution, the Tribunal concluded that – due to the special character of proceedings to determine the enforceability of a ruling of a foreign court where such proceedings are instigated by a creditor who had been awarded a ruling ordering compensation to him – it was admissible to differentiate between the procedural rights of one party and those of the other in first instance proceedings. In the view of the Tribunal, it does not follow from the content of Article 41, second sentence, of the Council Regulation (EC) No 44/2001 that the applicant (creditor) is excessively or unjustly privileged in comparison to the participant in the proceedings (the debtor).

Due to the precedential character of the case, the Constitutional Tribunal carried out a thorough analysis of the conformity of the challenged EU Regulation to the Polish Constitution. However, the Tribunal also deemed it desirable – for the future – to indicate a method for examining the conformity of the norms of EU law (the Treaties and the EU secondary legislation) to the Polish Constitution in the course of review proceedings commenced by way of constitutional complaint.

In that regard, the Tribunal made reference to the jurisprudence of the constitutional courts of other Member States, and concluded that direct reviews of the conformity of acts of EU secondary legislation to national constitutions had been conducted only in exceptional cases. This confirms the thesis that there is a certain caution in this area.

Likewise, in the jurisprudence of the European Court of Human Rights there is a presumption that EU law and the European Court of Justice ensure the protection of human rights at a level which is equivalent to the level of protection required by the European Convention for the Protection of Human Rights and Fundamental Freedoms. Therefore, the actions of EU Member States are consistent with the Convention as long as the European Union protects human rights by applying, for that purpose, appropriate guarantees of protection as well as review and control mechanisms which are at least equivalent to those guaranteed by the Convention. What follows from the above is that the European Court of Human Rights is competent only in exceptional cases to assess whether actions, or the lack thereof, on the part of EU bodies and institutions are consistent with the Convention; namely when the presumption of equivalent legal protection is undermined, and the protection of human rights at the EU level is “manifestly deficient”. In the opinion of the Constitutional Tribunal, there are premises for adopting an analogical approach when examining the constitutionality of EU law in Poland.

The legal acts passed by the EU prior to Poland’s accession to the EU were incorporated, pursuant to the Treaty of Accession, into the Polish legal system on the day of the accession. Subsequent legal acts were issued when Poland was already a Member State of the EU, usually with the participation of representatives of the competent organs of the Polish state. The following arguments – previously alluded to – justify the Polish Constitutional Tribunal in taking an analogical approach to that taken by other courts: the great significance of fundamental rights in the EU legal order; the constitutional principle of favourable predisposition of the Republic of Poland towards the process of European integration; as well as the Treaty’s principle of loyalty of the Member States towards the Union.

The approach presented herein has procedural consequences. In the case of filing a constitutional complaint which challenges the conformity of an act of EU law to the Constitution, a given complainant should be required to present probable cause that the said legal act undermines the level of protection of rights and freedoms in comparison with the level of protection guaranteed by the Polish Constitution. This requirement arises from Article 79(1) of the Constitution. Requiring the complainant to prove that an act of EU law undermines the level of protection of rights and freedoms, in comparison with the level of protection guaranteed by the Constitution, is not an additional requirement, but rather a more specific rendering of the requirement to indicate in what manner given rights or freedoms have been infringed. The need for such a specific rendering is justified by the character of the acts of EU law, which come from legislative centres other than the organs of the Polish state.

The requirement to present probable cause that the level of protection of rights and freedoms has been undermined, in comparison with the level of protection guaranteed by the Constitution, also follows from the allocation of the burden of proof in review proceedings commenced by way of constitutional complaint. There must be more than a possible indication that there has been an infringement of the Constitution. In the absence of legally sufficient proof, the Tribunal may conclude that the constitutional and statutory requirements of a constitutional complaint have not been met and, consequently, may issue a decision in which it refuses to proceed with the constitutional complaint or in which it discontinues the proceedings.

Prepared by Ewa Dąbrowska

**Answers to the questions for the hearing in the case
of *Janowiec and Others v. Russia*
(joint cases nos. 55508/07 and 29520/09)
Strasbourg, 6 October 2011**

On 6 October 2011, the European Court on Human Right held a hearing in the joint cases of *Janowiec and Trybowski v. Russia* (application no. 55508/07) and *Wołk-Jezińska and Others v. Russia* (application no. 29520/09). The historical background for these two cases was the Katyń Massacre committed in 1940, when 21,857 Polish citizens were murdered, pursuant to a decision taken on 5 March 1940 by the Politburo of the Central Committee of the USSR Communist Party.

The Russian Federation ratified the European Convention on Human Rights on 5 March 1998. The applicants alleged that the Russian investigation into the Katyń Massacre, which had started in 1990 and was discontinued in 2004, was not efficient as required by the Convention (violation of Article 2). Furthermore, they complained that the way the Russian authorities reacted to their requests and enquiries amounted to denigrating and inhuman treatment (violation of Article 3). Lastly, they claimed that the refusal of the Russian government to disclose documents from the Russian investigation into the massacre, which the Court had requested, could constitute a violation of Article 38 of the Convention (obligation to co-operate with the Court).

Before the hearing, the Court asked the participants (applicants, Russian government and the government of Poland, which joined the case as a third party) a number of questions to be answered. These questions related to important issues relevant to the case but also very crucial for the application of the Convention as such (in particular, competence *ratione temporis* of the Court). A recording of the hearing is available on the website of the Court (www.echr.coe.int).

Each participant had only 30 minutes to summarise its legal observations. An extended version of the answers was submitted to the Court in writing. Below are presented the legal observations prepared on behalf of the applicants. The author of this document is Professor Ireneusz C. Kamiński from the Institute of Legal Studies, Polish Academy of Sciences, Warsaw, Poland. In Strasbourg, he acted in his capacity as a legal representative for the applicants.

Article 2 of the Convention

1. Does the Court have [temporal] jurisdiction to assess the respondent State's compliance with the procedural obligations flowing from Article 2 of the Convention?

(a) *The parties are invited in particular to comment on whether or not the Court's jurisdiction can be founded on the "humanitarian clause" in the last subparagraph of paragraph 163 in Šilih v. Slovenia] ([GC], no. 71463/01, 9 April 2009).*

More specifically,

(i) Can the mass murder of Polish prisoners be characterised as a "war crime"?

1.1. The Katyn massacre was committed in 1940. In total, at least 21,857 people were killed. The majority of the individuals executed, i.e. 14,552, among them the applicants' relatives, were kept before the killing in three prisoner-of-war camps.

1.2. When the war started in September 1939, its participants had a duty to abide by the rules of military law (humanitarian law). At that time the basic precepts of international humanitarian law were contained in the IV Hague Convention respecting the Laws and Customs of War on Land (and especially its annex: Regulations concerning the Laws and Customs of War on Land) of 18 October 1907, and in the Geneva Convention relative to the Treatment of Prisoners of War of 27 July 1929.

1.3. The provisions of the Hague and Geneva Conventions set forth fundamental and universal principles regarding the treatment of prisoners of war. Under these principles prisoners of war remained under the power of the hostile State (government), and not that of the individuals and formations who had captured them. Prisoners of war were to be treated humanely at all times and especially, as stated in Article 2 of the Geneva Convention, protected against "acts of violence, from insults and from public curiosity. Measures of reprisal against them [were] forbidden." Prisoners of war were entitled to respect of their persons and honour (Article 3). Also Article 4 of the Hague Rules of Land Warfare stated that "Prisoners of war are in the power of the hostile Government, but not of the individuals or corps who capture them. They must be humanely treated..."

1.4. The provisions of the two Conventions also regulated the conditions under which prisoners of war were to be held and the possibility of applying penal sanctions against them. Regarding the latter issue, it was generally believed that prisoners of war were subject to the regulations and orders that applied to the army of the country under whose authority they were held (Article 8 of the Hague Convention, Article 45 of the Geneva Convention). Nevertheless, in the application of disciplinary measures, corporal punishment and cruelty in any form was forbidden. Collective punishment for the deeds of an individual was also forbidden (Article 46 of the Geneva Convention).

1.5. Special protection was accorded to the rights of prisoners of war in court proceedings, whereby they were entitled to defence and to the presence of

representatives of the caretaker powers in their proceedings. They also had a guaranteed right of appeal against their sentences at the same level as the members of the armed forces of the country in which they were detained (Chapter III of the Geneva Convention).

1.6. Although the two Conventions do not contain a rule that expressly prohibits killings of prisoners of war kept in detention centres, it belongs to the very fundamentals of legal argumentation that from the prohibitions of cruel treatment and of killing in direct post-combat situations also ensued the prohibition of killing those already held in prisoner-of-war camps (*a fortiori* reasoning). Moreover, the preamble to the IV Hague Convention provides that in cases not included in the Regulation “*the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilised peoples, from the laws of humanity, and the dictates of the public conscience.*”

1.7. The soldiers captured by the Red Army in 1939 were entitled to prisoner-of-war status, and therefore to the full protection reserved for prisoners of war. In Russian too these soldiers were termed “prisoners of war” (военнопленные) and the Soviet institution set up for the management of detention centres was the Administration for Prisoners’ of War and Internees’ Affairs (Главное управление по делам военнопленных и интернированных).

1.8. In 1939, the Republic of Poland was party to the two Conventions. However, the fact that the USSR was party neither to the IV Hague Convention (and to the Regulations appended thereto) nor to the Geneva Convention did not release that country from the duty to respect the universally binding principles of international customary law, which existed side by side with treaty obligations.

1.9. The legal status of norms contained in the IV Hague and Geneva Convention was addressed during the post-war trials. In 1946 the Nuremberg International Military Tribunal stated (*Goering and Others Trial*) with regard to the Hague Convention of 1907: “*The rules of land warfare expressed in the Convention undoubtedly represented an advance over existing international law at the time of their adoption. But the Convention expressly stated that it was an attempt ‘to revise the general laws and customs of war’, which it thus recognised to be then existing, but by 1939 these rules laid down in the Convention were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war which are referred to in Article 6 (b) of the Charter.*”¹

¹ The Nuremberg International Military Tribunal judgement (*Goering and Others Trial*), published in: *Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg 1947, vol. XXII, p. 497.

In another part of its judgement the Nuremberg Tribunal stated that: “Article 6(b) of the Charter provides that ‘ill-treatment (...) of civilian population of or in occupied territory (...) killing of hostages (...) wanton destruction of cities, towns or villages’ shall be a war crime. In the main these provisions are merely declaratory of the existing laws of war as expressed by the Hague Convention.”²

The opinion of the International Military Tribunal was subsequently substantially adopted by the United States Military Tribunal in the *High Command Trial* (Case of Wilhelm von Leeb and Thirteen Others)³ and the *Krupp Trial*.⁴

1.10. As far as the Geneva Convention is concerned, in the *High Command Trial* the United States Military Tribunal, while reconstructing the position of the International Military Tribunal in the *Goering and Others Case*, stated that the Geneva Convention “was not binding between Germany and Russia as a contractual agreement, but that the general principles of International Law as outlined in those Conventions were applicable. In other words, it would appear that the International Military Tribunal in the case above cited [Goering and Others], followed the same lines of thought with regards to the Geneva Convention as with respect to the Hague Convention to the effect that they were binding insofar as they were in substance an expression of International Law as accepted by the civilised nations of the world, and this Tribunal adopts this viewpoint” (p. 88).

