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Dear Readers,

We are delighted to present you with the new volume of the Polish Yearbook of International Law for the year 2014. The volume is divided into six parts including our traditional sections such as the Polish practice in international law, Polish bibliography in international and European law, and book reviews.

The first section (In memoriam) is devoted to two eminent scholars who left us recently. We pay the tribute to professor Karol Wolfke, an "outstanding scholar and teacher, (...) a good and honest man, as well as a loyal friend", who died in March 2015 (text by prof. Jan Kolasa), and to one of the most renowned Polish scholars and diplomats, professor Krzysztof Skubiszewski, who passed away five years ago (text by prof. Jerzy Kranz).

The second section is dedicated to the Ukrainian-Russian conflict and analyses various legal issues that have emerged in the context of the developments that have been taking place in Eastern and Southern Ukraine over last year and a half. Our contributing authors focus on the classification of the conflict between Ukraine and Russia, taking into account the traditional categories of international law of *Ius ad Bellum* and *Ius in Bello* (article by Patrycja Grzebyk), as well as the legal consequences of the annexation of the Crimean Peninsula (article by Natalia Cwicinskaja). Thomas D. Grant provides us with in-depth legal analysis of the Budapest Memorandum of 5 December 1994, while René Värk considers the Advisory Opinion on Kosovo's Declaration of Independence and its relevance to Russia's annexation of Crimea. This section is supplemented by the document of the Legal Advisory Committee to the Minister of Foreign Affairs of the Republic of Poland on Annexation of the Crimean Peninsula to the Russian Federation in light of international law, which is included in our section on the Polish practice.

The third section includes other articles not connected with the leading topic of this issue. In particular, Judge Koen Lenaerts presents an analysis of the EU system in the context of fundamental rights protection, taking into account EU values and constitutional pluralism, and Magdalena Słok-Wódkowska discusses the national treatment rules in the EU regional trade agreements, while Aleksandra Gliszczyńska-Grabias takes a closer look at the controversies relating to memory laws in contemporary Europe. In another article, Hanna Kuczyńska analyses questions concerning international criminal law with respect to the selection of defendants before the International Criminal Court. The section closes with the text of Magdalena Silska on the international regulation, or lack thereof, of the situation of internally displaced persons.

It is always a great pleasure to present you with the new volume of the Yearbook. We encourage you to contact us if you wish to submit a paper for a future volume, or just to express your opinion regarding the usefulness or content of PYIL (pyil@inp.pan.pl).

Karolina Wierczyńska & Łukasz Gruszczyński

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*Jan Kolasa**

KAROL WOLFKE (1915-2015)

Professor Karol Wolfke was born on 4 June 1915 in Zürich, Switzerland. As a seven-year-old boy he came with his parents to Poland, settling in Warsaw. He began studying at a public school, then entered a secondary school with a mathematics and natural sciences profile, from which he graduated in 1933. After completing compulsory military service, he took up studies at the Warsaw University of Technology Faculty of Mechanical Engineering, which was established following World War I by his father and renowned physicist, prof. Mieczysław Wolfke. Karol soon discovered, however, that his interests were more focused on social and philosophical matters, and transferred to Vilnius University to study law. He returned to Warsaw after completing his first year of studies and continued his education at the Warsaw University Faculty of Law, also studying during the same period to improve his knowledge of foreign languages at the Academy of English.

His law studies were interrupted by the outbreak of World War II in September 1939. Professor Wolfke was called up to the army in August of that year, and by October had already landed in captivity. After a fictitious release he was arrested on 10 November and sent with his father to prison. He was then transported from Pawiak in Warsaw to the German prisoner of war camp in Murnau (Oflag VIIA), where he remained until the conclusion of the war. After locating his brother, who had also been imprisoned in a camp in Germany, he returned to Poland.

He completed his law studies in 1946 at Warsaw University, receiving his Master's degree in Law. Upon learning of an opportunity to pursue academic work in international law, a field of great interest to him, he moved to Wrocław in September 1946 and took over the post of senior assistant at the Department of the Law of Nations, which formed a part of the newly-organized Polish university. It should be kept in mind that the phrase "took over the post" at the University of Wrocław at that time is a very liberal description; together with a second assistant it was necessary to organize everything from the ground up, including clearing the rubble from classrooms and obtaining furniture, as well as seeking the necessary materials and tools for proper instruction and

* Jan Kolasa, professor emeritus, Faculty of Law, Administration and Economics, University of Wrocław.

research. Hence Professor Wolfke was instrumental in the formation of the Department of the Law of Nations at the University of Wrocław. The department was headed by prof. Stanisław Hubert, who himself came from Lwów University.

It was there that Karol Wolfke obtained his next academic degrees and titles: in 1949 he received his Ph.D. and became an assistant professor; in 1963 he obtained his post-doctoral degree and the title of Docent; in 1973 he became an "extraordinary" professor, and in 1982 a full professor.

Professor Wolfke's pursuit of his academic work and fulfilment of his teaching obligations during that time was not without significant difficulties. The communist government imposed on Poland by the Soviet Union interfered heavily in university matters, attempting to exert influence not only on scholarship and teaching, but even on the behaviour and political attitudes of university employees. Professor Karol Wolfke, fiercely loyal to the pre-war traditions of Polish universities, refused to submit to the political yoke the USSR attempted to strap upon the scholarly community and upon academic freedom in general. As a result, in 1951 he was forced to leave the Faculty and the University of Wrocław for several years. He went to the Academy of Economics, where he worked as a teacher of English. At the same time, he continued his pursuit of studies undertaken at the University of Wrocław's Faculty of Philosophy and History. He completed those studies in 1952, obtaining a Master's in Philosophy. His expanded philosophical and social knowledge was particularly valuable to him in his work on the creation of law and its role in the international community of nations.

During the first political "thaw" in Poland following Stalin's death in 1953, Professor Wolfke returned to the Department of the Law of Nations, with which he remained formally linked until his retirement in 1985. Informally, he maintained his ties with the scholars of the Department until the end of his long, challenging and extremely productive life.

After resuming his work in the Department he quickly achieved recognition as an authority in the scholarship and teaching of international law. He continued his research on crucial issues in international law, which included extensive work on the process of the formation of the international community of nations and sources of international law, particularly the formation of international legal norms based on custom. In later years he expanded his research interests to include the processes of codification and development of international law within the framework of the United Nations, focusing on the role and binding force of the nascent environmental protection and conservation law.

The outstanding results of Professor Wolfke's research occupy a prominent place in the development of international law. His achievements, which include four expansive monographs and numerous articles published in English, are widely available to internationalists across the globe and have earned the acknowledgement of the international academic community and permeate the science of international law around the world.

Every important publication by Professor Wolfke aroused significant interest among international law scholars, reflected in both the widespread references to his work as well as the frequent reviews in both domestic and renowned foreign international law journals.

His first long publication in English, entitled *Great and Small Powers in International Law from 1814 to 1920* (Wroclaw 1961), presented his outstanding and meticulous research methods. He perceived the foundations of the modern international community in the anti-Napoleon coalition of great powers, which continually strived to establish and reinforce its superiority over smaller states at successive international conferences. These powers formally cemented their status in the Pact of the League of Nations, and later reaffirmed it in the Charter of the United Nations. In Wolfke's view, these states received formal acceptance of their leading roles in the international community at the relatively low price of admission of smaller states' representatives to discussions in international fora. He added that, following this forced compromise between larger and smaller states, international law theorists would do well to stop writing about the absolute equality of all states. This formula was exchanged for the concept of "equity before the law", which was understood primarily as legal protection, equivalent to independence, arising from the binding force of international law on all state actors.

Professor Karol Wolfke established his place in the international law community owing in particular to his next work, also published in English, entitled *Custom in Present International Law* (Wrocław 1964). He engaged in detailed research on the issue specified in the title in order to demonstrate that, contrary to the contemporary belief in the declining role of customary norms in the codified modern system of international law, law-making by custom remained in exuberant health. By focusing on the widespread reliance on the "practice of states", particularly those aspects which were most frequently cited by the PCIJ and the present ICJ, as well as taking heed of the views of scholars, particularly those presented at the forum of the International Law Commission, he demonstrated that customary norms in the modern international community retained both their vigour and their usefulness. In spite of what Wolfke demonstrated as the elusiveness of customary norms, with their binding force based merely on the presumed approval of states, he argued that they continue to serve as the most important resource in determining general principles of international law.

This publication met with significant interest in both the Polish and international academic communities. Professor M. Iwanejko wrote that this work by Professor Karol Wolfke was one of "the essential works in the theory of international law", one of lasting scientific significance (*Państwo i Prawo* [State and Law], 1965/5-6). Professor R. Falk, at the conclusion of his review published in American Journal of International Law, declared that Professor Wolfke's book "is an indispensable guide to anyone undertaking a study of the questions raised in it" or "more generally, to anyone concerned with the wider subject of the sources of international law (...)" (American Journal of International Law, 1966/1). A similar assessment of the scientific value of the publication came from Professor Ch. Rousseau (Revue générale de droit international public, 1965/2). The book's timeless value was attested to by the issuance of a second edition in 1992 by

Martinus Nijhoff Publishers, as well as the placement of an order for another edition, which Professor Karol Wolfke sadly failed to complete in its entirety.

Professor Wolfke's next monograph, entitled *Development and Codification of International Law: Selected Problems from the United Nations Practice* (Wrocław 1972), also met with significant praise. This study contains a very detailed legal analysis of the codification activity undertaken by the United Nations. The author's research focused primarily on the controversial issue of what determines the content of expanded and codified legal norms. This analysis led Wolfke to many interesting conclusions of a general nature, particularly with respect to the law-creating role of precedence and scholarship, referred to in the ICJ Statute as merely aids in determining international legal norms. These conclusions received very favourable reviews in both domestic and foreign publications (e.g. *Państwo i Prawo*, 1973/3, and the American Journal of International Law, 1973/67).

His final book, published in 1979 under the title *International Environmental Law: Creation and Enforcement*, was yet another landmark in the science of international law. Professor Wolfke conducted broad-based research on the issue during a year-long residence at the Woodrow Wilson International Center for Scholars in Washington. In this book, Wolfke presented a range of interesting perspectives and analyses concerning certain truths emerging out of the process of creating and developing international law in new areas, which had not previously been under the domain of international law. In Professor Bierzanek's opinion, when considering Prof. Wolfke's book against the backdrop of the many works focused on environmental law in the international plane, "it is distinguished by its comprehensive approach to the subject, as well as a theoretically in-depth portrayal of the key issues in this new area of international law" (*Państwo i Prawo*, 1979/10).

It is easy to note that while the above four essential publications by Professor Wolfke appear under different titles, taken together they constitute one unified strand of research on what can broadly be referred to as the sources, development and force of contemporary international law, with particular emphasis on customary law. Professor Wolfke's contributions in this respect are both revelatory and long-lasting.

Another expression of acknowledgement for Professor Wolfke's scientific contributions is reflected in the awards bestowed on him by the Minister of Science in 1976, 1980 and 1985, the *Państwo i Prawo* award in 1980, and multiple distinctions received from the Rector of the University of Wrocław.

Professor Wolfke was a member of many scientific societies and cooperated with various institutions both at home and abroad. He was, *inter alia*, a member of the Wrocław Scientific Society, served for many years as a member of the Commission of Legal Sciences at the Polish Academy of Sciences, and was also a member of the editorial staff of the Polish Yearbook of international Law. He was a member of the International Law Association (Polish Section) and the American Society of International Law. He cooperated with universities in Brno, Munich and Tübingen, and in 1983 served as the Director of Studies at The Hague Academy of International Law. He participated in the preparatory work on the International Red Cross publication entitled *Customary International Humanitarian Law*, vols. I-III (Cambridge 2005).

Professor Karol Wolfke was valued in equal measure for his work as a teacher of international law. His lectures and seminars were the subject of intense audience interest and engagement. He served as supervisor to six Ph.D. candidates in international law. For his outstanding work in the service of international law scholarship and instruction, he was awarded a range of titles and distinctions from both universities and state institutions.