The Tribunal continued that “most of the prohibitions of both the Hague and Geneva Conventions, considered in substance, are clearly an expression of the accepted views of civilised nations and binding (...) These concern the treatment of prisoners of war (...)” – p. 89.

Subsequently, while enumerating which provisions (or their parts) should be cited “in this category”, the Tribunal pointed, among others, to Article 4 of the Hague Rules of Land Warfare (“Prisoners of war are in the power of the hostile Government, but not of the individuals or corps who capture them. They must be humanely treated...”) and Article 2 of the Geneva Convention (“They [prisoners of war] must at all times be humanely treated and protected, particularly against acts of violence, insults, and public curiosity ...”) – pp. 89-91.

1.11. A similar position to that of the Nuremberg International Military Tribunal was adopted by the International Military Tribunal for the Far East (Tokyo Tribunal) when it stated that “the [IV Hague] Convention remains good evidence of the customary law of nations.”⁵

² *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg 1947*, vol. XXII, p. 475.

³ *Law Reports of Trials of War Criminals*, vol. XII.

⁴ *Law Reports of Trials of War Criminals*, London 1949, vol. X, p. 133.

⁵ “Digest of Public International Law Cases” 1948, vol. 15, p. 366.

1.12. The legal characterisation under international law of the Hague Regulations, as applied at the post-war trials, was followed by this Court in the seminal Grand Chamber judgement of *Kononov v. Latvia* (appl. no. 26376/04, judg. of 17 May 2010). The Court stated that the Hague Regulations were, although not ratified by the Soviet Union or Latvia, binding on them, as these rules “*were solidly part of international law by 1939*” (para. 200).

1.13. In the course of the Nuremberg Trial the Soviet prosecutors sought to charge the German forces with the Katyn massacre. The Katyn massacre was mentioned in the indictment as an instance of a war crime:

“Indictment: Count Three – War Crimes

(*Charter, Article 6, especially 6 (b)*)

(...)

(C) MURDER AND ILL-TREATMENT OF PRISONERS OF WAR, AND OF OTHER MEMBERS OF THE ARMED FORCES OF THE COUNTRIES WITH WHOM GERMANY WAS AT WAR, AND OF PERSONS ON THE HIGH SEAS

(...)

*In September 1941, 11,000 Polish officers who were prisoners of war were killed in the Katyn Forest near Smolensk.”*⁶

During the proceedings before the International Military Tribunal General R.A. Rudenko, Chief Prosecutor for the USSR, referred to the Katyn massacre as “*the mass shooting of Polish officers by the Fascist criminals in Katyn Forest*”, “*criminal activity*”⁷, “*mass shooting of Poles*”, “*a link in the chain of many bestial crimes perpetrated by the Hitlerites*”,⁸ “*atrocities at Katyn*”.⁹

Eventually, the charge related to the Katyn massacre, as brought against the Germans accused at Nuremberg, was dismissed by US and British judges for lack of evidence.

⁶ *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg 1947*, vol. I, pp. 42-54.

⁷ *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg 1948*, vol. XV, p. 289. In full: “*the Soviet Prosecution have several times expressed their view respecting the application of Defense Counsel to call witnesses with regard to the mass shooting of Polish officers by the Fascist criminals in Katyn Forest. Our position is that this episode of criminal activity on the part of the Hitlerites has been fully established by the evidence presented by the Soviet Prosecution*”.

⁸ *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg 1948*, vol. XV, p. 290.

⁹ *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg 1947*, vol. IX, p. 28.

1.14. The classification of the Katyń massacre as a war crime, as made by the Nuremberg Tribunal, must be treated in objective terms and is not dependent upon who actually committed the atrocity.

1.15. The Charter of the International Military Tribunal defines war crimes in its Article 6 (b) as, among others, acts consisting in murder or ill-treatment of prisoners of war.

1.16. Examining evidence on charges related to war crimes committed against prisoners of war, the International Military Tribunal at Nuremberg pointed to the executions of:

- members of Allied “commando” units who, following a directive issued on 18 October 1942 by Adolf Hitler, were to be “slaughtered to the last man”, even if they attempted to surrender;
- escaped officers and non-commissioned-officers who, upon recapture, were to be sent, as ordered by the so-called “Bullet decree” issued in March 1944, to the Mauthausen camp to be shot there;
- 50 officers of the British Royal Force, who escaped from the POW camp at Sagan, but on recapture were shot on the direct orders of Adolf Hitler;
- “Red commissars” of the Soviet Army, as they were considered by the German forces as not benefiting from the status of prisoners of war;
- those Soviet prisoners of war who, following the Gestapo order of 17 July 1941, were identified as important functionaries of the Soviet State, Jews, political agitators and fanatical communists.¹⁰

1.17. War crimes that were committed against prisoners of war and consisted in their executions or killing were also the subject matter of other post-war trials. Besides the main Nuremberg trial, this kind of war crimes occurred in particular in the *German High Command Trial (Case of Wilhelm von Leeb and Thirteen Others)*,¹¹ before the United States Military Tribunal at Nuremberg (30 December 1947–28 October 1948).

The charges against the accused referred to:

- “Commando” order, and the following war crimes:
 - a) on or about 7 July 1944 near Poitiers in France, troops of the LXXX Corps of the 18th Army, under Army Group G, executed 1 American prisoner of war and 30 British prisoners of war;

¹⁰ *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg 1947*, vol. XXII, pp. 471-475.

¹¹ *Law Reports of Trials of War Criminals*, vol. XII.

- b) on or about 22 May 1944 on the island of Alimnia near Greece an English soldier and a Greek sailor were executed;
 - c) on or about 16 April 1944 a British prisoner of war was turned over by Stalag 7a to the SD for execution;
 - d) on or about 10 December 1942 in or near Bordeaux, France, members of the German naval forces executed 2 uniformed British soldiers;
 - e) on or about 20 November 1942 near Stavanger, Norway, members of the German armed forces executed 17 uniformed British soldiers;
 - f) on or about 22 March 1944 near La Spezia, Italy, members' of the German armed forces executed 15 uniformed US soldiers;
 - g) in January 1945 in the Mauthausen Concentration Camp, Austria, from 12 to 15 American prisoners of war, comprising an American military mission, were executed.
- Eastern Front, and the following war crimes:
 - a) on or about 28 July 1941 in the sector of Zwiabel in the USSR troops within the rear area of Army Group South, killed 73 surrendered Soviet prisoners of war as "guerrillas";
 - b) on or about 25 August 1941, in the USSR, troops of the 18th Army under Army Group North killed 35 wounded prisoners of war;
 - c) on or about 9 September 1941 in Djedkowow in the USSR, troops of Panzer Group 3 killed 4 Soviet prisoners of war;
 - d) on or about 13 September 1941, troops of the 213th Security Division of the Rear Area Army Group South, executed 13 escaped and recaptured Soviet prisoners of war;
 - e) on or about 15 October 1941 in the area of the 24th Infantry Division, more than 1,000 Soviet prisoners of war were shot to death because they were unable to march, or died from exhaustion;
 - f) on 16 October 1941 in Nikolayev, troops of the 11th Army delivered 75 Jewish prisoners of war to the SD for execution;
 - g) on or about 22 October 1941, 20 Soviet prisoners of war were executed at concentration camp "Gross Rosen"; on or about 15 October 1941, 21 Soviet prisoners of war were executed at Dachau; on or about 22 October 1941, 40 Soviet prisoners of war were executed at Dachau; on or about 8 November 1941, 99 Soviet prisoners of war were executed at Dachau; on or about 12 November 1941, 135 Soviet prisoners of war were executed at Dachau; between 1 September 1941 and 23 January 1942, 1,082 Soviet prisoners of war were selected by the Gestapo at Regensburg for execution and executed;

- h) in the month of September 1942 in the rear area of the 2nd Army, 384 prisoners of war died or were shot and 42 others were turned over to the SD for execution;
- i) in the period from 1 January 1942 to 6 March 1942 in the rear area of the 11th Army, 2,366 prisoners of war were killed or died of exhaustion, neglect and disease, and 317 prisoners of war were turned over to the SD for execution;
- j) from 14 January 1942 to 29 September 1942 in the rear area of Army Group North, 200 captured Soviet prisoners of war were executed;
- k) in July 1943 in the rear area of the 4th Panzer Army, 24 prisoners of war were turned over to the SD for execution, and in August 1943, 39 prisoners of war were turned over to the SD for execution;
- l) in January 1945 a French prisoner of war, the General Mesney, then under the control of the German Prisoner of War Administration, was murdered, and thereafter false reports of the cause and nature of his death were issued.
- The “Commissar” Order:
 - a) from 21 June 1941 to about 8 July 1941, troops of the XXXXI Corps in Panzer Group 4 under Army Group North killed 97 “political commissars”;
 - b) from 21 June 1941 to about 19 July 1941, troops of Panzer Group 4, under Army Group North, killed 172 “political commissars”;
 - c) from 21 June 1941 to about 1 August 1941, troops of Panzer Group 3 killed 170 “political commissars”;
 - d) on or about 1 October 1941, troops of the rear area of the 11th Army, killed 1 “political commissar”;
 - e) on or about 4 October 1941, troops of the 454th Security Division, of the Rear Area of Army Group South, killed 1 “political commissar”;
 - f) from about 18 October 1941 to 26 October 1941, in the operational area of the XXVIII Corps in the USSR, troops of the 18th Army, under Army Group North, killed 17 “political commissars”;
 - g) on 29 May: 1942, in the operational area of the XXXXIV Corps. troops of the 17th Army, killed 2 “political commissars”.

1.18. The other most important post-war cases on war crimes were:

- The case of Anton Dostler, adjudicated by the United States Military Commission (Rome, 8-12 October 1945). Dostler was accused of having ordered the shooting of fifteen American prisoners of war. Two officers and 13 men of a special reconnaissance battalion disembarked from some United States Navy boats and landed on the Italian coast about 250 miles

behind the front-line. The 15 members of the United States Army were on a military mission, which was to demolish a railroad tunnel. After having been captured and interrogated, they were summarily executed on an order of General Dostler (*Law Reports of Trials of War Criminals*, vol. I, p. 22 and subseq.).

- The Almelo Trial (trial of Otto Sandrock and three others), before British Military Court for the Trial of War Criminals (held at the Court House, Almelo, Holland, 24-26 November 1945). The four accused individuals were charged with committing a war crime that consisted in killing of a British prisoner of war who was living in hiding (*Law Reports of Trials of War Criminals*, vol. I, p. 35 and subseq.).
- The Jaluit Atoll Case (trial of Rear-Admiral Nisuke Masuda and four others of the Imperial Japanese Navy), before the United States Military Commission (United States–Naval Air Base, Kwajalein Island, Kwajalein Atoll, Marshall Islands, 7-13 December 1945). Killing of three American unarmed airmen who were captured and held in custody (*Law Reports of Trials of War Criminals*, vol. I, p. 71 and subseq.).
- The Dreierwalde Case (trial of Karl Amberger), before British Military Court (Wuppertal, 11-14 March 1946). Shooting five allied prisoners of war, allegedly on their attempts to escape, when on the way, under a convoy, to a railway station (*Law Reports of Trials of War Criminals*, vol. I, p. 81 and subseq.).
- The Essen Lynching Case (trial of Erich Heyer and six others, before British Military Court for the Trial of War Criminals (Essen, 18-19 and 21-22 December 1945). Lynching by civilians of three airmen when they were escorted to an interrogation centre. Erich Heyer, who was the commanding officer, gave order to the escort not to interfere if civilians should molest the prisoners of war (*Law Reports of Trials of War Criminals*, vol. I, p. 88 and subseq.).
- Trial of Albert Bury and Wilhelm Hafner, before the United States Military Commission (Freising, Germany, 15 July 1945). Killing of an American airman (*Law Reports of Trials of War Criminals*, vol. III, p. 62 and subseq.).
- The case of Aoki Toshio, by British Military Court (Singapore, 11 February 1946). Toshio was charged with “committing a war crime in that he at Sonkurai Camp in the month of November 1943 in violation of the laws and usages of war by forcing some three hundred British prisoners of war at that time in his custody the majority of whom were sick and injured to enter a train containing no sufficient or suitable accommodation and by

allowing Korean soldiers under his command to beat, kick and otherwise maltreat the prisoners, causing the death of seven of the prisoners and further injured the health of the remainder."

- The trial of Major Karl Rauer and six others before British Military Court (Wuppertal, Germany, 18 February 1946). Rauer and co-accused were charged with committing war crimes in that they were "concerned in" the killing, contrary to the laws and usages of war, of Allied prisoners of war on one or more of three occasions on 22, 24 and 25 March, 1945 (*Law Reports of Trials of War Criminals*, vol. IV, p. 113 and subseq.).
- The trial of Karl Buck and ten others before British Military Court (Wuppertal, Germany, 6-10 May 1946) The accused were charged with committing a war crime, in that they, at Rotenfels Security Camp, Gaggenau, Germany, on 25 November, 1944, in violation of the laws and usages of war, were concerned in the killing of six British prisoners of war, all of No. 2 Special Air Service Regiment, four American prisoners of war, and four French Nationals (*Law Reports of Trials of War Criminals*, vol. V, p. 39 and subseq.)
- The trial of Karl Adam Golkel and thirteen others before British Military Court (Wuppertal, Germany, 15-21 May 1946). The accused were charged with committing a war crime in that they at La Grande Fosse, France, on 15 October 1944, in violation of the laws and usages of war, were concerned in the killing of eight named members of No. 2 Special Air Service Regiment, a British unit, when prisoners of war (*Law Reports of Trials of War Criminals*, vol. V, p. 45 and subseq.)
- The trial of Lieutenant General Harukei Isayama and seven others before the United States Military Commission (Shanghai, 1-25 July 1946). The accused were charged with committing a war crime in that they did each "at Taihoku, Formosa, wilfully, unlawfully and wrongfully, commit cruel, inhuman and brutal atrocities and other offences against certain American prisoners of war, by permitting and participating in an illegal and false trial and unlawful killing of said prisoners of war, in violation of the laws and customs of war" (*Law Reports of Trials of War Criminals*, vol. V, p. 60 and subseq.)
- The trial of Gerhard Friedrich Ernst Flesch, SS OBE Sturmbannführer, Oberregierungsrat before Frostating Lagmannsrett (November December 1946) and the Supreme Court of Norway (February 1948). The accused was charged with having committed war crimes *inter alia* in that in August-September 1944, he gave orders for the hanging of 15 Russian prisoners of war and supervised himself the execution (*Law Reports of Trials of War Criminals*, vol. VI, p. 111 and subseq.)

- The trial of Obersturmbannführer Rudolf Franz Ferdinand Hoess before the Supreme National Tribunal of Poland (11-29 March 1947). The accused was the Commandant of the Auschwitz Camp. He was charged with committing a war crimes and crimes against humanity in that from 1 May 1940 till the end of October 1943, as Commandant of the Auschwitz concentration camp set up by him, and thereafter from December 1943, till May 1945, as Head of the D.I. Department of the SS Central Economic and Administrative Office, as well as in June, July and August 1944, as commander of the SS garrison at Auschwitz he *inter alia* acting either himself or through the subordinate camp personnel deliberately deprived of life about 12,000 Soviet prisoners of war (*Law Reports of Trials of War Criminals*, vol. VII, p. 11 and subseq.).
- The trial of Karl Bauer, Ernst Schrameck and Herbert Falten, adjudicated by Permanent Military Tribunal (Dijon, 18 October 1945). The accused were charged with complicity in murder in that, by abusing authority and powers, they had provoked murder in reprisals of three soldiers of the F.F.I. captured as prisoners of war (*Law Reports of Trials of War Criminals*, vol. VIII, p. 28 and subseq.).
- The Dachau concentration camp trial. The trial of Martin Gottfried Weiss and thirty nine others, adjudicated by General Military Government Court of The United States Zone (Dachau, 15 November-13 December 1945). The accused were charged of cruelties and mistreatments including killings, beatings and tortures, starvation, abuses and indignities of prisoners whom app. 10 per cent were prisoners of war. In spring 1942, 6,000-8,000 Russian prisoners of war were killed. Around September 1944, 90 Russian officers were hanged in the camp (*Law Reports of Trials of War Criminals*, vol. XI, p. 17 and subseq.).
- The trial of Generaloberst Nikolaus von Falkenhorst, adjudicated by British Military Court (Brunswick, 29 July – 2 August 1946). He was charged with 9 charges, among them that he was responsible as Commander-in-Chief of Armed Forces, Norway, for the handing over by forces under his command, to the Security Service of, in total, 41 British prisoners of war of different ranks and 7 Norwegian prisoners of war, with the result that said prisoners were killed (*Law Reports of Trials of War Criminals*, vol. XI, p. 30 and subseq.).
- The Stalag Luft III Case. The trial of Max Wielen and 17 others, adjudicated by British Military Court (Hamburg, 1 July-3 September 1947). All the accused were charged with committing a war crime in that they were concerned in the killings in violation of the laws and usages of war

- of prisoners of war who had escaped from Stalag Luft III (*Law Reports of Trials of War Criminals*, vol. XI, p. 43 and subseq.).
- The trial of Lieutenant-General Baba Masao, adjudicated by Australian Military Court (Rabaul, 28 May-2 June 1947). The accused was charged with failing to discharge his duty as a commander to control the members of his command whereby certain of members of his command murdered a number of prisoners of war (*Law Reports of Trials of War Criminals*, vol. XI, p. 69 and subseq.).
 - The trial of Johannes Oenning and Emil Nix, adjudicated by British Military Court (Borken, Germany, 21-22 December 1945). Oenning and Nix were accused of killing of a named Royal Air Force Officer, a prisoner of war (*Law Reports of Trials of War Criminals*, vol. XI, p. 87 and subseq.).
 - The trial of Hans Renoth and three others, adjudicated by British Military Court (Elten, Germany, 8-10 January 1946). All the accused were charged with and found guilty of killing of an unknown Allied airman, a prisoner of war (*Law Reports of Trials of War Criminals*, vol. XI, p. 89 and subseq.).
 - The trial of Willi Mackensen, adjudicated by British Military Court (Hannover, 28 January 1946). He was accused of, that as a result of his ill-treatment of prisoners of war, at least 30 prisoners of war died (*Law Reports of Trials of War Criminals*, vol. XI, p. 94 and subseq.).
 - The trial of Eberhard Schoengrath and six others, adjudicated by British Military Court (Burgsteinfurt, Germany, 7-11 February 1946). They were charged with the killing of an unknown Allied airman, a prisoner of war (*Law Reports of Trials of War Criminals*, vol. XI, p. 96 and subseq.).
 - The trial of Ulrich Greifelt and others, adjudicated by United States Military Tribunal (Nuremberg, 10 October 1947 – 10 March 1948). There were three connected trials.
 - a) In the trial of Hans Seibold and two others (5-7 March 1947) the defendants were implicated in the killing of a member of the United States Army, who was surrendered and unarmed prisoner of war in the custody of the then German Reich.
 - b) In the trial held from 10 January to 21 March 1947, there were 23 accused with Jurgen Stroop at their head. They were implicated in the ill-treatment, including death, beatings, and torture, of members of armed forces then at war with the then German Reich, who were surrendered and unarmed prisoners of war in the custody of the then Germany Reich (*Law Reports of Trials of War Criminals*, vol. XIII, p. 14 and subseq.).

- United States Military Commission at the Mariana Islands (2-15 August 1946) tried and convicted Tachibana Yochio, a Lieutenant-General in the Japanese Army and 13 others, of murdering 8 prisoners of war.
- Australian Military Court at Rabaul (2 April 1946) sentenced Tomiyasu Tisato, a First Lieutenant in the Japanese Army, after finding him guilty of the murder of an unknown Indian prisoner of war (*Law Reports of Trials of War Criminals*, vol. XIII, p. 164 and subseq.).
- The trial of Takashi Sakai, adjudicated by Chinese War Crimes Military Tribunal of the Ministry of National Defence (Nanking, 29 August 1946). On 17 and 18 December 1941, in Hongkong, thirty prisoners of war were massacred and twenty four more prisoners were killed at West Point Fortress. Between 24th and 26th December 1941, sixty to seventy wounded prisoners of war were killed (*Law Reports of Trials of War Criminals*, vol. XIV, p. 15 and subseq.).

1.19. A comparison of the post-war trials on executions/killings of prisoners of war with the Katyń massacre reveals a certain striking and differing element. Post-war trials dealt with crimes, however heinous they were, which were either committed in a direct post-combat context or concerned certain groups of prisoners of war which were considered, for different reasons, as stripped of the benefit of prisoner-of-war status (members of “commando” units or military missions, escaped POWs, “political commissars”, “terror flyers”). Such particular small groups of military personnel were selected to be killed, in violation of international humanitarian law, from the ranks of all prisoners of war. By contrast, in the case of the Katyń massacre almost all prisoners of war were designated to be killed (14,552) with only a tiny group of 395 individuals chosen to survive. In the context of the Second World War this very feature makes the Katyń massacre unique and exceptional as a war crime perpetrated against prisoners of war.