It is with great sadness that we bid farewell to Professor Wolfke, who left us on 8 March 2015. He was not only an outstanding scholar and teacher, but also, and perhaps most importantly, a good and honest man, as well as a loyal friend.

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*Jerzy Kranz**

SAPERE AUSO (TO ONE WHO DARED TO BE WISE) ON THE FIFTH ANNIVERSARY OF THE DEATH OF KRZYSZTOF SKUBISZEWSKI

When Krzysztof Skubiszewski passed away five years ago, on 8 February 2010, Poland bid farewell to both a modest man and a great statesman and academic, to a Pole and a European, an eminent theoretician and a skilled practitioner of international law, who was also the first Minister of Foreign Affairs of newly-independent Poland and later President of the Iran-United States Claims Tribunal in The Hague.

The aim of this contribution is to outline the Foreign Minister's most important accomplishments in order to better introduce him to the reader as well as to share a handful of personal reminiscences.[1] An analysis of his scholarly work would warrant separate coverage, so in this memorial I only briefly mention its key directions. I have chosen instead to often cite the Foreign Minister from various sources, especially the collection of his speeches, statements and interviews from 1997.[2]

Nothing during Minister Skubiszewski's groundbreaking time in office (12 September 1989 – 25 October 1993) fell from the sky. And although many of his innovations in his foreign policy work appear obvious from today's perspective, it is worth remembering that there were no clear precedents for his work at that time. At the turn of the 1990s his job demanded wisdom, strength of character and careful diplomacy. And Krzysztof Skubiszewski was the right man in the right place at the right time – an exquisitely educated man of principle who was not afraid to stand by his beliefs and pursue his vision. This was a completely new attitude in the Polish political community at that time.

He died prematurely and it is unfortunate that his all-consuming life of public service did not allow him to write a memoir. While the unprecedented events of the turn of the 1990s cannot all be adequately recounted in written form, even worse their eye-

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[1] *See* my contribution in R. Kuźniar (ed.), *Krzysztof Skubiszewski – dyplomata i mąż stanu*, PISM, Warszawa: 2011.

[2] K. Skubiszewski, *Polityka zagraniczna i odzyskanie niepodległości. Przemówienia, oświadczenia, wywiady 1989–1993*, Interpress, Warszawa: 1997.

witnesses and participants are slowly leaving us... Having this in mind, I try to recap the importance of his life below.

1. Krzysztof Skubiszewski was born on 8 October 1926 in Poznań, western Poland, into the family of Ludwik Skubiszewski, a professor at the Poznań Medical University, and Aniela, née Leitgeber. Under German occupation he was displaced to the so-called *Generalgouvernement* area with his parents and siblings. He lived in Warsaw and Biała Podlaska throughout World War II. He took underground schooling to pass the final secondary education examinations, and after the war he began his university studies at the Faculty of Law and Economics of the University of Poznań.

Until 1973 Skubiszewski was a professor at the Law Faculty of the Adam Mickiewicz University in Poznań, lecturing on public international law. In his Master's thesis he analysed the immunities and privileges of the representatives of member states and international officials of the League of Nations and the UN. The Polish communist authorities declared that his 1950 doctoral dissertation, on the conditions of obtaining United Nations membership, contained "fallacious methodology," so it remained unpublished until 2004.[3] In fact, the Faculty of International Law in Poznań was criticised at the time for a "lack of aggressive material underpinning progressive study" as well as for minimal utilisation of Soviet literature and for scientific objectivism.[4]

In 1957 and 1958 he graduated in European Affairs from the University of Nancy and was awarded the title of Master of Law by Harvard Law School. His 1960 habilitation thesis was devoted to the study of currency in occupied territory, with particular emphasis on German practice.[5]

He was an excellent and well-liked teacher whose lectures were very popular among students. He was known for "alluding to risqué subject matter for the time" which he did with great finesse. He was often dressed "in a navy blue suit with a burgundy bow-tie, which earned him a reputation for being an arbiter of elegance."[6]

Under political pressure from the Polish communist authorities, who obstructed his professorial appointment (also for his criticism of the 1968 Warsaw Pact intervention in Czechoslovakia), Skubiszewski was forced to leave the University. He went on to find employment at the Institute of Legal Sciences of the Polish Academy of Sciences in Warsaw, where he headed the Department of Public International Law.

He continued to live in his 20-square-metre studio flat in Poznań (a consequence of the communists' earlier decision to evict him from a larger apartment), which was

[3] K. Skubiszewski, *Warunki uzyskania członkostwa Organizacji Narodów Zjednoczonych*, Ars boni et aequi, Poznań: 2004.

[4] J. Sandorski, *Nie deptać prawników. Wydział Prawa Uniwersytetu im. Adama Mickiewicza w anegdocie*, Wydawnictwo Poznańskie, Poznań: 2007, p. 126 (the author cites an article by L. Gelberg, *Problematyka prawnomiędzynarodowa na łamach Przeglądu Zachodniego (1952-1953)*, 7-8 Państwo i Prawo 178 (1954).

[5] *See* K. Skubiszewski, *Currency in Occupied Territory and the Law of War*, 9 Jahrbuch für internationales Recht 161 (1959–1960).

[6] Sandorski, *supra* note 4, p. 122.

so small that it could hardly contain his spacious book collection. It was there that he wrote his works.

2. Krzysztof Skubiszewski's scholarly achievements are more than impressive.[7] His publications are strikingly profound, precise in their arguments, thoroughly substantiated and written in superb style. His main areas of interest embraced the legal effects of World War II (including two books on Poland's western border),[8] the law of international organisations (especially the role, significance and legal consequences of their resolutions, including the acts of institutions of the European Communities),[9] selected aspects of the sources of international law,[10] and the use of armed force.[11]

His numerous works, many of them of a pioneering nature in Poland at the time, were dedicated to the relationship between international and domestic law, especially the application of international treaties by domestic courts.[12] Resolutions on this

[7] For a list of publications and Professor Skubiszewski's biography see J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century. Essays in Honour of Krzysztof Skubiszewski*, Kluwer law international, The Hague, London, Boston: 1996, pp. 11–58. For comments on his academic achievements *see* W. Rudolf, *Laudatio*, [in:] *Ehrenpromotion Krzysztof Skubiszewski*, Johannes Gutenberg-Universität, Fachbereich Rechts- und Wirtschaftswissenschaften, Mainz, 26 April 1991.

[8] K. Skubiszewski, *Zachodnia granica Polski w świetle traktatów*, Instytut Zachodni, Poznań: 1975; *idem*, *Zachodnia granica Polski*, Wydawnicwo Morskie, Gdańsk: 1969; *idem*, *Administration of Territory and Sovereignty: A Comment on the Potsdam Agreement*, 23 Archiv des Völkerrechts 31 (1985); *idem*, *The Great Powers and the Settlement in Central Europe*, 18 Jahrbuch für öffentliches Recht 92 (1975); *idem*, *Gdańsk and the Dissolution of the Free City*, [in:] J. Delbrück, K. Ipsen, D. Rauschning (eds.), *Recht im Dienst des Friedens. Festschrift für Eberhard Menzel zum 65. Geburtstag*, Duncker & Humblot, Berlin: 1975, pp. 469-85; *idem*, *Poland's Western Frontier and the 1970 Treaties*, 67 American Journal of International Law 23 (1973); *idem*, *The Western Frontier of Poland and the Treaties with Federal Germany*, 3 Polish Yearbook of International Law 53 (1970).

[9] K. Skubiszewski, *Uchwały prawotwórcze organizacji międzynarodowych*, PWN, Poznań: 1965; *idem*, *Enactment of Law by International Organizations*, 41 British Yearbook of International Law 198 (1965-66); *idem*, *Resolutions of the General Assembly of the United Nations*, Institut de droit international, Annuaire, Paris: 1985, vol. 61, part I; *idem*, *Les techniques d'élaboration des grandes conventions multilatérales et des normes quasi-législatives internationales (en collaboration avec Hans Blix)*, Institut de droit international, Annuaire, Basel: 1978, vol. 57, part II.

[10] K. Skubiszewski, *Les actes unilatéraux des Etats*, [in:] M. Bedjaoui (ed.), *Droit international. Bilan et perspectives*, Pedone, Paris: 1991, vol. 1, pp. 231-51; *idem*, *Der Rechtscharakter der KSZE-Schlussakte*, [in:] *Drittes Deutsch-Polnisches Juristen-Kolloquium*, Nomos, Baden-Baden: 1977, vol. 1, pp. 13-30.

[11] K. Skubiszewski, *Quelques remarques sur la notion de force dans la Charte des Nations Unies*, [in:] *Mélanges Georges Perrin*, Diffusion Payot, Lausanne: 1984, pp. 293-301; *idem*, *Use of Force by States. Collective Security. Law of War and Neutrality*, [in:] M. Soerensen, *Manual of Public International Law*, Macmillan, London–New York: 1968, pp. 739-854.

[12] K. Skubiszewski, *Prawo międzynarodowe w porządku prawnym państwa*, [in:] *Prawo międzynarodowe a prawo wewnętrzne w świetle doświadczeń państw socjalistycznych*, Wrocław-Warszawa: 1980, pp. 13-53; *idem*, *Prawo PRL a traktaty*, 3 Ruch Prawniczy, Ekonomiczny i Socjologiczny 1 (1972); *idem*, *Miejsce traktatów w porządku prawnym PRL*, 1 Sprawy Międzynarodowe 80 (1973); *idem*, *Traktaty a prawo krajowe*, 8-9 Państwo i Prawo 255 (1977); *idem*, *Konflikt normy krajowej z międzynarodową*, 12 Państwo i Prawo 3 (1979); *idem*, *Prawa jednostki, umowy międzynarodowe i porządek prawny PRL*, 7 Państwo i Prawo 9 (1981); *idem*, *Stosowanie i przestrzeganie prawa międzynarodowego w państwie*, 9 Państwo i Prawo 18

matter, adopted at his initiative and passed on to the Polish communist authorities, are well-known in Poland. These publications constituted Professor Skubiszewski's great contribution to the struggle for human rights, playing a key role in the registration of independent trade unions and having a significant impact on future constitutional regulations, as they reflected a departure from the communist way of thinking about international law.[13] He held to these views while serving as the Foreign Minister.

Many of his scholarly works deal with German-Polish issues. His book on Poland's western border appeared in 1969 as a manuscript only and was unavailable in bookstores. A twist of fate, however, soon brought the question of a treaty normalising relations between Poland and West Germany to the negotiating table. The document was ultimately signed in Warsaw in 1970, and the Polish negotiators were known to rely extensively on Krzysztof Skubiszewski's manuscript.

In his works Professor Skubiszewski defended the Polish national interest while avoiding nationalism.[14] He was engaged in Polish-German rapprochement in the belief that focusing on a tragic past and hatred was not the best way to build the future. His task was not made easier by West German policy at the time, nor that country's legal doctrine. He was among the leading architects of regular meetings of Polish and German lawyers (since the early 1970s). In 1984 he was awarded the prestigious Humboldt Foundation Award.

He was a Visiting Professor at the School of International Affairs, Columbia University, New York, in 1963–1964, at the Department of Law at the University of Geneva in 1971 and 1979, and at All Souls College, Oxford, in 1971-1972. He was offered a position with the United Nations Secretariat in New York, but – as he observed in an interview – "the communist authorities did not agree, because I was neither with the Foreign nor the Interior Ministry and I had refused to collaborate when expected to."[15]

Krzysztof Skubiszewski owed his scholarly position to hard work and diligence. He never wrote anything at somebody's political bidding. This is one of the reasons for the international renown he had achieved already at by the end of the 1950s. He enjoyed the respect and trust of many of his distinguished colleagues abroad, many of whom visited him – on his invitation – in Poland. Fifty-eight authors (11 of them Polish) contributed to the *Festschrift* honouring the 70th anniversary of his birth.[16]

(1984); *idem*, *Wzajemny stosunek i związki pomiędzy prawem międzynarodowym i prawem krajowym*, 1 Ruch Prawniczy, Ekonomiczny i Socjologiczny 1 (1986); *idem*, *Konstytucyjne ujęcie stosunku prawa polskiego do prawa międzynarodowego*, 10 Państwo i Prawo 138 (1987); *idem*, *Umowy międzynarodowe w porządku prawnym PRL*, 6 Państwo i Prawo 135 (1989).

[13] A. Wyrozumska, funeral speech in the name of the Polish Group of the International Law Association, 18 February 2010 (unpublished, on file with the author).

[14] K. Skubiszewski, *Niebezpieczeństwo nacjonalizmu w Europie*, from the inaugural lecture beginning a series of readings titled *Rozmyślania o Europie*, Frankfurt an der Oder, 21 February 1992, [in:] Skubiszewski, *supra* note 2, pp. 195-207.

[15] Głos Wielkopolski, interview, 2-4 April 1994, p. 3.

[16] *See* Makarczyk, *supra* note 7.

3. Professor Skubiszewski was not by nature a man of politics, although he never concealed his views. He summed them up as the Minister of Foreign Affairs in 1989: "The State was a tool of the Polish United Workers' Party (PZPR). It was a contradiction of normal statehood. Today we all feel the effects of an absence of a normal state and we shall continue to feel them for a long time."[17]

He was a member of the Solidarity (Independent Self-Governing Trade Union) from 1980, a member of the Primate's Social Council in 1981-1984, a representative of the Polish Episcopate in the Steering Committee of the Polish-German Forum in 1984–1989, and a member of the Consultative Council in 1986-1989.[18]

Between 12 September 1989 and 26 October 1993, Professor Skubiszewski held the post of the Foreign Minister – the first in independent post-communist Poland. Premier Tadeusz Mazowiecki announced Professor Skubiszewski's candidacy despite resistance from the Polish United Workers' Party (PZPR).[19] The circumstances at the time of his assuming office were not exactly auspicious. "At the beginning, I wasn't sure if one day the government might not be interned and the Polish experiment would be finished. There was too much to get done, however, to worry about hypothetical actions of bygone powers."[20]

High-level representatives of the PZPR (Kiszczak, Ciosek) warned Solidarity and the Church of the possibility of a revolt within the army and secret service, as well as a backlash from the USSR. This is what ultimately led to General Jaruzelski becoming President.[21] The PZPR was intent on keeping as much power as possible as well as maintaining strong ties with the USSR. This contrasted greatly with the views of Mazowiecki and Skubiszewski, who longed for an independent Poland with Western ties.

[17] Rzeczpospolita, interview, 16 November 1989.

[18] K. Skubiszewski, *Do niepodległości krok po kroku*, Gazeta Wyborcza, 11 September 2009: "Why did you join a Council that was formed by the Communists? – The situation in Poland seemed hopeless. I considered it pertinent to urge the Polish leaders to accept the changes happening within the country, to legalise 'Solidarity'. In particular, the attorney Władysław Siła-Nowicki (who was sentenced to death by the Communists four times after World War II), Andrzej Święcicki (former Chairman of the Warsaw Board of the Club of Catholic Intelligentsia [KIK]) and some other members of the Council, including myself, felt that our participation in Jaruzelski's Council hinged primarily on freeing all political prisoners, and secondly on observing the rule that the Council would not be enacting any decrees, but would function solely as a platform for dialogue."

[19] Skubiszewski, *supra* note 18: "Mazowiecki added: I am trying very hard to avoid handing this department over to the PZPR. The Communists agreed to Mazowiecki being Premier, but reserved control over four departments: defense, foreign and internal affairs, as well as transportation and communications. Mazowiecki, however, rightly deemed that his premiership brought with it complete change, initiating a new era and a new face of Poland, which needed to also be expressed in foreign policy"; A. Hall, *Rząd Mazowieckiego dokonał największych zmian*, Gazeta Wyborcza, 22 August 2009: "It was very important to Mazowiecki that the Ministry of Foreign Affairs be headed by someone outside of the PZPR. Erstwhile leader Mieczysław Rakowski opposed this idea."

[20] Skubiszewski, *supra* note 18.

[21] M. Korkuć, *Dwaj prezydenci – dwa światy*, Rzeczpospolita (Plus-Minus supplement), 17-18 July 2010.

Skubiszewski often recalled that "the so-called People's Republic of Poland was practically devoid of foreign policy – it was merely a division of state administration governed by PZPR but subject to foreign control."[22] The Ministry of Foreign Affairs was during that time a closed structure that drew its personnel primarily from the PZPR apparatus, youth organisations, as well as the secret service; a number of these individuals graduated from Moscow's school of diplomacy.[23]

The leftover party apparatus post-communist Poland,[24] assisted by certain right-wing nationalists,[25] tried to make the life of the new Foreign Minister very difficult. He turned out, however, to be too independent, pro-European, and above all, too wise for them. Just before completing his mission, he warned: "The people of the PZPR, the organisation upholding Poland's bygone dependence on the USSR, are still present on the political stage, some have even recently returned to it with increased confidence. They and their varied supporters, however, have paid short shrift to the debilitating past of this nation."[26]

Upon Skubiszewski's departure from office an outrageous report by the Parliamentary (*Sejm*) Committee[27] was published (1994) on the condition of the personnel at the Ministry of Foreign Affairs.[28] This report attested to the fact that the mentality of the PZPR, as well as its system, had unfortunately survived the changes of 1989.

4. Here let us recall the words of French philosopher André Glucksmann: *sortir du communisme, c'est rentrer dans l'Histoire*. Implementation of the necessary and fundamental changes in Poland's foreign orientation proved essential but difficult, not only due to opposition from Moscow and the post-communists in Poland, but also because

[22] K. Skubiszewski, *Imperatyw ciągłości*, Rzeczpospolita, 29 September 1993.

[23] "Talented individuals were barred from working in the Ministry of Foreign Affairs (and not only there) for decades. (...) The Ministry became the exclusive domain of the PZPR", Rzeczpospolita, *supra* note 17; "The undersecretaries, the entire team in essence, was composed of individuals from the previous era. Their loyalty to the new Minister was questionable at best. (...) In the beginning I had no advisors, but after personnel changes in the department, a small group of senior employees quickly formed and became excellent advisors. I am very indebted to them" (Skubiszewski, *supra* note 18).

[24] An interview conducted by Marek Siwiec and Wiesław Dębski and published in Trybuna, 6-7 April 1991, contains some sample arguments postulated by these journalists: "A particular type of foreign policy system was shaped over the course of 45 years embracing, among others, special relations with the Soviet Union (...). It appears to us that you are putting a lot of effort into dismantling what has been hitherto formed, (...) a great number of people do not agree with your overt anti-Sovietism nor your unfriendly policy towards the USSR, (...) In breaking off her partnership [with the USSR], Poland has found herself alone in Europe. (...) there are fears that a Poland free of dependence on the USSR, being economically weak, is throwing herself at the mercy of yet another Super Power."

[25] Skubiszewski, *supra* note 2, pp. 74, 346-8, 350-1.

[26] *See* Skubiszewski, *supra* note 22.

[27] Its members included: Andrzej Micewski, Janusz Dobrosz, Tadeusz Iwiński, Włodzimierz Konarski, Wojciech Lamentowicz, Tadeusz Samborski.

[28] *See* K. Skubiszewski, *Lista proskrypcyjna*, Życie Warszawy, 9 June 1994; *see also*, W. Bereś, K. Burnetko, *PRL-owska miotła w MSZ?*, Tygodnik Powszechny, 8 July 1994.

of the play-safe approach of the West, which had no clear and firm strategy for change in Europe. By employing peaceful and skilful diplomacy, extraordinary effort, original initiatives as well as great personal style, Skubiszewski led Poland onto the international stage as an independent and meaningful partner.

He summed up the situation himself as follows:

"Mazowiecki's foreign policy proposed a progressive distancing from the USSR, normalising relationships with neighbours, and creating ties with the West. It had to be a gradual process."[29] Skubiszewski's rationale was rooted in the sad fact that "from the partition of Poland [at the end of the 18th century, JK] to the catastrophe of 1939, Poland's fate was a function of German-Russian relations. It was time to end this disastrous situation."[30]

Skubiszewski combined a vision of the future with realism and patient diplomacy. He served with a sense of far-sighted responsibility. He didn't want "ideas like fireworks, but genuine thinking and political action. Realism combined with a vision for the future."[31] Since the West was unprepared for any sudden geopolitical changes, Skubiszewski was a guarantee of dependability and prudence in rebuilding the European political stage. He was neither anti-German nor anti-Russian – he was Polish and European.

Foreign Minister Skubiszewski very clearly introduced the notion of the Polish national interest, despite difficulties in defining this terminology.[32] He was aware that for the past 200 years the Polish nation had been not only repeatedly attacked and its territories annexed, but its very existence threatened. He equated Poland's *raison d'Etat* with the national interest, acknowledging, of course, all the basic tenets of international law and international morality (including human rights). He underscored that politics need not be on a collision course with morality, but that politics conflicting with international morality is, in the long run, doomed to failure. Soon after taking office as the Foreign Minister, in a speech at a United Nations General Assembly in September 1989, he reminded everyone that the Soviet-German treaties of 1939 "were contrary to international morality, to the very definition of treaties as well as to all applicable fundamental rules of international law."[33]

Foreign Minister Skubiszewski defined Poland's *raison d'Etat*[34] as regaining its political independence and safeguarding its security by breaking free from Soviet domination and establishing normal (not special) relations with Russia on a new basis, as well as

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[29] Skubiszewski, *supra* note 18.

[30] *Polska w Europie*, Rzeczpospolita (Plus-Minus supplement), 15-16 July 2006.

[31] Foreign Minister Krzysztof Skubiszewski's speech given during the VI Polish-German Forum in Poznań, 22 February 1990, [in:] W.M. Góralski (ed.), *Polska-Niemcy 1945-2007. Od konfrontacji do współpracy i partnerstwa w Europie*, PISM, Warszawa: 2007, pp. 361-64.

[32] *See* A. Wolff-Powęska, *Polska racja stanu w procesie normalizacji stosunków z Niemcami w warunkach wolności i demokracji*, [in:] Góralski, *supra* note 31, pp. 177-79.

[33] K. Skubiszewski, from a speech given during the general debate at the 44th General Assembly Session of the United Nations, 25 September 1989, [in:] Polityka (*supra* note 2), pp. 15 and 21.

[34] *See* K. Skubiszewski, *Racja stanu Rzeczypospolitej Polskiej*, [in:] Skubiszewski, *supra* note 2, pp. 299-308.

Poland's inclusion in the political structures of the Western world (NATO, EU), thus overcoming the post-Yalta division of Europe into spheres of influence.[35] In response to President Mitterrand's comments, he stated: "Everything that distances us from Yalta fosters good international relationships and European unity."[36] He underlined that "our *raison d'Etat* presupposes a rejection of any politics that locate Poland (and its neighbours) in a 'grey' or buffer zone in which we are to become a subject of force, rivalry even, of more powerful nations."[37] He added a characteristically far-sighted commentary, in reference to Tadeusz Mazowiecki's government, that "security zones must not be (...) identified with spheres of influence."[38]

5. In his vision of a post-communist Poland, Krzysztof Skubiszewski paid great heed to the problem of national security. He perceived this issue in the light of newly regulated relationships with neighbouring countries as well as future membership in the European Union and NATO. He longed to see Poland as strong and stable domestically (politically and economically), as well as connected to European security institutions. Furthermore, he strove to develop regional cooperation and steered Poland in the direction of becoming a role model of stabilisation in the central European region.