1.20. As a crime of international law, the Katyń massacre was imprescriptible at the time of its commission. The applicants’ counsels rely in this respect on the Court’s considerations in *Kononov v. Latvia*. First, the Court declared that in order to adequately qualify under law an act committed in 1944 (and to determine the ensuing legal consequences) the national prosecution authorities and courts were required to make reference to relevant international law, not only as regards the definition of the act, but also as regards the determination of any applicable limitation period (para. 230). Then the Court held that in 1944 no limitation period was fixed by international law as regards the prosecution of war crimes, and neither did developments in international law since 1944 impose any limitation period with respect to war crimes (paras. 231-232)

1.21. It should be mentioned that the Katyn massacre was classified as having the features jointly of war crime, crime against humanity and genocide by the Russian Commission of Experts (in its report of 2 August 1993 prepared within the framework of investigation no. 159) and by the Polish Institute of National Remembrance (decision of 30 November 2004 to commence investigation into the Katyn crime). Furthermore, political institutions and bodies in their resolutions called the Katyn massacre “a war crime having the character of genocide”: resolution of Polish Parliament of 23 September 2009 and statement of the Delegation to the EU–Russia Parliamentary Co-operation Committee, European Parliament, dated 10 May 2010.

Conclusion: The Katyn massacre constituted a violation of the prohibitions contained in the IV Hague Convention of 1907 and Geneva Convention of 1929. These prohibitions were recognised, as evidenced by post-war trials, as corresponding by 1939 to the relevant universally binding customary rules of humanitarian law. The Katyn massacre was also classified as a war crime in the indictment to the Nuremberg trial of the main war criminals before the International Military Tribunal. This legal qualification was never questioned, but fully endorsed at the Nuremberg trial by representatives of the Soviet Union, which was the legal predecessor of the Russian Federation. Furthermore the abundant case law from the post-war trials of war criminals demonstrates convincingly and unequivocally that executions of prisoners of war constituted and were treated as war crimes by the international community. Lastly, the Katyn massacre as a crime of international law was imprescriptible at the time of its commission, as it is today.

(ii) *If characterised as a “war crime” contrary to the underlying values of the Convention, was the need to ensure the real and effective protection of those values sufficient for the procedural obligations imposed by Article 2 to come into effect (see Šilih, § 163)?*

1.22. To date, the Court has on several occasions made reference to “the underlying values of the Convention” as a normatively relevant construct.

1.23. Usually, the construct of the underlying values of the Convention was used in its negative function of preventing individuals from making use of the Convention rights and freedoms for purposes or in a way contrary to the Convention axiology.

1.24. In *Lehideux and Isorni v. France* [GC] the Court held that “[t]here is no doubt that, like any other remark directed against the Convention’s underlying values (...) the justification of a pro-Nazi policy could not be allowed to enjoy the protection afforded under Article 10” (appl. no. 24662/94, judg. of 23 September 1998, RJD 1998-VII, § 53). In this judgement the Court referred to the case of *Jersild v. Denmark* [GC], where insulting racially motivated speech was deemed not to enjoy the protection of the Convention (appl. no. 15890/89, judg. of 23 September 1994, Series A no. 298, § 35; in this sense also e.g. *Glimmerveen and Hagenbeek v. the Netherlands*, appl. nos. 8348/78 and 8406/78, dec. of 11 October 1979, DR 18, p. 187; and *Kühnen v. Germany*, appl. no. 12194/86, dec. of 12 May 1988 DR 56, p. 205).

In the subsequent decision of *Garaudy v. France* the Court was confronted with a revisionist book that denied the reality of the Holocaust (appl. no. 65831/01, dec. of 24 June 2003, ECHR 2003-IX). The Court declared that “[d]enying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others. (...) The Court considers that the main content and general tenor of the applicant’s book, and thus its aim, are markedly revisionist and therefore run counter to the fundamental values of the Convention, as expressed in its Preamble, namely justice and peace.”

This line of reasoning was repeated in *Witzch v. Germany*, where statements denying Hitler’s and the National Socialists’ responsibility in the extermination of the Jews were described as showing “disdain towards the victims of the Holocaust” and running “counter to the text and the spirit of the Convention” (appl. no. 7485/03, dec. of 13 December 2005).

In *Orban and Others v. France* the Court noted that “statements pursuing the unequivocal aim of justifying war crimes such as torture or summary executions (...) amounted to deflecting Article 10 from its real purpose” (appl. no. 20985/05, judg. of 15 January 2005, § 35).¹²

1.25. If speech denying the Holocaust or crimes against humanity or justifying war crimes has been rightly declared by the Court as contravening the underlying values of the Convention, then all the more the heinous acts themselves, the reality of which is denied or committing of which is justified, must be deemed contrary to the core values of the Convention.

¹² Original version: “des propos ayant sans équivoque pour but de justifier des crimes de guerre tels que la torture ou des exécutions sommaires sont pareillement caractéristiques d’un détournement de l’article 10 de sa vocation.”

1.26. In *Šilih v. Slovenia*, para. 163, the construct of the underlying values of the Convention was evoked in its positive function, i.e. as a justification for the State's obligation to conduct an effective investigation under Article 2 when a particular case of death (*resp.* killing) preceded the ratification of the Convention by the respondent State. The applicants' counsels are of the opinion, as they have already submitted to the Court in their observations, that the Court's temporal competence should be established, first of all, by reference to the need to ensure the real and effective protection of the underlying values of the Convention.

1.27. For an investigation to be effective as required by Article 2, it must include all reasonable and available measures capable of establishing the circumstances of a given tragic event and leading to the identification of the perpetrators and those who might be involved in it, as well as bringing them to justice.

1.28. Three principal arguments can be formulated in the case of the Katyń massacre, which was a mass-scale crime of international law, contrary to the underlying values of the Convention, to justify the fulfilment of the procedural obligations imposed by Article 2 being needed to ensure the real and effective protection of the Convention founding values.

1.29. Firstly, in the preamble to the Convention it was declared that the Member States of the Council of Europe and of the Convention build a community based on "*the maintenance and further realisation of human rights and fundamental freedoms.*" State Parties of the Convention depend, as political democracies, on "*observance of the human rights*", which are "*the foundation of justice and peace*".

Crimes of international law, in particular those consisting in murders, are by definition contrary to the above-mentioned aims of the Council of Europe and the Convention. They constitute drastic violations of human rights, undermining the very sense of justice and peace. Therefore, since speech denying the reality of crimes of international law or justifying their being committed was declared by the Court to be an act of "*disdain towards the victims*" (decision *Witzch v. Germany*), "*a serious threat to public order*" which is "*incompatible with democracy and human rights*" and running counter to "*the fundamental values of the Convention, as expressed in its Preamble, namely justice and peace*" (decision *Garaudy v. France*), the same rationale should apply, *mutatis mutandis*, in the context of the lack of an efficient investigation into killings that are crimes of international law.

Furthermore, the lack of an efficient investigation into killings that are crimes of international law should also be qualified as act of disdain towards victims and their living relatives, sometimes even tantamount to a denial of the atrocities or a justification of their being committed (if the State authorities ignore or disregard established historical facts).

1.30. It seems unnecessary to define in abstract terms with respect to which categories of murders as crimes under international law the very character of a given act would require an effective investigation to be conducted in order to ensure the real and effective protection of Convention values. Murderous crimes of international law can be committed by “private individuals” or “occasionally” by State functionaries, but sometimes they are also perpetrated as part of a State policy, deliberately planned and realised on the orders of the highest State authorities. It is with regard to this final category of international crimes that the interrelationship between the procedural obligation of effective investigation and the real and effective protection of the Convention values becomes pertinent.

In other words, if we were to reconstruct a *continuum* of crimes of international law it would start with crimes committed by private individuals, followed by crimes “occasionally” committed by State functionaries, and on the extreme edge of this *continuum* would be located crimes that involve States in the strongest possible way: these are mass-scale crimes orchestrated and carried out on the orders of the highest State authorities (such as the Holocaust and the Katyń massacre). If the humanitarian rule from *Šilih* is to have any normative sense and any practical effect, and to be alive at all, it must apply at least to the crimes located in and around the extreme edge of the *continuum*.

1.31. Secondly, the Council of Europe and the Convention came into being as democratic political and legal alternatives to the two totalitarian regimes, Nazism and Stalinism, which were responsible for horrific mass-scale violations of human dignity. The vision of the founders of the Council of Europe and the Convention was directed towards a system that clearly defines what is just and what unjust. This intention clearly transpires from the *Travaux préparatoires* to the Convention. To give only one example:

“while I was in the Gestapo prisons, while one of my brothers was at Dachau and one of my brothers-in-law was dying at Mauthausen, my father (...) was interned at Buchenwand. He told me that on the monumental gate of the camp was this outrageous inscription: ‘Just or unjust, the Fatherland’.

I think that from our First Session we can unanimously proclaim that in Europe there will henceforth only be just fatherlands.

I think we can now unanimously confront ‘reasons of State’ with the only sovereignty worth dying for, worthy in all circumstances of being defended, respected and safeguarded – the sovereignty of justice and law.” (Collected edition of the “Travaux préparatoires” of the European Convention on Human Rights, The Hague 1975-1985, vol. I, pp. 48-49).

1.32. The Katyn massacre was committed by a totalitarian regime whose aims and values radically and drastically contradicted those of the Convention. It therefore becomes mandatory, if the Convention values are to be protected in the real and effective manner, that the political successors of the totalitarian States, currently Contracting Parties to the Convention, should conduct an effective investigation into the totalitarian crimes. Whenever other *rationes* for the Court's competence are established, the temporal jurisdiction of the Court may result from the need to ensure the real and effective protection of the Convention values.

Had democratic Germany not conducted an effective investigation into the Holocaust atrocities, the Court would have been competent, relying on "the humanitarian clause" from the *Šilih* judgement, to determine whether this led to a violation of the procedural obligation under Article 2. The applicants' counsels are mindful of the differences between the Holocaust and the Katyn massacre, but they consider that in the cases of mass-scale crimes perpetrated by the two totalitarian regimes the rationale of the real and effective protection of the Convention values come into play as a specific factor for the determination of the Court's competence *ratione temporis*.

1.33. Thirdly, an effective investigation into the Katyn massacre is a prerequisite for the rehabilitation of the murdered persons as victims of political repression. To date, those persons killed are considered, in legal terms, as sentenced and executed in conformity with Soviet legislation.

It is also worth noting the social consequences of the lack of efficient investigation. The fact that the Katyn massacre was committed by the Soviet Union is broadly denied in Russia, even by members of the Russian Parliament. In a public opinion poll conducted in Russia in 2010 as many as 53 percent of the respondents did not know who committed the Katyn massacre, 28 percent attributed it to the Germans and only 19 percent pointed to the Soviet Union.