Though he rejected the satellite state arrangement, he was able to maintain good relations with the Soviet Union, and next with Russia, for whom Poland's independence was a bitter surprise. The chief issue was "a rebuilding and change of relations with the USSR – the abolishment of dependence on Moscow and the dissolution of the Soviet Bloc. Dissolving the Soviet Bloc could be achieved with the consent of all interested parties. In this way we avoided the conflict and destabilisation that the West was so worried about. We wanted to join with the West, and a bothersome candidate for partner would surely have been rejected, or at the very least treated with distance. Please remember that the West (including President Ronald Reagan, despite his anti-Soviet stance) continued to acknowledge the division of Europe and the Soviet sphere of influence. The West did not actively pursue any politics aimed at emancipating the nations trapped in an external and internal Moscow Imperium. The collapse of Soviet domination was not the fruit of American or – more generally – Western politics, although they did have a hand in the event."[39]

One of the premises of his thinking was the dissolution of the Warsaw Pact (formally, the Treaty of Friendship, Co-operation, and Mutual Assistance) and Comecon (formally, the Council for Mutual Economic Assistance). In aspiring to achieve this goal he paid

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[35] K. Skubiszewski, opening remarks to the Sejm of the Republic of Poland given on 26 April 1990 (*ibidem*, pp. 41-54); *idem*, a speech given during a joint sitting of five parliamentary commissions (of the Sejm and Senate of the Republic of Poland), 18 November 1992 (*ibidem*, pp. 269-290).

[36] *See* Skubiszewski, *supra* note 31, p. 362.

[37] *See* Skubiszewski, *supra* note 2, p. 303.

[38] K. Skubiszewski, from a speech given during the general debate at the 44th General Assembly of the United Nations, 25 September 1989 (*ibidem*, pp. 15 and 21).

[39] *Polska w Europie*, *supra* note 30.

strict attention to legal aspects, thereby avoiding nervous reactions from Moscow. There was no doubt in his mind that the "Warsaw Pact stopped being a platform for beneficial cooperation. (...) We want excellent relations with the USSR, but the Warsaw Pact is not a necessary factor in the success of these relations."[40]

In Skubiszewski's opinion, "[w]e couldn't join with the West and simultaneously be a part of the Warsaw Pact and Comecon. My goal was to unify all parties involved in order to dissolve these institutions, including Moscow, and not just to step away from them as a single country (with potentially Czechoslovakia or Hungary joining us), although that was a potential scenario. The West was actually interested in maintaining the Warsaw Pact at this time due to disarmament talks. This was not a decisive aspect for me, however certain realities needed to be considered. (...) The Warsaw Pact needed to, first, be weakened and only then effectively dissolved – with the consent of all sides. Which also meant convincing the USSR that the Warsaw Pact was dead."[41] Polish policy made the Russians aware that neither the Warsaw Pact nor Comecon were going to continue functioning in accordance with the hopes that Moscow had initially placed in them. The Warsaw Pact ceased to exist on 1 July 1991 by mutual consent,[42] while the final Comecon session took place on 28 June 1991 in Budapest.

Skubiszewski was criticised for being too soft with the Soviets and in the beginning was even accused of the "Finlandization" of Poland, which was complete nonsense. His vision and goal was to create a Polish nation free from Moscow's control and the control of the PZPR. Due to the circumstances, Mazowiecki's government acted firmly when it came to its goals, yet with caution in terms of its implementation of gradual measures. The Foreign Minister never accepted Soviet proposals (the so-called Falin-Kwiciński Doctrine), even though other former satellite states concluded treaties with Russia which obligated them to refrain from military-political alliances.

6. In terms of national security, the Polish Foreign Minister took account of a pre-war history lesson: "In order to be secure, [Poland] had to enter into the structures created by the West after World War II that were proven in their stability. No other policy was even taken into account, not even after the unexpectedly quick collapse of the USSR, when the geopolitical and geo-strategic placement of Poland turned in our favour. In particular, the idea behind the so-called *Intermarium* policy certainly did not come into play, that is, the idea of creating a union of states to the west of Russia –a stretch from Finland to Romania under the eventual leadership of Poland (to which none of the potential nations had any heart) (...) I did not see the need for such efforts nor any chance for their success. The nations along this stretch did not wish to have any kind of outside leader."[43]

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[40] K. Skubiszewski, Nasz Dziennik,13-14 October 1990.

[41] Skubiszewski, *supra* note 18.

[42] K. Skubiszewski, from a speech during a sitting of the Political Consultative Committee of the Warsaw Pact, Budapest, 25 February 1991, [in:] Skubiszewski, *supra* note 2, pp. 117-120.

[43] *Polska w Europie*, *supra* note 30.

This, though, did not stop Poland from developing partnerships with nations from within this region (The Visegrad Group, Pentagonale).[44] Simultaneous to relations with Moscow, the Minister ran a parallel policy for independence for a handful of Soviet Republics (Belarus, Ukraine, and Lithuania).[45] It was an unprecedented move which showed the world that Polish diplomacy was capable of marrying ingenuity with action.[46]

When it came to NATO, Skubiszewski's stance was firm. He sought partnership with NATO from the get-go, with the aim of NATO membership in the future, though he realised it would not happen overnight nor solely as a result of Polish eagerness. This political move did not enjoy popularity among the post-communists in Poland, who for years were against the idea. On the other side were critics who, seemingly ignorant of the circumstances of the time, held the idea that both NATO and the European Union couldn't wait to invite Poland into their fold.

Instead of engaging in jugglery and ideological hocus pocus, Tadeusz Mazowiecki's government continued to act in a straightforward manner. Foreign Minister Skubiszewski was always in his element when he was working towards a goal, which in this instance was Poland's membership in NATO – but this vision still needed to be defined.[47] From the time he took office the Foreign Minister initiated ties (his visit to Brussels on 21 March 1990) with Manfred Wörner, the NATO Secretary General, whom he invited to Poland and who later hosted President Lech Wałęsa in Brussels. The difficulty in realising this national security policy had peculiar sources. The evolving international situation needed time. This was not only a result of Moscow's attitude and the presence of the Russian army in Poland (which lasted until September 1993), but mostly of the resistance coming from the West, which for the long time viewed Poland as a pawn of the Soviet/Russian State. Opponents of the Foreign Minister could be found on his own soil, and not only in the ranks of the PZPR. He relied on slow and calculated movements (in which he did not immediately make public his goals in their entirety, or even at all) which eventually showcased Poland as a reliable partner and a country with an effective government and even more effective diplomacy.

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[44] Skubiszewski, *supra* note 2, pp. 131-4, 309-20.

[45] K. Skubiszewski, from a speech given 18 November 1992. (Skubiszewski, *supra* note 35.)

[46] Gazeta Wyborcza, 8 February 2010: "Professor Henryk Szlajfer recalled Skubiszewski in this way: He was a difficult and demanding partner, but as the Russians say - he was a man who wore a top hat - in other words, very serious, and deserving of respect, who could never be underestimated in negotiations. (...) Skubiszewski knew how to talk with the USSR. He initiated a very complicated manoeuvre, which passed into history. He established a dual-track policy, which consisted of maintaining relations with the USSR while building new relations with leaders of the Soviet Republics – separately with Belarus, Ukraine and Lithuania. (...) Szlajfer declared the Polish-Russian treaty developed by Skubiszewski as the crowning glory in the art of diplomacy."

[47] For a more complete picture *see* K. Skubiszewski, *Polska i Sojusz Północnoatlantycki w latach 1989-1991*, 1 Sprawy Międzynarodowe 9 (1999); *idem*, *Stosunki między Polską i NATO w latach 1989-1993 – przyczynek do historii dyplomacji III Rzeczpospolitej*, Wykłady Polskiej Rady Biznesu 2005, pp. 5-41 (regarding Boris Yeltsin's visit to Warsaw in 1993); *see also* the Minister's speech during a North Atlantic Council meeting in London, 29 November 1990, [in:] Skubiszewski, *supra* note 2, pp. 99-106.

For the sake of keeping good relations with Moscow, the West was not exactly eager to support Poland's membership in NATO.[48] "At the beginning of my work in the government, I did not speak of Poland's eventual membership in the NATO. At the time, the Alliance remained closed to our end of Europe. I did not want Poland to receive a negative response, as in the case of Czechoslovakia and Hungary. But I did start cooperating with NATO and, what's most important, I tried to convince the North Atlantic Alliance that our security and independence should also be their concern. I had a fantastic rapport with NATO's then-Secretary General Manfred Wörner. I started talking to him about Poland's entry into NATO after the dissolution of the USSR and after Gorbachev's exit. While Gorbachev was in power, the Organisation did not see a possibility of expanding to the East."[49]

Poland entered NATO (with considerable support from the USA) in 1999, when the Minister of Foreign Affairs was Bronisław Geremek.

In terms of dealing with the European Communities, in May 1990 Poland submitted a petition initiating negotiations towards an Association Agreement, which was signed in December 1991 (it entered into force on 1 February 1994, though the trade aspects of the agreement came into force two years earlier). Poland entered the European Union in May 2004. As much as had been said about the division of Europe, after 1989 her boundaries could no longer end on the Elbe or the Oder. From the Polish perspective, and presumably from the perspective of the nations of the central-eastern region, the idea of expanding the EU and NATO was not just a question of expanding into the East, but rather of unifying Europe. Krzysztof Skubiszewski saw this membership as a chance for economic growth, civilizational revival, and modernisation for the country. He wished to move on from integrating *into* Europe to a *European integration*.

7. Immediately upon assuming office, Minister Skubiszewski became engrossed in German issues.[50] He chose not to enforce the agreement between the People's Republic of Poland and East Germany concluded during the times of communism, so he resolved to grant assistance to the refugees – nearly 6,000 people travelled to West Germany from Poland at the time when East Germany was still under Erich Honecker's communist rule.

Meanwhile, the unification of Germany loomed large.[51] The strategies employed by Mazowiecki's government were relatively effective, though they were being implemented

[48] With respect to German hesitation, *see* J. Kranz, *Germany, Quo Vadis? A View from Poland*, 10(1) German Politics 141 (2001) (Special Issue: *New Germany, New Europe, Old Foreign Policy?*, ed. by D. Webber).

[49] Skubiszewski, *supra* note 18.

[50] He presented a draft of Polish policy on this matter on 22 February 1990, Skubiszewski, *supra* note 31; *see also* Skubiszewski, *supra* note 2, pp. 29-34.

[51] *See* J. Barcz, J. Sułek, W. M. Góralski, J. Kranz contributions [in:] W. M. Góralski (ed.), *Breakthrough and Challenges: 20 Years of the Polish-German Treaty on Good Neighbourliness and Friendly Relations*, Dom Wydawniczy Elipsa, Warszawa: 2011. *See also* C. Rice, P. Zelikow, *Germany Unified and Europe Transformed: A Study in Statecraft*, Cambridge, MA: 1995; *Dokumente zur Deutschlandpolitik. Deutsche Einheit. Sonderedition aus den Akten des Bundeskanzleramtes 1989/90*, hrsg. von Hanns Jürgen Küsters und Daniel Hofmann, Munich: 1998.

at a time of great uncertainty. In short, it was unclear how it all would end and what the consequences for Poland would be. Minister Skubiszewski supported the unification of Germany, seeing it as not just a bilateral issue but also as a prospect for Europe's unity and stability and as part of a new international order. In February 1990, before Germany's unification, he had already formulated the notion of a Polish-German community of interests.[52] His critics saw this as delusional, but in reality it was a far-reaching challenge for both countries, having the aim of intensive growth and a future European partnership.

Against this background, Poland wanted to secure unequivocal recognition of its western border (while the Germans were ambivalent and recalled Article IV of the Treaty between West Germany and Poland of 1970[53] and the rights and responsibilities of the Four Powers relating to Germany as a whole). "When the possibility of a unified Germany started to take shape on the cusp of 1989/90, I was initially afraid that the price of such unification would mean a certain restoration of Soviet influence in Central Eastern Europe, especially since the West continued to acknowledge Soviet interests. At a certain point, however, though not on 12 September nor 9 November [1989], it became clear to me that US President George Bush, Sr. was determined to achieve two goals: a unified Germany and support for the emancipation of the former Soviet Bloc. Before this, we had always been considered by the West as a zone of Soviet influence. (...) During the Cold War, the governments used to say: we are open, and in the end, a great opening did finally come to fruition, but not without much hesitation, and the public opinion of the West was not exactly prepared for this great turn of events."[54]

The Minister recalled that "in July 1989, when a new parliament had already been established, the chair of the Civic Parliamentary Caucus, Bronisław Geremek, met with then German Chancellor Helmut Kohl. (...) Kohl accepted that the border agreed upon in Potsdam would not be changed, because it cannot be changed. When Geremek, however, mentioned he would like to publicly announce the Chancellor's stance, Kohl told him that publicly he would deny it. In November 1989, in a 10-point plan for the unification of Germany presented by Chancellor Kohl, there was no mention of our western border. Kohl was not opposed to this border, yet for reasons unknown, he chose to dilly dally on this matter."[55]

The border issue was also problematic in that West Germany did not want to negotiate the text of the Polish-German treaties before formal unification. Thanks to the Minister's stubbornness, however, many Polish-German meetings did take place prior to

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[52] From a speech given 22 February 1990 (Skubiszewski, *supra* note 31).

[53] Treaty between the Federal Republic of Germany and Poland Concerning the Basis for Normalizing Their Mutual Relations, Warsaw, December 7, 1970: "IV. The present Treaty shall not affect any bilateral or multilateral international arrangements previously concluded by either Contracting Party or concerning them."

[54] Skubiszewski, *supra* note 18. *See also* J. Kranz, *Polska i Niemcy w Europie*, 1 Sprawy Międzynarodowe 5 (1998).

[55] Skubiszewski, *supra* note 18.

unification, during which Poland submitted specific treaty proposals and the Minister finally oversaw the course of negotiations of the Four Powers and two German nations (the future Two Plus Four Treaty) securing appropriate assurances.

One of Minister Skubiszewski's achievements was assuring Poland's participation in the Two Plus Four negotiations (formally the Treaty on the Final Settlement With Respect to Germany, 12 September 1990), the outcome of which was a unified Germany. "In February 1990, in Ottawa, during a conference regarding open skies, two German nations as well as France, the United States of America, the United Kingdom and the USSR agreed that they would be the only negotiators in matters of German unification (the Two Plus Four formula). A peace conference with the participation of all World War II participants was rejected. (...) Thanks to my intervention in Ottawa, however, the final statement relating to the aims of talks of the Two Plus Four nations, which read 'a discussion of external aspects of German unification', was supplemented with the words: 'inclusive of security questions of neighbouring nations.' This opened the doors for our participation in the Two Plus Four negotiations which dealt with German borders and other vital Polish interests. This was a great success for Polish diplomacy."[56] Decisions regarding German borders were adopted on 17 July 1990 during the Paris session of the Two Plus Four negotiations (with Polish participation) and they were reiterated in principle in the Treaty on the Final Settlement With Respect to Germany signed in Moscow on 12 September 1990.

During the Paris session of the Two Plus Four negotiations, Minister Skubiszewski took care that Poland's borders were not made a subject of any of the Four Powers' guarantee.[57] This sounds like a paradox, but guarantors frequently gain the greatest – often negative – influence and they do not always meet their obligations (as the recent situation of the Ukraine perfectly illustrates).[58]

"It was important that the USSR ceased to function as the guarantor of the Polish-German border. I was apprehensive of potential Western concessions to the benefit of

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[56] *Ibidem*.

[57] *See Przemówienie ministra spraw zagranicznych RP Krzysztofa Skubiszewskiego na spotkaniu ministerialnym konferencji "2 + 4"*, Paris, 17 July 1990, [in:] Skubiszewski, *supra* note 2, pp. 55-67. *See also Procès-verbal de la réunion des ministres des Affaires étrangères de la France, de la Pologne, de l'Union des Républiques Socialistes Soviétiques, des Etats-Unis d'Amérique, de la Grande-Bretagne, de la République Fédérale d'Allemagne et de la République Démocratique Allemande* (point 4): "Les Quatre puissances alliées déclarent que les frontières de l'Allemagne unifiée auront un caractère définitif qui ne pourra être remis en cause par aucun événement ou circonstance extérieurs. Le Ministre des Affaires étrangères de la Pologne indique qu'aux yeux du Gouvernement Polonais, cette déclaration ne constitue pas une garantie de frontières par les Quatre puissances. Le Ministre de la République Fédérale d'Allemagne indique qu'il a pris connaissance de ce que le gouvernement polonais ne voyait pas dans cette déclaration une garantie sur les frontières. La RFA s'associe à la déclaration des Quatre puissances alliées et souligne que les événements ou circonstances auxquels cette déclaration fait référence ne se produiront pas, à savoir qu'un Traité de paix ou un règlement de paix ne sont pas envisagés. La RDA souscrit à la déclaration faite par la RFA", [in:] J. Barcz, *Udział Polski w konferencji 2 + 4. Aspekty prawne i proceduralne*, PISM, Warszawa: 1994, pp. 167-168.

[58] *See* Memorandum on Security Assurances in connection with Ukraine's accession to the Treaty on the Non-Proliferation of Nuclear Weapons, Budapest, 5 December 1994.

Soviet influence in Europe in exchange for Moscow's consent to losing East Germany to unification with West Germany. Moscow was ready to write-off Czechoslovakia and Hungary, but various political powers within the USSR (especially the military) saw Poland differently – Poland's location between the USSR and Germany affected this view. This was also the reason for difficulties in talks (continued with Russia after the collapse of the USSR) relating to the withdrawal of the Russian military from Poland."[59]

The Minister's concerns were not unfounded, likewise with regards to concessions benefitting the USSR on the part of certain centres of power within West Germany. The treaties negotiated between Poland and a unified Germany[60] were for the most part executed and proved fruitful.[61] Such was the case in settling the matter of national minority groups in Poland and Germany. In this regard, the Polish-German treaty of 17 June 1991, signed by Minister Skubiszewski, set an example for other similar regulations.

Controversy arose around the matter of reparations from Germany. Since this was a multilateral issue, it could have prolonged the date for unification of Germany, potentially even turning it into an impossibility. The Four Powers were categorically opposed to this scenario. Poland renounced reparations in 1953, and the matter of compensation for the Polish victims of National Socialist measures of persecution was closed by way of a two-step compromise: bilaterally in October 1991 as well as multi-laterally in July 2000.[62]

Unified Germany as a NATO member posed a peculiar problem. During the Paris session of the Two Plus Four negotiations, the Minister declared: "Mazowiecki's government has never been and is not now an advocate of unified Germany's neutrality. The isolation of the political and military role of such a powerful neighbour does not, presumably, lie in anyone's interest."[63] Poland did not have any direct influence in this

[59] Skubiszewski, *supra* note 18.

[60] Treaty between the Federal Republic of Germany and the Republic of Poland on the confirmation of the frontier between them, Warsaw, 14 November 1990 as well as Treaty of Good Neighbourship and Friendly Cooperation, Bonn, 17 June 1991. *See* Informacja ministra spraw zagranicznych o traktacie polsko-niemieckim, Sejm RP, 7 June 1991, [in:] Skubiszewski, *supra* note 2, pp. 137-42; Minister Krzysztof Skubiszewski's speech during a closed sitting of the Sejm, 26 July 1990, [in:] Barcz, *supra* note 57, pp. 173-80; Skubiszewski's speech in the Senate of the Republic of Poland, 25 October 1991, with regards to the ratification debate on the Republic of Poland-West Germany Treaty, [in:] Skubiszewski, *supra* note 2, pp. 179-83.

[61] *See* J. Kranz, *Oczekiwania i rzeczywistość: uwagi o współpracy polsko-niemieckiej*, Centre for International Relations, Raporty i Analizy, vol. 5, 2003.

[62] Deutsch-polnischer Notenwechsel vom 16. Oktober 1991; Joint Statement on occasion of the final plenary meeting concluding international talks on the preparation of the Foundation "Remembrance, Responsibility and the Future", Berlin, 17 July 2000; more extensively J. Kranz, B. Jałowiecki, J. Barcz, *Między pamięcią a odpowiedzialnością. Rokowania w latach 1998-2000 w sprawie świadczeń za pracę przymusową*, Prawo i Praktyka Gospodarcza, Warszawa: 2004; J. Barcz, *Pomoc dla ofiar prześladowania nazistowskiego (Polsko-niemieckie porozumienie z 16 X 1991)*, 1 Państwo i Prawo 49 (1992); *see also* K. Ruchniewicz, *Polskie zabiegi o odszkodowania niemieckie w latach 1944/45-1977*, Wrocław 2007.

[63] Foreign Minister Skubiszewski's speech during the ministerial meeting of the "2+4" conference, Paris, 17 July 1990, [in:] Skubiszewski, *supra* note 2, p. 64.

matter, but with the idea of Germany as a fully-fledged member of NATO Skubiszewski saw a chance of weakening Moscow's influence in Central Europe as well as facilitating the future expansion of the NATO into this region. Without NATO on the territory of a unified Germany, any expansion of this structure to the East would be decidedly hindered, if not rendered entirely impossible. Despite Russian opposition, the matter came to a favourable end in time.

8. Foreign Minister Skubiszewski was always interested in the relationship between international and municipal law.[64] During the Communist era in Poland, the Constitution in force (personally amended by comrade Stalin), for obvious reasons excluded this aspect. The Minister was one of the individuals who, post-1989, led the way to the first, preliminary adjustment in this matter. The significance of this issue could be observed during the negotiation of a treaty with Germany aimed at regulating, among other things, the status of minority groups. In this context, there was no way to escape the question of the status of international treaties in the Polish legal system.

Minister Skubiszewski attached high importance to human rights issues. During his time in office, Poland joined the Council of Europe, signed the Convention for the Protection of Human Rights and Fundamental Freedoms, recognized the jurisdiction of the European Court of Human Rights, and joined the Optional Protocol to the International Covenant on Civil and Political Rights. Poland was also the first of the post-communist states to recognize the jurisdiction of the International Court of Justice under Article 36 of the Statute of the Court.

9. Foreign Minister Skubiszewski left a great heritage to Poland. The transformation he initiated was carried out with the aim of establishing trust in Poland as a predictable and reliable partner. His work demanded enormous effort, great wisdom and patriotism, and is perhaps not entirely appreciated today in all its dimensions.

In summary: he ensured Poland's participation in the negotiations on Germany's unification (the July 1990 Two Plus Four negotiations in Paris, with Poland's participation); he was one of the main architects behind the new treaties with all of Poland's new neighbours, including two very important ones with Germany; in 1990 he initiated the two-way eastern policy, i.e. maintaining direct contacts, without going through the USSR authorities, with the republics of the Soviet Union aspiring to independence; he was behind the 1991 dissolution of the Council for Mutual Economic Assistance and the Warsaw Pact; he engineered the launch of the first contacts with NATO (1990) and the Western European Union (1992); he was also behind the signing of the Association Agreement between Poland and the European Communities (1991); he won German compensation for Polish forced labourers (1991); he contributed to the emergence of Central European states' regional cooperation as well as Polish-German-French cooperation within the Weimar Triangle; he re-established diplomatic relations with

[64] *See* Z. Kędzia, *Prawa człowieka pośród wartości polityki zagranicznej*, [in:] Kuźniar, *supra* note 1.

Israel in 1990; he prompted visa-free travel to a number of Western countries; and last but not least, he coordinated the withdrawal of Russian troops from Poland in 1993.[65] He was also the chief government negotiator in talks with the Holy See on the Concordat, concluded in 1993.

In recognition of his contribution to Polish-German relations, Minister Skubiszewski was awarded the Wartburgpreis (together with the French and German Foreign Ministers, Roland Dumas and Hans-Dietrich Genscher) in 1992, and the Pomerania Nostra Award in 2005 (awarded by the University of Greifswald and the authorities of Szczecin).

The new orientation of Polish foreign policy which he initiated bore fruit in the following years, both for Poland and for Europe. Skubiszewski's success was not limited to his competences – he was well-versed in contemporary political history as well as international law. His personality also distinguished him among his peers, especially his foreign counterparts, with whom he conversed in English, German and French with great ease.[66] He was respected for his substance and eloquent speech, for his distinguished demeanour as well as for his candour and reliability. His achievements are testimony to the fact that personal chemistry (especially in conjunction with competence) plays a fundamental role in foreign relations.

In the Ministry of Foreign Affairs he promoted quality, though not without difficulties. He was not afraid to promote brilliant individuals into diplomatic service. "He expected a lot: competence, hierarchal loyalty, punctuality, and above all, to be driven by an ethos of service to your country."[67] When his term of office was nearing its end in 1993, his closest associates presented him with an album with the dedication: "To one who dared to be wise" (*sapere auso*). Skubiszewski's "people" were no slouches – many of them had great success in their careers, though not many of them remained with the Ministry.