Another illustration of the indirect adverse consequences of the lack of efficient investigation is that some Russian towns continue today to bear the names of members of the Politburo of the Communist Party who on 5 March 1940 made the decision to shoot almost 22,000 Polish citizens. Among these towns is Kaliningrad, capital of the region adjacent to the Polish-Russian border.

1.34. Since, for several cumulatively applicable reasons, the effective investigation into the Katyn massacre was necessary to ensure the real and effective protection of the Convention values, the applicants' counsels respectfully invite the Court to make use of Article 46 of the Convention. In exceptional cases – as this case is exceptional – the Court indicated the type of measure that might, and sometimes should, be taken in order to put an end to the situation it found to exist

(e.g. *Abuyeva and Others v. Russia*, appl. no. 27065/05, judg. of 2 December 2010). The applicants' counsels would wish to rely in particular on the judgement in the case of *Association of "21 December 1989" and Others v. Romania* (appl. nos. 33810/07 and 18817/08, judg. of 24 May 2011). In this judgement the Court declared that:

"l'État défendeur doit mettre un terme à la situation constatée en l'espèce, jugée par elle contraire à la Convention, relevant du droit des nombreuses personnes touchées, comme les requérants individuels, à une enquête effective, qui ne s'achève pas par l'effet de la prescription de la responsabilité pénale, compte tenu également de l'importance pour la société roumaine de savoir la vérité sur les événements de décembre 1989. L'État défendeur doit donc offrir un redressement approprié afin de respecter les exigences de l'article 46 de la Convention, en tenant compte des principes énoncés par la jurisprudence de la Cour" (§ 194).

["The respondent State is to end the situation found in this case, considered by the Court as contrary to the Convention and concerning the rights of many persons affected, as individual applicants, to an effective investigation, which does not end as a result of prescription of criminal responsibility, also taking into account the importance for Romanian society of knowing the truth about the events of December 1989. The respondent State must provide an appropriate remedy to meet the requirements of Article 46 of the Convention, taking into account the principles expressed in the case law of the Court."]

1.35. In the background of the Romanian case were the tragic events that preceded the fall of the Ceausescu regime. The Court held that the effective investigation of the events was necessary because of two principal reasons. Firstly, the persons killed were "many", and it meant several hundred. Secondly, the Court stressed the interest of Romanian society in knowing the truth about the events. This rationale applies all the more to the Katyń massacre, which was an imprescriptible crime under international law and in which 21,857 persons were murdered.

Conclusion: the humanitarian clause from the *Šilih* judgement justifies, for three reasons cumulatively present in the instant case, that the procedural obligations under Article 2 come into effect in order to ensure the real and effective protection of the Convention values. Firstly, the Katyń massacre was a mass-scale crime of international law organised and perpetrated on the orders of the highest authorities of the State, whose legal successor is a party to the Convention. Secondly, that crime was committed by a totalitarian regime in the furtherance of aims drastically contrary to the very foundations of the Council of Europe and the

Convention. Thirdly, an effective investigation is indispensable to eliminate the serious legal and societal adverse consequences of the lack of such an investigation. Additionally, the applicants' counsels respectfully invite the Court to make use of Article 46 of the Convention.

(b) In the alternative, are there any other elements of the Court's case-law capable of establishing its temporal jurisdiction in the present case?

1.36. As the applicants' counsels have already argued in their former observations submitted on 29 May 2010, the Court will also have the competence *ratione temporis* to hear the case as far as "the proportion rule" from the *Šilih* judgement is concerned.

1.37. Firstly, a significant part of the procedural steps in the Katyn criminal proceedings must have taken place after 5 May 1998, as the facts established before and after that date differ profoundly. At earlier stages of the Russian Katyn investigation the execution of Polish POWs by NKVD squads was not doubted, whereas the relevant Russian institutions later repeated that the fate of those prisoners was unknown.

1.38. On 21 April 1998 the Chief Military Prosecutor's Office of the Russian Federation confirmed in its written answer to Mrs. Ojcumiła Wołk and Witomiła Wołk-Jezierska that Wincenty Wołk, son of Waclaw, born 12 May 1909, had been kept as a POW in the special NKVD camp at Kozelsk, and had been shot dead along with others in spring 1940. However, in its responses to further requests filed in 2006 and 2008 by Mrs. Witomiła Wołk-Jezierska, the Chief Military Prosecutor's Office stated that the whereabouts of Wincenty Wołk remained unknown. This position was then upheld by the Russian courts.

1.39. Therefore, there was a dramatic change in the investigation. If that change is to be presumed reasonable and justified it must have been accompanied by significant investigation activities and backed up by a solid evidentiary material. Yet, very puzzlingly, the Respondent Party alleges that only "an insignificant number of investigation activities, carried out at the end of the 1990s and after the year 2000, did not lead to any considerable advance and change in the investigation" (para. 32 of the Memorandum).

1.40. Secondly, the crucial decisions to discontinue the investigation and to classify the materials from the investigation were made only in September and December 2004 respectively.

1.41. Lastly, it must be stressed that due to the secrecy clause still imposed on a significant part of the Russian Katyń investigation files it is impossible to determine precisely how many and which legal steps took place before and after the “critical date”.

1.42. After the submission of the observations of 29 May 2010, the “proportion rule” from the *Šilih* judgement was applied in the following cases concerning deaths or killings that occurred before the “critical date”: *Lăpușan and Others v. Romania*, appl. nos. 29007/06, 30552/06, 31323/06, 31920/06, 34485/06, 38960/06, 38996/06, 39027/06 and 39067/06, judg. of 8 March 2011; *Association of “21 December 1989” and Others v. Romania*, appl. nos. 33810/07 and 18817/08, judg. of 24 May 2011; *Jularić v. Croatia*, appl. no. 20106/06, judg. of 20 January 2011; *Lyobov Efimesto v. Ukraine*, appl. no. 75726/01, judg. of 25 November 2010; *Palić v. Bosnia and Herzegovina*, appl. no. 4704/04, judg. of 15 February 2011. To date, the proportion rule has been unanimously applied in 11 judgements.

Conclusion: The applicants’ counsels consider that in the present case the Court has temporal jurisdiction established both by the humanitarian rule and the proportion rule. However, they ask the Court to hold that compliance with the procedural limb of Article 2 is required by the need to ensure that the guarantees and the underlying values of the Convention are protected in the real and effective manner. Moreover, the applicants’ counsels respectfully invite the Court to make use of Article 46 of the Convention.

2. Assuming that the Court has jurisdiction to examine the case from the standpoint of the procedural obligation under Article 2, did the Russian State discharge its duty to carry out an effective investigation?

- (a) In particular, was the applicants’ right to participate effectively in the investigation adequately secured?
- (b) In rendering the decision on classification of the file materials, was due weight given to the public interest in uncovering the crimes of the totalitarian past and the applicants’ private interest in discovering the fate of their relatives?

2.1. Article 2 requires States to conduct an effective investigation in all cases of violent death or allegations that this may have occurred. This duty consists in taking all reasonable steps capable of establishing the circumstances of the death in question, identifying those who were responsible for it and bringing the perpetrators to justice. This is not an obligation of result, but one of means.

The investigation must be transparent to the public, but especially to close relatives of the victim. In all cases, the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests (e.g. *Hugh Jordan v. the United Kingdom*, appl. no. 24746/94, judg. of. 4 May 2001, § 109). Therefore the Court found violations of Article 2, e.g. when the family of the victim had no access to the investigation and court documents (*Ögur v. Turkey [GC]*, appl. no. 21954/93, judg. of 20 May 1999, ECHR 1999-III, § 92) and when the father of the victim was not informed of the decisions not to prosecute (*Güleç v. Turkey*, appl. no. 21593/93, judg. of 27 July 1998, Reports 1998-IV, § 92).

The obligation to carry out an effective investigation becomes especially pertinent when State functionaries are or may be implicated in the death (relevant Court's case law referred to in para. 65 of the submissions of 29 May 2010).

2.2. Russian investigation no. 159 does not meet the basic requirements of Article 2. In the proceedings it has not been established whether in 1940 there were any executions of Polish citizens. Responding to the questions formulated by the Court in the document communicating the application, the Russian government stated that, of those who had been detained in the Ostashkov, Starobelsk and Kozelsk camps, 1,803 had "perished", whereas the fate of the others was not known. Only 22 persons were identified during the 1991 exhumation works, none of whom was a relative of the applicants.

2.3. The Russian authorities did not provide any explanation as to the difference between the number of persons killed in Shelepin's note (21,857) and the much lower number of those called "perished" persons (1,803).

2.4. Actually, however, the Russian authorities have not provided any single name of the persons murdered. Illustrative of the Russian authorities' approach is the case of the two persons who were among the 22 bodies identified during the excavation work at Mednoye in 1991. These were Mr. Lucjan Rajchert and Mr. Waław Słabolepszy. In 2006 the Memorial Association lodged an application for rehabilitation of the 16 POWs held in the special NKVD camps, among them Mr. Lucjan Rajchert and Mr. Waław Słabolepszy. Despite the identification of these two POWs the Chief Military Prosecutor's Office rejected the rehabilitation request. This decision was confirmed by Khamovniki Circuit Court. When confronted with the results of the Russian exhumation, Judge Igor Kananovitch stated at a court hearing that a bullet hole in the skull proved only that a firearm had been used against a certain person, but not that this person had been shot dead by State functionaries and, all the more, that he was a victim of political repression (the judgements of Khamovniki Circuit Court were attached to the submissions of applicants' counsels of 12 October 2010).

2.5. In its submissions to the Court the Russian Government stated that the Russian authorities had not in any way been obliged to institute and carry out any investigation into the Katyń massacre. This position may justify why, at a certain point, when the authorities started to consider, for whatever reasons, the investigation as “mistakenly” initiated, the investigation was no longer conducted properly. It must be stressed, however, that during the first period the investigation was carried out with the full co-operation of Polish specialists and the prosecutor in charge of it intended to classify the Katyń massacre as a war crime, crime against humanity and genocide (motion of Anatoly Yablokov of 13 June 1994 and the legal opinion of the Russian Commission of Experts on the Katyń Case of 2 August 1993).

2.6. As regards the evidence collected, the Russian authorities did not conduct full-scale excavations at all burial sites. Originally, however, the excavations were to be performed not to assess the number of victims, but only to confirm that Polish citizens had been buried in certain locations. In terms of the number of victims and their names, other evidence was considered pertinent and credible. When, however, the excavation works became crucial for determining the number of victims and their identities, they should have been carried out on a full scale with the aim of identification of the bodies.

2.7. The applicants were not given the status of injured party in the investigation. As a result, they could not participate in the proceedings, present documents and evidence, or submit motions. Their participation became especially pertinent when the Russian authorities began to have doubts as to the number of victims and the fate of those whose names were on the NKVD dispatching lists.

2.8. Deprivation of opportunities to participate in the investigation was particularly detrimental to the applicants’ rights as the Russian authorities consistently assured that the investigation was coming to its end without anything suggesting a sudden and dramatic change in the conclusions of the proceedings.