10. Many of his political postulates and aims remain current today. Below are a few of the most important and prescient.

With respect to relations with Russia and Germany: "The findings from the years 1989-90 are still current in that Germany and Poland are tied in a community of interest. This doesn't mean that we must return to the politics of that time, because the

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[65] For more information on the latter issue see Gazeta Wyborcza, 24 January 1991.

[66] J. Reiter, Rzeczpospolita, 10 February 2010: "He was highly educated and belonged in good company among the best of the erstwhile Polish elite. He didn't feel alienated in any western foreign country. Whether he was in France, Germany, or Great Britain, he always felt at home. His Polish patriotism and Europeanism were in perfect harmony. He was a specialist on international law and knew many languages. Poland needed people like him in 1989. (...) Hans-Dietrich Genscher, former German Minister of Foreign Affairs, often recalled, with great admiration and respect, that in the course of negotiations pertaining to the unification of Germany, three languages were used: German, Russian and English. Everyone used headphones except for Skubiszewski, because he knew all three of those languages very well. Above all, however, what he enjoyed most from his peers was trust, without which good diplomacy doesn't stand a chance."

[67] Mazowiecki, *Przypadek Krzysztofa Skubiszewskiego* (Tadeusz Mazowiecki's speech at the funeral of Krzysztof Skubiszewski 18 February 2010), Gazeta Wyborcza, 22 February 2010.

politics of every age have their own dynamism. But some elements remain constant. Pragmatism, so essential in foreign policy, suggests that we must stress that which brings us together and not that which tears us apart, the latter often being something that is exaggerated. Our relationship with Russia continues to be marred. Moscow's acceptance of our independence came in stages and not without resistance, and throughout the final days of the Soviet Union much remained unclear. Despite the warming of relations with Russia that came at the start of Boris Yeltsin's term, something of that defiance remained. From time to time, Moscow would send out a signal that nations such as Poland are not on equal ground with Russia. This point of view is derived from Russia's imperialistic mind-set and weighs heavily on our relations. The task of Polish diplomacy is to overcome these difficulties using a variety of means."[68]

On the EU: "I always considered it beneficial to see the European Union from our perspective as a political union serving our national security, not only our economy. The national security factor was and remains foremost, because without it our independence and national self-determination regarding our destiny and progress are illusory. At the same time, EU membership gives us a chance for economic growth and civilisational revitalisation. In other words, it gives us a chance to become wealthy and powerful nation. There is no other way if we want to modernise our country and meet the challenges of globalisation. (...) The problem is that Poland doesn't – at least at the moment – participate in the debate regarding the future of the Union. And those absent are simply of no consequence. It is imperative that Polish policy regarding the Union remain active and grounded in a pro-Union strategy."[69]

On the USA: "We must maintain good relations with the USA. Polish politicians need to remember, however, that Poland will never fully be a strategic partner for the US. The strategic partner for the United States on the European continent is Germany. In order to maintain good ties with the USA, we must maintain good ties with the Germans."[70]

He remained a realist in his views; one who, despite the pitfalls of politics,[71] never lost hope in a better future for Europe.

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[68] *Polska w Europie*, *supra* note 30.

[69] *Ibidem*.

[70] Skubiszewski, *supra* note 18.

[71] Sylvie Kauffmann, *Krzysztof Skubiszewski, diplomate polonais*, Le Monde, 17 February 2010: "Il était surtout un Européen convaincu et n'en ressentait que plus douloureusement la frilosité des grands Etats européens à l'égard des voisins de l'Est qui, comme la Pologne, venaient d'accéder au club des démocraties libérales et se reconstruisaient au prix de lourds efforts. Peu avant de quitter son poste de ministre des affaires étrangères, en 1993, il avait confié au Monde sa frustration de voir les Douze refuser de parler ne serait-ce que 'de la date du début des négociations sur l'adhésion' des pays d'Europe centrale à la CEE, 'des critères, des conditions, des prémisses' d'une telle adhésion. Et son regret de voir 'l'Europe occidentale tourner le dos lorsqu'a surgi le problème yougoslave', laissant ce conflit devenir, au bout du compte, 'l'échec de l'Europe'."

See Czesław Miłosz, *Sarajevo*: (…) "While a country murdered and raped calls for help from the Europe which it had trusted, they yawn. / While statesmen choose villainy and no voice is raised to call it by name. (…) / Listening with indifference to the cries of those who perish because they are after all just barbarians killing each other. (…) / Let them tremble and at the last moment comprehend that the word Sarajevo will from now on mean the destruction of their sons and the debasement of their daughters. / They prepare it."

11. When his ministerial mission came to an end Professor Skubiszewski was, astoundingly, offered no position in Poland that would have enabled him to make use of his vast expertise in the performance of further public functions.

He was, however, offered a highly prestigious international judicial position that recognised his great knowledge and experience: he served as the President of the Iran-United States Claims Tribunal (the most significant international arbitration) from 16 February 1994 until his death. This position required extensive knowledge and keen diplomatic insight. He also served as an *ad hoc* judge in two cases before the International Court of Justice (East Timor[72] and Gabčíkovo-Nagymaros[73]) and presided over the *Netherlands vs. France* case before the Permanent Court of Arbitration in 2004.[74]

Professor Skubiszewski admitted in one of his interviews that "he owed the crowning achievements of his career as an international judge solely to his upbringing in his Poznań home and to his own hard work; Polish official factors didn't play any part there."[75]

It is worth mentioning that Skubiszewski was faced with a dramatic decision in 1993, when he withdrew at the last moment from the election of judges to the International Court of Justice. The post would have crowned his career, yet at the Prime Minister's request he withdrew his candidacy and decided to stay with the Polish Government for the sake of preserving the government's stability, which was threatened by his potential resignation.[76]

12. In the speeches delivered at his funeral, Krzysztof Skubiszewski was depicted as a person "thoroughly devoted to his work, with a great sense of duty to the country", "the architect of an independent foreign policy of the Third Republic of Poland", and "one of the founding fathers of Poland's western direction." These were words well-grounded in substance.

The first Prime Minister of the Third Republic of Poland, Tadeusz Mazowiecki, described Krzysztof Skubiszewski as "a man of great charm, a representative of the Oxford class which he embodied here, upon the Warta and Vistula rivers. He spoke and wrote beautiful Polish. His thoughts were reasoned and clear. He avoided grandiose statements (...) He was the architect of a sovereign foreign policy. From the onset he became a pillar of might in my government. I was quickly convinced that there existed between us a convergence of views with regard to steering policy. (...) It was a gift to collaborate with him during such a momentous, difficult and uncertain time."[77]

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[72] ICJ, *Case Concerning East Timor (Portugal v. Australia)*, Judgment, 30 June 1995.

[73] ICJ, *Case Concerning the Gabcíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, 25 September 1997.

[74] Affaire concernant l'apurement des comptes entre le Royaume des Pays-Bas et la République française en application du Protocole du 25 septembre 1991 additionnel à la Convention relative à la Protection du Rhin contre la Pollution par les Chlorures du 3 décembre 1976 (sentence arbitrale du 12 mars 2004).

[75] Głos Wielkopolski, interview, 2–4 April 1994, p. 3.

[76] Życie Warszawy, 15 June 1993.

[77] Mazowiecki, *supra* note 67.

His closest associates stress that he taught them "to represent Poland without resorting to chauvinism and megalomania; but where necessary to be uncompromising and firm – qualities that were a function of his convictions and view of the national interest.… We will remember him as a boss we were proud of."[78]

The life of Professor Skubiszewski was laborious and full of devotion to public ideals and intellectual challenges. Despite his sometimes demanding nature he demonstrated modesty when it came to his own needs. He was a man of self-discipline, diligence and integrity. He was dignified yet easy to get on with; he praised where praise was due. He was a Polish patriot and at the same time a European, deeply rooted in the culture of the Old Continent. He was an individual of staunch beliefs and clear judgement. His propriety, composure, reasoning and comportment were all distinctive factors of his personality. At times he perhaps gave the impression of haughtiness, but that quickly dissolved in direct conversation.

He had an exceptional memory and a great gift for storytelling. He remembered his family's displacement from Poznań in 1939 in great detail, as well as wartime Warsaw, the atmosphere during the post-war years at the University in Poznań, and the expansion of belligerent Marxism in the study of international law in the 1950s. He was an excellent speaker who loved storytelling, but he also listened with a keen ear.

Given the context of his family home and environment, there were suspicions that a nationalistic pre-war Poznań may have influenced his views. In my personal relations with the Professor, however, I can state with certainty that there was never a hint of anti-Germanic or anti-Semitic sentiment.

His personal and political convictions were moderate. He was independent and tolerant. His motto was "live and let live."

He experienced the totalitarian regimes of his times. Together with his family he suffered distress and persecution from both the Nazis and the Communists. Yet he rarely complained about his fate or about the biased criticism levelled at him after 1989.

He was a realist, yet in matters of fundamental importance he remained uncompromising both in his scholarly and political endeavours. His independent mind relied on European and Christian values. He never sought compromise for personal gain or for illusive ideologies – he remained unaffected by Hegel.

Serving Poland was a creed he inherited from his family tradition, although Poland at the time routinely shunned people like him, pushing them onto the sidelines. In one of his last letters he wrote on communist Poland: "Those were hard times, and yet our work remained sensible despite the absurdity around us."

It is not an overstatement to claim that his ministerial achievements laid the groundwork for a free Poland and for the new European order. Was he appreciated? Not fully, because in Polish politics personalities like Professor Skubiszewski are do not always receive their proper due.

He died following a nosocomial infection on 8 February 2010, in his 84th year.

[78] I. Byczewski, funeral speech on 18 February 2010 (unpublished, on file with the author).

13. Krzysztof Skubiszewski was awarded the Order of the White Eagle, Great Cross of Polonia Restituta, Grand Officier de la Légion d'honneur, papal Gran Croce, Ordine Piano and Großkreuz des Verdienstordens der Bundesrepublik Deutschland.

He was a member of the Polish Academy of Sciences, the Academy of Learning, Institut de droit international, Institut de France – Académie des sciences morales et politiques, the Pontifical Academy of Social Sciences, the Curatorium of the Hague Academy of International Law, and many other Polish and international scholarly associations, including, since 1991, an honorary membership in the American Society of International Law.

He was awarded honorary doctorates by the universities of Ghent, Liège, Turin, Mainz, Geneva and the Cardinal Stefan Wyszyński University in Warsaw.

The Book of Ecclesiastes asks: "What does man gain from all his labour at which he toils under the sun?" (1:3, New International Version). If we were to ask Professor Skubiszewski if it was all worth his labour, he would in all likelihood have said yes, in spite of the high price he had to pay, more than once, for his resolute actions.

He took little rest in life but was able to leave this world a much better place, in accordance with the words *non omnis moriar*.

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CLASSIFICATION OF THE CONFLICT BETWEEN UKRAINE AND RUSSIA IN INTERNATIONAL LAW (*IUS AD BELLUM* AND *IUS IN BELLO*)

Abstract:
The aim of this article is to classify the armed conflict between Ukraine and Russia in light of international law. Firstly, the Russian armed activities are qualified through the lens of use of force and it is shown that Russia committed an aggression. Secondly, the Russian-Ukrainian conflict is qualified according to the law of armed conflict, not only identifying the applicable norms of law of armed conflict but examining whether atrocities have been committed and whether they are war crimes or mere crimes or acts of terror. The article posits that there is an international armed conflict between Russia and Ukraine and in addition a non-international one between Ukrainian insurgents and governmental forces. The methodology used in the article is legal analysis of documents and international law doctrine.