2.9. Irrespective of whether the Russian authorities considered the applicants’ relatives as dead or disappeared, the applicants should have access to the case file, as their own legal interests were involved in the proceedings, e.g. knowing the circumstances of the death (or disappearance) of their close relatives and the decision-making process that led to this death (or disappearance).

2.10. In view of the foregoing, investigation no. 159 may not be considered transparent to the applicants.

2.11. The requirement of transparency also applies to the public at large. This requirement should be of particular importance in cases of serious human rights violations, especially those committed by totalitarian regimes in the furtherance

of aims contrary to values of the Council of Europe and the Convention. Investigation no. 159 concerned a mass-scale crime of international law perpetrated by the Stalinist regime. There therefore existed, and continues to exist, an important public interest in terms of knowing what circumstances of the Katyń massacre have been established by the prosecutor's office.

2.12. The Russian authorities rely on State security grounds as justification for the secrecy of the case file. There are several reasons for which this argument may not be accepted. Firstly, in a democratic society the public interest in uncovering the mass-scale crimes of totalitarian regimes is so preponderant that hardly may any true and real interest of the State, which pretends to be democratic and follows democratic values, be invoked to justify the secrecy of the investigation files. It is therefore unimaginable that, for example, the democratic Germany might claim security reasons for classifying files concerning Nazi crimes. If a State of the Convention relies on fundamental State interests in the context of crimes committed by its totalitarian predecessor it may be justly perceived as equal to suggesting the continuity between the regimes, and even as an act of approval of the atrocities. Secondly, societies that lived under totalitarian regimes, if these societies are to transform themselves into democratic ones, need knowledge about the atrocities of such regimes. This knowledge is part and parcel of civic and democratic education. Thirdly, the time factor must be taken into account. The applicants' counsels are ready to accept that even in the case of crimes of international law State interests may exceptionally be invoked. Nevertheless such exceptions must be very rigorously and narrowly interpreted, and may justify the classification of only particular sensitive documents relating to military and diplomatic matters. Over time, this exceptional justification ceases to exist.

2.13. The Russian authorities claimed that one of the major obstacles to the investigation into the Katyń massacre was the destruction of the prisoners' personal files. The applicants' counsels have serious doubts as to the indispensability of this material for the success of the investigation. However, in this context let us recall – although it is not a strictly legal argument – the words of Mikhail Bulgakov, the great Russian writer: “archives don't burn”. The allegation that the personal files of prisoners were destroyed has never been substantiated. Reasons therefore exist for doubting the assertion of the Russian authorities. Firstly, the authorities have never shown the routine protocols of destruction of files. Secondly, in the 1990s, when Russian-Polish co-operation with regard to the Katyń massacre was proceeding smoothly, the Russian partners assured their Polish colleagues, albeit unofficially, that the files of Polish prisoners of war – not only those killed in 1940 but all of them – still existed and were divided into four different categories.

2.14. Lastly, effective investigation must be directed, by the use of all available measures, towards the identification of perpetrators and bringing them to justice. As the case file is secret, we do not know who has been declared responsible for the Katyn massacre and on which grounds. However, we know that the Katyn massacre was classified as an abuse of power. This classification entirely disregards the precepts of international law, which in 1940 already treated killing of prisoners of war as a war crime. Moreover, at the time when it was committed this crime was not subject to statute of limitation (we refer in this context to the findings of the Court in the *Kononov* judgement, § 230).

2.15. If the Katyn massacre had been given the adequate legal classification, i.e. being declared an imprescriptible crime of international law, the Russian authorities should have pursued a criminal prosecution of the key organisers and perpetrators as long as they live. In this context it is worth mentioning that in the 1990s still alive were such persons as Lazar Kaganovitch, member of the Soviet Politburo, who on 5 March 1940 made the decision to execute Polish citizens, and Piotr Soprunienko, in 1940 head of the Administration for Prisoners of War and Internees Affairs.

Conclusion: Russian investigation no. 159 did not meet the very basic requirements for being declared effective. The applicants were not given injured party status, their rights to participate in the investigation were not safeguarded properly, and – a fact which became particularly important when the Russian authorities reversed the original version of the tragic events – evidence was not collected from the applicants, basic evidentiary measures (e.g. excavation works) were not undertaken, and the adequate legal classification was not given to the Katyn massacre.

Article 3 of the Convention

3. *Did the Russian authorities subject the applicants to a form of degrading treatment in breach of Article 3 of the Convention in connection with the applicants' attempts to obtain information about the fate of their relatives and the way in which the Russian authorities treated those enquiries?*

3.1. In their written submissions the applicants' counsels have already referred to the Court's case law on Article 3. It is therefore pointless to repeat these arguments at the hearing. We will only respectfully remind the Court of some elements pertinent to the allegations concerning Article 3.

3.2. The Court emphasised in its case law that the essence of violations of Article 3 does not so much lie in the fact of the "disappearance" or killing of the family

member (in “inherent” emotional suffering concomitant with killing or disappearance) but rather concerns the authorities’ reactions and attitudes to this situation when it is brought to their attention (e.g. *Çakıcı*, para. 98).

3.3. It sometimes happens that “disappeared persons” become “dead persons” when the bodies of those who disappeared are found. The peculiarity of the Katyn case is that the sequence of “first disappeared, then dead” is reversed. Those who were “dead” became the “disappeared”.

3.4. When in the 1990s Mrs. Wołk and her daughter Mrs. Wołk-Jezińska enquired of the Russian Chief Military Prosecutor’s Office about the rehabilitation of their husband and father they were informed that Lieutenant Wołk had been executed by the NKVD and his rehabilitation would be decided when investigation no. 159 was finished. The Russian authorities did not question the fact that Mr. Wołk had been executed in 1940 and that this had taken place during the Katyn massacre.

3.5. In reply to the requests lodged twice (2005 and 2007) by the applicants after investigation no. 159 was discontinued, the Chief Military Prosecutor’s Office also confirmed that the death penalty had been carried out on the applicants’ relatives.

3.6. In response to the request filed in 2008 by Mrs. Anna Stavitskaya, the Russian advocate for the applicants, the Chief Military Prosecutor’s Office stated, among the reasons for rejecting the rehabilitation request, that the applicants’ relatives had not been identified in the course of investigation no. 159.

3.7. In the course of the subsequent court proceedings the Moscow Circuit Military Court stated in its judgement of 14 October 2008 (upheld by the Military Division of the Supreme Court on 29 January 2009) that it had not been established what had happened to the applicants’ relatives who in 1940 were held in the special POW camps at Kozelsk, Starobelsk and Ostashkov, after they had left those camps and been handed over “to the disposal” of the regional NKVD commissions. Although the transfer of prisoners of war had taken place in pursuance of the decision of the Politburo of the Communist Party to exterminate Polish prisoners and those people had been delivered to the locations where executions were carried out, their fate was declared unknown.

3.8. Such statements, enunciated in sheer denial of the very basic facts and the previous assertions of Chief Military Prosecutor’s Office, must be considered as inflicting grave moral pain, anguish and stress on the applicants. By way of comparison, bearing in mind the established legal and historical standards, one

could not even imagine that a post-war German public institution might state to a group of relatives of Holocaust victims that such victims must be considered unaccounted-for as their fate could be traced only to the dead-end track of Birkenau. As a result, the competent State authorities are unable to unearth what may subsequently have happened to that group at Auschwitz, insofar as there exist no documents on their whereabouts (or because the documents have been destroyed by the Nazi authorities). Such a statement would clearly amount to an act of degrading and inhuman treatment.

We are clearly mindful of the differences between the Holocaust and the Katyn massacre. It is important to point out, however, that the destiny of those reaching the dead-end track of Birkenau and that of Gniezdovo (adjacent to Katyn) was equally tragic, with only one exception in the latter case. As the tragic events of the Holocaust and the Katyn massacre are well established, any statement of State authorities denying the reality of these two atrocities must bring about extreme distress, anguish and emotional suffering to relatives of the victims.

3.9. In response to the requests for rehabilitation the applicants were informed that the Chief Military Prosecution Office was unable to establish – as the personal files of prisoners had allegedly been destroyed – “which provision of the Penal Code formed the legal basis for calling the prisoner to account”.

3.10. The motives given by the Chief Military Prosecutor’s Office to support its decisions, which were upheld by the courts, demonstrate that the Chief Military Prosecution Office assumed that in the case of the victims of the Katyn massacre, who had been murdered in violation of the elementary rules of international humanitarian law and following a special extra-judicial procedure contrary even to Soviet legislation, there might have existed due reasons for the execution. This is tantamount to an allegation that the victims were criminals who deserved capital punishment.

3.11. We would also like to respectfully draw the Court’s attention to certain facts occurring in the proceedings for rehabilitation. Firstly, the Moscow Circuit Court in its judgement of 16 May 2008 stated – while dismissing an appeal against the decision on rehabilitation – that the only persons entitled to institute the appeal action were the victims of the repression themselves, i.e. the executed Polish officers. Secondly, in his submissions before the Moscow Circuit Court of Khamovniki Prosecutor Blizyeyev, acting on behalf of the Chief Military Prosecutor’s Office, argued that even if “hypothetically” the Polish officers “may have been killed” by organs of the Soviet state, there existed “due reasons” for the repression, as “some” Polish officers were “spies, terrorists and saboteurs” and the Polish pre-war army “had been trained to fight against the Soviet Union” (court sitting on 24 October 2008).

3.12. There is abundant evidence allowing reconstruction of the circumstances of the Katyń massacre and confirming the death of the applicants' close relatives. The names of the ten prisoners of war have been inscribed on the memorials erected in the burial places. The bodies of the three prisoners of war killed in Katyń – Mr. Wołk, Mr. Rodowicz and Mr. Mielecki – were identified during the excavations in 1943. Despite all that evidence, the applicants heard in 2008 that their relatives had “disappeared” in the spring of 1940. They also heard that if they were executed in 1940 there may have existed “due reasons” for the killing of the POWs.

3.13. The hypothesis of “disappearance” evoked by the Russian authorities must also bring about anguish and pain to the applicants because it resembles a well-known statement made by Joseph Stalin during a meeting on 3 December 1941 with Władysław Sikorski, Polish Prime Minister of the Government-in-Exile. When asked about the fate of Polish soldiers held by the Soviets in the camps for POWs, Stalin answered that those still unaccounted-for “*could have fled to Manchuria*” (minutes of talks conducted in the Kremlin on 2 December 1941).

3.14. The anguish, pain and moral suffering of the applicants cannot be classified as simply and inherently accompanying the killings themselves. It resulted from the treatment the applicants experienced from the Russian authorities when the applicants lodged their legal requests. Another factor relevant in the context of Article 3 is the age of the applicants and the fact that for most of the persons executed were fathers whom they do not remember or never had the chance to see.

Conclusions: the treatment of the applicants was degrading and inhuman, and amounted to a violation of Article 3. Their anguish and suffering clearly went beyond the emotional distress normally accompanying the killing of a close relative. The source of this anguish and suffering was the way the Russian authorities reacted to the applicants' enquiries about the fate of their close relatives.

Article 38 of the Convention

4. *As regards the Russian Government's refusal to furnish a copy of the decision of 21 September 2004 as requested by the Court, was their reference to the provisions of national law preventing confidential information from being communicated to international organisations compatible with their obligations under Article 38 of the Convention read in the light of Article 27 of the 1969 Vienna Convention on the Law of Treaties (“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”)?*

4.1. The rule expressed in Article 27 of the Vienna Convention on the Law of Treaties (VCLT) is broadly considered as a reflection of the longstanding principle of customary international law (M. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Leiden 2009, p. 375 and further references). In accordance with this principle no internal rule, even of constitutional rank, can be invoked as an excuse for the non-observance of international law. Article 27 VCLT applies only to contractual international obligations and is narrower than the customary principle of precedence of all binding norms of international law over any rule of domestic legal order.

4.2. The principle that, in international terms, the provisions of domestic law may not prevail over international obligations, goes back to the *Alabama Claims Arbitration* of 1872. In the arbitration proceedings that followed the use of a British shipyard by the American Confederates to transform a commercial vessel into a warship that subsequently sank a number of Union vessels, it was ruled that “*the government of Her Britannic Majesty cannot justify itself for a failure in due diligence of the plea of insufficiency of the legal means of action which it possessed (...) It is plain that to satisfy the exigency of due diligence, and to escape liability, a neutral government must take care (...) that its municipal law shall prohibit acts contravening neutrality*” (J.B. Moore, *International Arbitration*, New York 1898, vol. 1, p. 653).

4.3. The predominant position of international law *vis-à-vis* domestic legislation was declared in several rulings of the Permanent Court of International Justice (PCIJ).

- In the *Treatment of Polish Nationals* case the PCIJ denied the Polish Government the right to submit to organs of the League of Nations questions concerning the application to Polish nationals of certain provisions of the Constitution of the Free City of Danzig, on the grounds that:

“*according to generally accepted principles, a State cannot rely, as against another State, on the provisions of the latter’s Constitution, but only on international law and international obligations duly accepted (...) [C]onversely, a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force. Applying these principles to the present case, it results that the question of the treatment of Polish nationals and other persons of Polish origin or speech must be settled exclusively on the basis of the rules of international law and the treaty provisions in force between Poland and Danzig. The application of the Danzig Constitution may (...) result in the violation of an international obligation incumbent on Danzig towards Poland, whether*

- under treaty stipulations or under general international law (...) However, in cases of such a nature, it is not the Constitution and other laws, as such, but the international obligation that gives rise to the responsibility of the Free City”;*¹³
- Greco-Bulgarian “Communities” Case:
*“it is a generally accepted principle of international law that in the relations between Powers who are contracting Parties to a treaty, the provisions of municipal law cannot prevail over those of the treaty”;*¹⁴
 - Free Zones of Upper Savoy and the District of Gex Case:
*“it is certain that France cannot rely on her own legislation to limit the scope of her international obligations”;*¹⁵
 - Exchange of Greek and Turkish Populations Case:
*“a State which has contracted valid international obligations is bound to make in its legislation such modifications as may be necessary to ensure the fulfilment of the obligations undertaken. (...) the contracting Parties are obliged to bring their legislation into harmony with the Convention [of Lausanne of 30 January 1923], that that instrument must be construed as implicitly referring to national legislation in so far as that is not contrary to the Convention”;*¹⁶
 - Jurisdiction of the Courts of Danzig Case;¹⁷
 - In the Wimbledon case the PCIJ held that conformity with internal law does not preclude State conduct being characterised as wrongful under international law:
*“a neutrality order, issued by an individual State, could not prevail over the provisions of the Treaty of Peace. (...) under Article 380 of the Treaty of Versailles, it was [Germany’s] definite duty to allow [the passage of the Wimbledon through the Kiel Canal]. She could not advance her neutrality orders against the obligations which she had accepted under this Article”.*¹⁸

4.4. In the post-war period the International Court of Justice referred and applied the same principle in a number of cases:

¹³ Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion, 1932, Series A/B, No. 44, pp. 24-25.

¹⁴ Greco-Bulgarian “Communities”, Advisory Opinion, 1930, Series B, No. 17, p. 32.

¹⁵ Free Zones of Upper Savoy and the District of Gex, Order of 6 December 1930, Series A, No. 24, p. 12; and Judgment, 1932, Series A/B, No. 46, p. 167.

¹⁶ Exchange of Greek and Turkish Populations, Advisory Opinion, 1925, Series B, No. 10, pp. 20-21.

¹⁷ Jurisdiction of the Courts of Danzig, Advisory Opinion, 1928, Series B, No. 15, pp. 26-27.

¹⁸ S.S. “Wimbledon”, 1923, Series A, No. 1, pp. 29-30.

- *Applicability of the Obligation to Arbitrate* Case (Case of the PLO Mission); “It would be sufficient to recall the fundamental principle of international law that international law prevails over domestic law”;¹⁹
- In the same sense: *Fisheries* (Judgement, ICJ Reports 1951, p. 132); *Nottebohm* (Preliminary Objection, Judgement, ICJ Reports 1953, p. 123); *Application of the Convention of 1902 Governing the Guardianship of Infants* (Judgement, ICJ Reports 1958, p. 67); also: *Reparation for Injuries* case (*Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, ICJ Reports 1949, p. 184) and *Elettronica Sicula S.p.A.* case (*Elettronica Sicula S.p.A. (ELSI) (United States v. Italy)*, Judgement, ICJ Reports 1989, para. 73);
- In the *LaGrand* Case the ECJ held that the US constitutional procedural rule of “procedural default” may not prevail over the obligations incumbent under Article 36 of the Vienna Convention on Consular Relations;²⁰ this reasoning was then followed in the *Avena and Other Mexican Nationals* case.²¹

4.5. The principle that internal law may not prevail over international law and domestic provisions may not serve as an excuse for evading international obligations was introduced in the Draft Declaration on Rights and Duties of States prepared by the International Law Commission (1949), Yearbook of the International Law Commission 1949, pp. 286-290; the Declaration was prepared in conformity with resolution 178 (II) of the General Assembly (21 November 1947). Article 13 of the Draft Declaration provided that: “Every State has the duty to carry out in good faith its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty”.

Article 13 of the Draft Declaration made the principle in question closely related to another fundamental principle of international law: that of acting in good faith and respecting obligations (*pacta sunt servanda*).

4.6. The drafting history of Article 27 VCLT shows that it resulted from an amendment proposed by the Pakistani delegation to draft Article 23 on *pacta sunt servanda* and was modelled on Article 13 of the Draft Declaration. Among the States

¹⁹ *Applicability of the Obligation to Arbitrate* under Section 21 of the United Nations Headquarters Agreement of 26 June 1947, Advisory Opinion, ICJ Reports 1988, para. 57.

²⁰ *LaGrand* Case (Germany v. USA), ICJ Reports 2001, para. 90-91.

²¹ *Avena and Other Mexican Nationals* (Mexico v. USA), ICJ Reports 2004, para. 112.

which decidedly supported the amendment was the USSR. After the amendment draft Article 23 provided that:

“Every treaty in force is binding upon the parties to it and must be performed by them in good faith, and no party may invoke the provisions of its constitution or its laws as an excuse for its failure to perform this duty”.

The proposal was accepted on first reading by 55 votes in favour, none against, 30 abstentions (*Vienna Conference, First Session*, p. 158).

4.7. Article 27 was adopted by 73 votes in favour, 2 against, 24 abstentions (*Vienna Conference, Second Session*, p. 54). Only two States – Venezuela and Iran – expressed their opposition, suggesting the primacy of their constitutional law over treaties.

4.8. Only two States – Guatemala and Costa Rica – formulated reservations to Article 27, claiming the primacy of their constitutions. Subsequently several States raised objections to these reservations.

4.9. Article 27 or – more generally – the prohibition to invoke domestic law as an excuse for evading international obligations was referred to and applied in the practice of various international bodies and institutions.

4.10. Human Rights Committee:

- *General Comment No. 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, adopted on 29 March 2004 (2187th meeting):

4. The obligations of the Covenant in general and article 2 in particular are binding on every State Party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the State Party. The executive branch that usually represents the State Party internationally, including before the Committee, may not point to the fact that an action incompatible with the provisions of the Covenant was carried out by another branch of government as a means of seeking to relieve the State Party from responsibility for the action and consequent incompatibility. This understanding flows directly from the principle contained in Article 27 of the Vienna Convention on the Law of Treaties, according to which a State Party ‘may not invoke the provisions of its internal law as justification for its failure to perform a treaty’. Although Article 2, Paragraph 2, allows States Parties to give effect to Covenant rights in accordance with domestic constitutional processes, the same principle operates so as

to prevent States parties from invoking provisions of the constitutional law or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty. In this respect, the Committee reminds States Parties with a federal structure of the terms of Article 50, according to which the Covenant's provisions 'shall extend to all parts of federal states without any limitations or exceptions'.

4.11. Committee on Economic, Social and Cultural Rights

- *General comment No. 9, The domestic application of the Covenant*, adopted on 3 December 1998, E/C.12/1998/24:

3. Questions relating to the domestic application of the Covenant must be considered in the light of two principles of international law. The first, as reflected in Article 27 of the Vienna Convention on the Law of Treaties, is that "[A] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty". In other words, States should modify the domestic legal order as necessary in order to give effect to their treaty obligations.

4.12. International Criminal Tribunal for the former Yugoslavia

- *Prosecutor v. Blaškić* (IT 95-14-T), decision of 3 April 1996 made by President Antonio Cassese (Application to vary conditions of detention), (paras. 8-11), ILR 1998, vol. 108, p. 69:

"all States have been under an unquestionable obligation to enact any implementing legislation necessary to permit them to execute warrants and requests of the Tribunal."

- *Prosecutor v. Slobodan Milošević*, Decision on preliminary motions, 8 November 2001, para. 47:

47. Article 27 of the Vienna Convention on the Law of Treaties is also relevant. It provides: a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.

The Statute of the International Tribunal is interpreted as a treaty. The Federal Republic of Yugoslavia has an obligation under the Statute to comply with the request to arrest and transfer the accused and, therefore, cannot rely on its internal law, namely the division of power as between the federal government and its States as a justification for failure to comply.

4.13. Committee Against Torture

- *Communication No. 181/2001: Senegal*, 19 May 2006:

9.8 The Committee considers that the State party cannot invoke the complexity of its judicial proceedings or other reasons stemming from domestic law to justify its failure to comply with (...) obligations under the Convention.