Keywords: aggression, armed conflict, Crimea, Donetsk, international conflict, Russian Federation, self-determination, Ukraine

INTRODUCTION

Decision of Ukrainian president Viktor Yanukovych not to sign a European Union association agreement in November 2013, and the subsequent clashes between governmental forces and the Euromaidan protesters in January and February 2014, led to the one of the biggest political crisis in the history of Ukraine.[1] The danger of civil war appeared to have been defused when the president announced on 21 February 2014 that he had reached an agreement with the opposition. But immediately after this announcement Yanukovych escaped from Kiev and the very

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[1] *See* D. R. Marples, F. V. Mills (eds.), *Ukraine's Euromaidan: Analyses of a Civil Revolution*, Columbia University Press, New York: 2015.

next day the Ukrainian parliament removed him from the post in violation of the Ukrainian Constitution.[2] This provided fertile ground for Russia to question the legitimacy of the actions of the transitional authorities.[3] When it became apparent that Ukraine was on the path toward establishing new democratic authorities and integrating with the Western structures, Russia decided to take control over the Crimean Peninsula and the Eastern part of Ukraine (it was essential to seize the latter in order to secure the transport of, e.g., energy, water and other supplies to Crimea and Sevastopol).

At the end of February 2014 armed forces without a state insignia, in cooperation with Crimean self-defence units formed by separatists, began to take control of the main points in the Crimean Peninsula and engage in some raids in neighbouring regions. They met with almost no resistance. On 16 March 2014 the Crimean authorities organized a referendum in which, allegedly, the overwhelming majority (96.8%) voted for accession to the Russian Federation. Their expressed "will" resulted in a declaration of independence by the Crimean authorities and the signing of an agreement on the accession of Crimea and Sevastopol to the Russian Federation on 18 March 2014.[4] By the end of March Russia controlled the whole Crimean peninsula and secession was thus effective. Simultaneously, riots began in Eastern Ukraine, allegedly inspired

[2] Art. 111 of the Ukrainian Constitution of 1996 (available at: faolex.fao.org/docs/pdf/ukr127467E.pdf, accessed 30 March 2015) states as follows: "The President of Ukraine may be removed from the office by the Verkhovna Rada of Ukraine in compliance with a procedure of impeachment if he commits treason or other crimes. The issue of the removal of the President of Ukraine from office in compliance with the procedure of impeachment shall be initiated by the majority of the constitutional membership of the Verkhovna Rada of Ukraine. The Verkhovna Rada of Ukraine shall establish a special ad hoc investigating commission, composed of special prosecutor and special investigators to conduct an investigation. The conclusions and proposals of the ad hoc investigating commission shall be considered at the meeting of the Verkhovna Rada of Ukraine. On the basis of evidence, the Verkhovna Rada of Ukraine shall, by at least two-thirds of its constitutional membership, adopt a decision to bring charges against the President of Ukraine. The decision on the removal of the President of Ukraine from office in compliance with the procedure of impeachment shall be adopted by the Verkhovna Rada of Ukraine by at least three-quarters of its constitutional membership upon a review of the case by the Constitutional Court of Ukraine, and receipt of its opinion on the observance of the constitutional procedure of the investigation and consideration of the case of impeachment, and upon receipt of the opinion of the Supreme Court of Ukraine to the effect that the acts of which the President of Ukraine is accused contain elements of treason or other crimes." In the vote of 22 February 2014, 328 out of 450 members of Verkhovna Rada of Ukraine voted in favour of removal of Yanukovych from his post, so the required majority of 338 members was not reached, not to mention that the procedure described above was totally ignored. In addition, the Chairman of the Verkhovna Rada of Ukraine (at that time Serhiy Arbuzov) should have been assumed power after Yanukovych's removal (Art. 112). However, the Ukrainian parliament elected Oleksandr Turchynov as the new Chairman of the Ukrainian Parliament and the acting President of Ukraine.

[3] *See* Vladimir Putin answered journalists' questions on the situation in Ukraine, 4 March 2014, available at: http://eng.kremlin.ru/news/6763 (accessed 30 March 2015).

[4] T. A. Olszański, A. Sarna, A. Wierzbowska-Miazga, *The consequences of the annexation of Crimea*, The Center of Eastern Studies, Analyses, 19 March 2014, available at: http://www.osw.waw.pl/en/publikacje/analyses/2014-03-19/consequences-annexation-crimea (accessed 30 March 2015).

by Russian agents.[5] In April 2014 the Donetsk and Lugansk People's Republics were proclaimed and then, after taking control over the main cities of the Donbas region, the establishment of the Federal State of New Russia was announced.[6] On 11 May 2014 the separatists announced that the people of the Donetsk and Lugansk regions had voted in the referenda in favour of independence. The Ukrainian government began its offensive only after the presidential elections which took place on 25 May 2014. Despite a cease-fire agreement of 12 February 2015 (the Minsk accords) hostilities continue to take place in Eastern Ukraine.[7]

The aim of this article is to classify the armed conflict between Ukraine and Russia in the light of international law. Firstly, the Russian armed activities will be examined through the lens of the principles concerning use of force in order to answer the question whether there was an aggression. Secondly, the Russian-Ukrainian conflict will be examined from the point of view of the law of armed conflict (LOAC) and international criminal law in order to identify norms which should be applied to the conflict and in order to determine whether the atrocities committed constitute war crimes, mere crimes, or acts of terror. The methodology used in the article is a legal analysis of documents, including Security Council (SC) decisions and the international law doctrine.

1. IUS AD BELLUM

1.1. Crimea

Russia denies its direct involvement in the Crimean crisis and emphasizes that the Crimean case is an example of execution by the Crimean people of their right to self-determination, which it argues is the same right Ukraine exercised when separating itself from the USSR, additionally justified by the Kosovo precedent.[8] In addition Russia justified the annexation of Crimea by execution of its right to self-defence, which encompasses the right to defend its own citizens, the prevention of human rights violations in light of the violent situation in Ukraine and the activities of the *Nationalists, neo-Nazis, Russophobes and anti-Semites* who executed the coup, the consent of the legitimate authorities of Ukraine (president Yanukovych and Crimean authorities), and the need to prevent NATO forces deployment near Russian borders.[9]

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[5] G. Hughes, *Ukraine: Europe's New Proxy War?*, 1(2) Fletcher Security Review 106 (2014), p. 114.

[6] *Donetsk, Lugansk People's Republics unite in Novorossiya*, 24 May 2014, available at: http://sputniknews.com/voiceofrussia/news/2014_05_24/Donetsk-Lugansk-Peoples-Republics-unite-in-Novorossiya-1012/ (accessed 30 March 2015).

[7] *See* SC/11784, 17 February 2015.

[8] *Vladimir Putin's address to the State Duma deputies, Federation Council members, heads of Russian regions and civil society representatives in the Kremlin*, 18 March 2014, available at: http://eng.kremlin.ru/news/6889 (accessed 30 March 2015).

[9] *Ibidem* ("It would have meant that NATO's navy would be right there in this city of Russia's military glory, and this would create not an illusory but a perfectly real threat to the whole of southern Russia. These are things that could have become reality were it not for the choice the Crimean people made, and I want to say thank you to them for this").

Before addressing the grounds used by Russia which allegedly justify its intervention in Crimea, some fundamental principles of law on the use of force must be recalled. Firstly, it must be emphasized that any use of force, or even a threat to use force, against another state is prohibited by the UN Charter (Art. 2(4)), and in particular the alteration of international borders by force is considered inadmissible in light of international law.[10] Definitely the deployment of soldiers and using "those who were stationed in Crimea as a part of the Black Sea fleet members in order to take control" over the main positions in the Autonomous Republic of Crimea and the city of Sevastopol was an example of the use of force. In doing so Russia violated not only the UN Charter, but also several bilateral treaties: the Agreement between Ukraine and the Russian Federation on the Status and Conditions of Presence of the Black Sea Fleet of the Russian Federation in the Territory of Ukraine of 28 May 1997 (extended in 2010), the Treaty on Friendship, Cooperation, and Partnership between Ukraine and the Russian Federation of 31 May 1997, the Agreement between the Cabinet of Ministers of Ukraine and the Government of the Russian Federation on the Use of Airspace of Ukraine and of Airspace Over the Black Sea, Where Ukraine is Responsible for Security of Flights and Organization of Servicing of Air Traffic, by the Forces and Resources of the Black Sea Fleet of the Russian Federation of 16 July 1999.[11] All of these treaties stress the importance of the obligation to respect the sovereignty and territorial integrity of Ukraine.

The actions of Russia can be qualified as an aggression.[12] In light of the definition of aggression contained in UN General Assembly (GA) resolution 3314 of 14 December 1974, the customary character of which was confirmed by the International Court of Justice,[13] in order to qualify the use of armed force as an aggression it is necessary to prove that this force was used "against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations" (Art. 1). The annexation of part of Ukrainian territory by Russia confirms that the military actions in the Crimean Peninsula had as their aim the violation of sovereignty and territorial integrity and reached the sufficient level of gravity. The fact that Russian operations were advancing without a fight does not

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[10] GA resolution 2625, 24 September 1970.

[11] *See* Ministry of Foreign Affairs of Ukraine, *On Violations of Ukraine's Laws in Force and of Ukrainian-Russian Agreements by Military Units of the Black Sea Fleet of the Russian Federation in the Territory of Ukraine,* 3 March 2014, available at: http://mfa.gov.ua/en/news-feeds/foreign-offices-news/18622-shho-do-porusheny-chinnogo-zakonodavstva-ukrajini-ta-ukrajinsyko-rosijsykih-ugod-vijsykovimi-formuvan-nyami-chf-rf-na-teritoriji-ukrajini (accessed 30 March 2015).

[12] *See Opinia Doradczego Komitetu Prawnego przy Ministrze Spraw Zagranicznych RP w sprawie przyłączenia Półwyspu Krymskiego do Federacji Rosyjskiej w świetle prawa międzynarodowego* (Advisory Opinion of the Legal Committee of the Ministry of Foreign Affairs of the Republic of Poland on accession of Crimean Peninsula to Russian Federation in light of International Law), 22 June 2014, reprinted in this volume of the Yearbook.

[13] *See* ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgment, 27 June 1986, ICJ Rep. 1986, para. 195.

impact this qualification, as it is incontrovertible that in a situation when one state uses force to take a position and waits for the reaction of the state whose territory was invaded, the former must be labelled as an aggressor not the latter.[14] Russia first used armed force which, by the principle introduced in GA resolution 3314 on USSR's request, should be considered as *prima facie* evidence of an act of aggression. Resolution 3314 defines (in non-exhaustive way) acts which can be qualified as acts of aggression, some of which can be directly applied to the situation in Ukraine. Firstly: "the invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof" (Art. 3(a)). It should be stressed that this act requires invasion or attack on a territory, and it says nothing about the necessity of attacking the armed forces of another state. In consequence, such an aggression can be committed without a single bullet being fired or a drop of blood being shed. Invasion means a situation in which a state sends its troops into the territory of another state and maintains them there for an extended period of time,[15] thus a crossing of frontiers and physical entering of troops into at least a part of a state's territory is therefore required.[16] This was clearly the case in Crimea. The definition contained in Resolution 3314 considers as aggression any military occupation resulting from an invasion or attack on a territory, and undoubtedly the territory of the Autonomous Republic of Crimea and of the city of Sevastopol was occupied. The question of annexation is also beyond discussion. This separation was done against the will of Kiev, in violation of the Ukrainian Constitution and with the use of armed forces.

Secondly, Resolution 3314 defines "the blockade of the ports or coasts of a State by the armed forces of another State" (Art. 3(c)) as an act of aggression. Ukrainians emphasize that the missile boat Ivanovets of the Black Sea Fleet of the Russian Federation blocked the Balaklava Bay.[17] In addition, the sinking by the Russians of their own anti-submarine vessel Ochakov in the straits that connect the Black Sea with Donuzlav Lake should be considered as a part of the blockade as it prevented Ukrainian navy ships from leaving a nearby base and going to sea.[18]

Thirdly, Resolution 3314 considers as an act of aggression "[t]he use of armed forces of one State 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 or any

[14] Y. Dinstein, *War, Aggression and Self-Defence*, Fourth edition, Cambridge University Press, New York – Cambridge: 2005, pp. 188-189.

[15] O. Solera, *Defining the Crime of Aggression*, Cameron May, London: 2007, p. 67.