4.14. Inter-American Court on Human Rights:

- Advisory Opinion OC-14/94 of 9 December 1994 on International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights), requested by the Inter-American Commission on Human Rights [116 ILR 320]. It was stated that:

35. International obligations and the responsibilities arising from the breach thereof are another matter. Pursuant to international law, all obligations imposed by it must be fulfilled in good faith; domestic law may not be invoked to justify non-fulfilment. These rules may be deemed to be general principles of law and have been applied by the Permanent Court of International Justice and the International Court of Justice even in cases involving constitutional provisions (...). These rules have also been codified in Articles 26 and 27 of the 1969 Vienna Convention on the Law of Treaties.

- Resolution of 17 November 1999 on the compliance by the State of Peru with the judgement on the Court's ruling on the merits of the *Case Castillo Petruzzi and Others against Peru*, points 3-5.

4.15. The African Commission on Human and Peoples' Rights:

- Communication 313/05 – *Kenneth Good v Republic of Botswana*, 47th Ordinary Session, held from 12-26 May 2010, the Commission stated:

139. The Respondent State further contends that for the legislative, executive and judicial organs of a State Party, a treaty is infrequently assessed in the hierarchy of legal norms applicable in the domestic legal order and as a consequence, treaties are sometimes deemed inapplicable if they conflict with the constitutional provisions of a state. Thus, in Botswana, treaties do not confer enforceable rights on individuals until passed into law by Parliament. However, they may be used as an aid to construction of laws including the Constitution.

239. It is also a well established principle in international law that a state cannot invoke its domestic laws to avoid its international obligations.

- In Communication 211/98, *Legal Resource Foundation v. Zambia*, 29th Ordinary Session, held from 23 April to 7 May 2001; the Commission reiterated that:

"international treaties which are not part of domestic law and which may not be directly enforceable in the national courts nonetheless impose obligations on State Parties" (para. 60).

4.16. The principle in question was also applied by numerous arbitrate tribunals.

- *Norwegian Shipowners' Claims* (*Norway v. United States of America*), UNRIAA, vol. I (Sales No. 1948.V.2), p. 331 (1922); *Aguilar-Amory and*

Royal Bank of Canada Claims (Tinoco case) (Great Britain v. Costa Rica), *ibid.*, p. 386 (1923); *Shufeldt Claim*, *ibid.*, vol. II (Sales No. 1949.V.1), p. 1098 (“it is a settled principle of international law that a sovereign cannot be permitted to set up one of his own municipal laws as a bar to a claim by a sovereign for a wrong done to the latter’s subject”) (1930); *Wollemborg Case*, *ibid.*, vol. XIV (Sales No. 65.V.4), p. 289 (1956) (“one thing is certain: the Italian Government cannot avail itself, before an international court, of its domestic law to avoid fulfilling an accepted international obligation”); and *Flegenheimer Case*, *ibid.*, p. 360 (1958);

- International Centre for Settlement of Investment Disputes, established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States; *Enron Corporation and Ponderosa Assets LP v. Argentina* (ICSID Case No. ARB/01/3), 22 May 2007:

208. *It must be noted also that the very legal system of the Argentine Republic, like many modern systems, provides for a prominent role of treaties under both Articles 27 and 31 of the Constitution. Treaties are constitutionally recognised among the sources considered “the supreme law of the Nation”. It follows that in case of conflict between a treaty rule and an inconsistent rule of domestic law, the former will prevail. This is not just the consequence of the Constitution so providing, but also the solution dictated by Article 27 of the Vienna Convention on the Law of Treaties in that a State “may not invoke the provisions of its internal law as justification for its failure to perform a treaty”.*

4.17. Restatement (Third) of the Foreign Relations Law of the United States § 111 cmt. a (1987):

“[F]ailure of the United States to carry out an obligation [of international law] on the ground of its unconstitutionality will not relieve the United States of responsibility under international law.”

4.18. Article 27 VCLT corresponds to Article 4 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission, which provides that: *“The characterisation of an act of a State as internationally wrongful is governed by international law. Such characterisation is not affected by the characterisation of the same act as lawful by internal law”*.

4.19. The position of international courts summarised above is accepted by the doctrine of international law. E.g. in P. Malenczuk, *Akehurst’s Modern Introduction to International Law* New York 1997, 7th ed.), it is stated that:

“the general rule of international law is that a State cannot plead a rule of or a gap in its own municipal law as a defence to a claim based on international

law. (...) This is particularly true when (...) a treaty or other rule of international law imposes an obligation on States to enact a particular rule as part of their municipal law. A similar rule can be found in Article 27 (...) in other words, all that international law says is that States cannot invoke their internal law and procedures as a justification for not complying with their international obligations. States are required to perform their international obligations in good faith, but they are not at liberty to decide on the modalities of such performance within their domestic legal systems. Similarly, there is a general duty for States to bring their domestic law into conformity with obligations under international law” (p. 64).

4.20. Question no. 4 of this Court relates specifically to the refusal of the Russian Government to submit a copy of the decision of 21 September 2004. At the outset it should be stressed that the Respondent Government relies on its ordinary legislation provisions but not on any constitutional rule (a fact which motivated the government of Venezuela and those of Guatemala and Costa Rica to respectively vote against Article 27 and formulate reservations to it).

4.21. State secret privilege is defined as “*a long-standing evidentiary privilege that permits governments to resist discovery of evidence if disclosure reasonably could be seen as threat to military or diplomatic interest of nation*” (Henry C. Black, Black’s Law Dictionary, St. Paul 1990, 6th ed., p. 1409). Therefore, the refusal must have two features: it must be related to military or diplomatic interests (but not to all security concerns as such) and additionally must be reasonable.

4.22. On several occasions international tribunals were confronted with refusals to submit the requested documents.

4.23. In *Godínez Cruz v. Honduras*, the Inter-American Court of Human Rights requested that the government of Honduras produce evidence concerning the structure of a certain unit of the national armed forces. The government averred that the evidence sought was closely related to the security of the State. Nevertheless, the government did not refuse to produce the evidence and was permitted by the Court, upon request, to present the testimony in a closed session due to “*strict security reasons of the State of Honduras*” (judg. of 20 January 1989, Ser. C No. 5, § 33-35).

4.24. In 1972, in the *Ballo* case before the Administrative Tribunal of the International Labour Organisation UNESCO, as respondent organisation, declined to make some files available to the Tribunal. UNESCO held that the requested documents were either confidential or not relevant to Mr. Ballo’s situation. However, when the Tribunal repeated its request the files were submitted by UNESCO

and inspected *in camera*. Noting subsequently that the documents were indeed of a confidential character, the Tribunal decided not to communicate them to the complainant and merely informed him of the tentative conclusions which it had drawn from them (ILO Administrative Tribunal, *Ballo v. UNESCO*, judg. No. 191, 15 May 1972, International Labour Office, Official Bulletin, vol. LV, Nos. 2, 3 and 4, 1972, p. 227).

Other cases of this kind, decided in an analogous way by the Administrative Tribunal of the International Labour Organisation, are *Molina*, Judgement No. 440 [1980] (WHO) and *Alikhan*, ILO AT Judgement No. 556 [1983] (ILO).

4.25. The issue of access to confidential information also arose in the so-called *Sabotage* cases in the 1930s (concerning two destructive acts of sabotage committed by German agents during the period of American neutrality in 1916 and 1917), brought before the United States–German Mixed Claims Commission. When the German legal agent requested the inspection of certain files of the United States Department of Justice, the Umpire dismissed the request. Before taking this decision, however, the Umpire had visited the United States Attorney-General and examined the files on his own. Having inspected the files, he was satisfied that they actually contained information pertinent to the State's security.

4.26. On the other hand, the International Court of Justice in the *Corfu Channel* case did not draw any negative inference when the United Kingdom refused to submit the requested evidence, which it considered related to naval secrecy (judgement of 9 April 1949, ICJ Reports 1949, p. 32).

4.27. The objection founded on the *Corfu* judgement was raised by Croatia in the *Prosecutor v. Tihomir Blaškić* case before the International Criminal Tribunal for the Former Yugoslavia. When the Tribunal issued *subpoenae duces tecum*, requesting, among others, some documents and evidence of a military character, the Government of Croatia challenged this decision by referring to the protection of its national security. Croatia alleged that determination of whether national security interests are involved should be left solely to the State concerned.

4.28. The Tribunal dismissed these allegations first as a chamber (Decision of 18 July 1997 on the Objection of the Republic of Croatia to the Issuance of *Subpoenae Duces Tecum*) and then as an appeals chamber (Judgement of 29 October 1997 on the request of the Republic of Croatia for Review of the Decision of Trial Chamber of 18 July 1997).

4.29. The Tribunal's rulings were based on three principal grounds. Firstly, reliance on the *Corfu* case was considered inappropriate. Article 49 of the Statute of

the International Court of Justice is couched in non-mandatory terms,²² whereas Article 29 of the Statute of the International Criminal Tribunal for the Former Yugoslavia is worded in strong mandatory language (para. 62 AC). Secondly, the Statute and the Rules of the Yugoslavia Tribunal do not envisage any exceptions to the obligation of States to co-operate with the Tribunal (para. 112 Ch, para. 63 AC). Thirdly, a blanket right of States to withhold, for security reasons, documents necessary for proceedings might jeopardise the very function of the Tribunal (para. 147 Ch, para. 65 AC).

4.30. At the same time the Tribunal stressed that the validity of State security concerns can be scrutinised by procedural arrangements, such as *in camera* proceedings and various modalities related to communicating and recording of documents considered sensitive.

4.31. The applicants' counsels respectfully submit that the reasons enunciated by the Yugoslavia Tribunal apply, *mutatis mutandis*, to this Court. Article 38 of the Convention is worded in mandatory language, does not provide for any exceptions, and a blanket right of States may endanger the very function of the Court. Simultaneously, security concerns of States can be assessed and secured by application of Rule 33 of Rules of the Court and other specific arrangements the Court might find proper.

4.32. In the later case of *Prosecutor v. Dario Kordić and Mario Čerkez* the Yugoslavia Tribunal held that the question of the relevance of the requested documents for the proceedings falls into the full discretion of the Tribunal and cannot be challenged by States. The Tribunal declared that: "*it falls squarely within the discretion of the Trial Chamber to determine whether the documents sought are relevant to the trial. Furthermore, the State from whom the documents are requested does not have locus standi to challenge their relevance*" (Decision of 9 September 1999 on the Request of the Republic of Croatia for Review of a Binding Order, para. 40).

Conclusion: the applicants' counsels respectfully submit that in the light of the case law of various international tribunals and bodies, as well as the case law of this Court, the refusal of the Russian Government constituted a violation of Article 38 of the Convention as read in the light of Article 27 VCLT.

Written by Ireneusz Kamiński

²² Article 49: "*The Court may, even before the hearing begins, call upon the agents to produce any document or to supply any explanations. Formal note shall be taken of any refusal.*"

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