[16] A. Constantinou, *The Right of Self-defence under Customary International Law and Article 51 of the UN Charter*, Ant. Sakkoulas, Bruylant, Athènes – Bruxelles: 2000, p. 67.

[17] Ministry of Foreign Affairs of Ukraine, *supra* note 11.

[18] Ch. K. Chumley, *Russia accused of sinking own cruiser to block Ukrainian navy*, The Washington Times, 7 March 2014, available at: http://www.washingtontimes.com/news/2014/mar/7/russia-accused-sinking-own-cruiser-block-ukrainian/ (accessed 30 March 2015).

extension of their presence in such territory beyond the termination of the agreement" (Art. 3(e)). Art. 6(1) of the above-mentioned agreement on the status and conditions of stay of the Black Sea Fleet provided that "[m]ilitary units shall conduct their operations in the areas of disposition in accordance with the legislation of the Russian Federation, respect Ukraine's sovereignty, obey its legislation and refrain from interference with Ukraine's domestic affairs." In addition Art. 8(2) stresses that "[m]ilitary units shall conduct exercises and other combat and operative training within the limits of training centers, training areas, positioning and dispersal areas, firing ranges, and, except for forbidden zones, within the designated airspace as agreed with Ukraine's competent authorities." The undeniable moves of the soldiers of the Black Sea fleet outside the agreed-upon zones was in contravention of the aforementioned provisions and constitutes an act of aggression. It is in fact a variation of an invasion, but the purpose behind its enumeration among acts of aggression was to emphasize that aggression can be committed without the violation of frontiers, from within the victim state. Fourthly, as Russia has denied any connections to the so-called "green people" (armed forces without state insignias on their uniforms), it is worth recalling that an act of aggression is also committed by the "sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein" (Art. 3(g) of GA resolution 3314). In consequence, if it is proven that Russia had effective control over those groups, the operations conducted by them can be attributed to Russia and thus constitute the commission of another act of aggression.

The chapeau of the definition of aggression emphasizes that the use of force in contravention of the UN Charter should be considered as an aggression. The UN Charter allows for the use of force only when there is an authorisation on behalf of the UN Security Council (Art. 42) or in case of self-defence in response to an armed attack (Art. 51). There was no such authorisation in the Crimean case, but Russia attempted to justify its actions towards Crimea and Sevastopol through its right to defend its citizens. This kind of defence is in fact admissible, but only in specific situations such as a case when there was an attack (e.g. on its armed forces, diplomatic premises) or imminent threat of attack on its nationals, they were taken as hostages, and when the hosting state was unwilling or unable to protect those nationals.[19] In case of Crimea, there was

[19] *See* J. Kranz, *Kilka uwag na tle aneksji Krymu przez Rosję* (Some remarks on the annexation of Crimea by Russia), 8 Państwo i Prawo 23 (2014), p. 33. In the context of Russian intervention it should be recalled that the Independent International Fact-Finding Mission on the Conflict in Georgia stated: "There is probably not one single instance in state practice where a state invoked an independent, stand-alone entitlement to rescue its nationals, without relying on one of the classic grounds of justification. In state practice, none of the arguments advanced by states in order to justify military interventions in favour of their nationals has been accepted by the entire community of states. The prevailing reactions were rather reprobation, e.g. in the case of the Congo, Grenada and Panama" (pp. 286-287). Independent International Fact-Finding Mission on the Conflict in Georgia, *Report*, vol. II, September 2009, available at: http://rt.com/files/politics/georgia-started-ossetian-war/iiffmcg-volume-ii.pdf (accessed 30 March 2015).

no attack on Crimean people, not even the slightest threat of an attack. The Russian allegation that the Ukrainian authorities were working on the adoption of new law revising the language policy, which would thus be directed against ethnic minorities, definitely does not constitute a reason justifying the use of force in defence of those minorities. The live and health of members of those minorities were not endangered and the Russian reaction was excessively disproportional. For the same reasons, the argument about the need for humanitarian intervention (i.e. responsibility to protect) is invalid. In addition, it should be stressed that the concept of responsibility to protect has been limited only to situations of genocide, war crimes, crimes against humanity, and ethnic cleansing. The argument about cultural genocide, which is raised by some Russian scholars,[20] certainly has as its purpose to put the Russian intervention within the framework of a responsibility to protect exception, but it should not be forgotten that the cultural aspect of genocide was purposefully eliminated from the definition of genocide. In addition, analysis of the judgments of, e.g. the Polish Supreme National Tribunal concerning the cultural dimension of genocide committed against Jews and Poles clearly demonstrates that only the most severe violations of cultural rights, equal to an annihilation of the culture of a particular group (e.g. burning libraries or a ban on education) could be labelled as some sort of genocide, which was clearly not the case in the Crimean conflict.[21]

Two other justifications, which are not directly mentioned in the UN Charter, were raised by Russia: the consent of legitimate authorities and the right to self-determination. With respect to them, it must be stressed that they are allowed according to international law, but only under certain conditions.[22] In case of consent, there must be a clear request issued by constitutional authorities. Russia has used the argument that Yanukovych was still president as he was toppled in violation of the Ukrainian Constitution. However, Russia did not reveal any document which would confirm that such a request was made by Yanukovych.[23] It has happened in history that the head of a state has asked for help in regaining power (e.g. Haitian president Jean-Bertrand Aristide in 1994),[24] or to stop riots and calm a situation, but the international community has responded to these calls only when there was an authorization of the UN Security Council (SC), otherwise such "help" would constitute an interference into a state's domestic affairs (Art. 2(7) of the UN Charter). It must be stressed that according to Russia, Yanukovych

[20] V. Tolstykh, *Reunification of Crimea with Russia: A Russian Perspective*, 13(4) Chinese Journal of International Law 879 (2014), p. 884.

[21] *See more* P. Grzebyk, *The Role of the Polish Supreme National Tribunal in the Development of Principles of International Criminal Law*, [in:] M. Bergsmo, Ch. Wui Ling, Y. Ping (eds.), *Historical Origins of International Criminal Law*: *Volume 2*, Torkel Opsahl Academic EPublisher, Brussels: 2014, pp. 624 ff.

[22] *See more* Ch. Marxsen, *The Crimea Crisis – An International Law Perspective*, 74(2) Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (Heidelberg Journal of International Law) 367 (2014).

[23] S/PV.7125, 3 March 2014.

[24] *See more* Ch. Gray, *International Law and the Use of Force*, 3rd edition, Oxford University Press, Oxford: 2008, pp. 84 ff.

asked for intervention not to restore his position, secure territorial integrity and/or calm the situation in the state, but to give the part of his country to another state, in other words to carry out an act of secession in contravention of the Ukrainian Constitution.[25] This is a clear example of a request which raises major doubts about the intentions of the intervening power, so it cannot be considered as a legal justification for the use of force.[26]

The fact that such a request was also issued on behalf of Crimean authorities[27] has no legal meaning, as international law does not allow intervention on behalf of insurgents,[28] even in a situation of self-determination. GA resolution 2626 stressed that

> [n]othing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour,

and also that "[e]very State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country." It would seem that the GA resolution could not have more clearly expressed the prohibition of intervention into the internal affairs of another state under the pretext of self-determination. The people of Crimea have no right to external self-determination, as this right was attributed only to people of a colony or Non-Self-Governing Territory, and the so-called "secession remedy" would be allowed only if there was no other way to secure its self-determination within the Ukrainian state and the rights of Crimean inhabitants were violated in such extent that, e.g., crimes against civilians were committed.[29] None of these conditions were fulfilled in the Crimean case. The right of self-determination does not give rise to a right of secession.[30]

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[25] According to Art. 73 of the Ukrainian Constitution: "Alterations to the territory of Ukraine shall be resolved exclusively by the All-Ukrainian referendum."

[26] United Nations, *Report of the Special Committee on the Problem of Hungary,* General Assembly Official Records: Eleventh Session Supplement no. 18, A/3592, New York 1957, para. 266, available at: http://mek.oszk.hu/01200/01274/01274.pdf (accessed 30 March 2015).

[27] Премьер Крыма попросил Путина обеспечить мир на полуострове, 1 March 2014, available at: www.vesti.ru/doc.html?id=1334804 (accessed 30 March 2015).

[28] ICJ, *Military and Paramilitary Activities in and against Nicaragua*, para. 246.

[29] Kranz, *supra* note 19, p. 26; *see also* Supreme Court (Canada), *Reference re secession of Quebec*, Judgment, 20 August 1998, 2 SCR 217, paras. 126, 138. For more treatment of this issue, *see* Th. Christiakis, *Les conflits de sécession en Crimée et dans l'Est de l'Ukraine et le droit international*, 3 Journal du droit international 737 (2014).

[30] *See more* C. Mik, *Opinia prawna w sprawie statusu prawnomiędzynarodowego przestrzeni powietrznej nad Półwyspem Krymskim po zajęciu Krymu przez Federację Rosyjską (ze szczególnym uwzględnieniem kompetencji ICAO)* (Legal opinion on international status of airspace over Crimean Peninsula after the seizure of Crimea by the Russian Federation (with particular focus on competences of the ICAO)), 3 (43) Zeszyty Prawnicze Biura Analiz Sejmowych Kancelarii Sejmu 86 (2014).

1.2. Eastern Ukraine

The same mechanism of intervention as in Crimea was used in the case of Eastern Ukraine. But in this case the victim state decided to respond militarily, and not just through diplomatic channels.

As in the case of Crimea, so too in Eastern Ukraine Russia committed aggression. Apart from attack and invasion of the territory of Ukraine and sending in groups controlled by it, the following acts of aggressions can be mentioned: "use of any weapons by a State against the territory of another State" (Art. 3(b)) and "an attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State" (Art. 3(d)), as the fight about control over this territory has been anything but bloodless and the hostilities between armed forces of both states took place, including the usage of heavy weapons by both states.[31] There is no legal justification for the use of force by Russia against Ukraine in the Donbas region as there was no authorization on behalf of the UN SC (in fact Russia blocked any action by the SC in order to prevent any involvement of other states), and there was no armed attack against Russia by Ukraine which would have entitled Russia to use force. No human rights were violated in the Donbas territory, so the issue of humanitarian intervention or the need to protect Russian citizens could not be raised and the support of rebels is prohibited by international law. The Russian rhetoric about the need to answer the Western transfer of weapons to Kiev or the training of its army is incomprehensible, as according to international law support for the legitimate authorities of a state (and definitely the current Ukrainian powers have legitimacy after the elections) is legal.[32]

From the very beginning of the Crimean crisis Russia has amassed major armed forces near the Ukrainian border. This could be considered as a threat to use of force, as could the authorization by the Council of Federation of the Federal Assembly of the Russian Federation to use force against Ukraine,[33] and although the mere threat to use force cannot be considered as aggression,[34] it is prohibited in light of Art. 2(4) of the UN Charter.

For the sake of clarity, it must be noted that the qualification of the use of force by Russia or Ukraine as aggression or self-defence does not have any impact on the application of the LOAC,[35] but this issue is crucial for four other reasons. Firstly, the

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[31] *See e.g. Ukraine accuses Russia of shooting down jet*, The Telegraph, 17 July 2014, available at: http://www.telegraph.co.uk/news/worldnews/europe/ukraine/10973212/Ukraine-accuses-Russia-of-shooting-down-jet.html (accessed 30 March 2015).

[32] A. C. Arend, R. J. Beck, *International Law and the Use of Force*, Routledge, London: 2003, pp. 84 ff.

[33] *Vladimir Putin submitted an appeal to the Council of Federation of the Federal Assembly of the Russian Federation,* 1 March 2014, available at: http://eng.kremlin.ru/news/6751 (accessed 30 March 2015).

[34] The Soviet Union was strongly opposed to including the threat of force in the definition of aggression, since it would go against the "first shot principle" that is so strongly endorsed (Solera, *supra* note 15, p. 129); *see also* P. Grzebyk, *Criminal Responsibility for the Crime of Aggression*, Routledge, New York: 2013, p. 54.

[35] See the preamble of the First Additional Protocol of 8 June 1977 relating to the Protection of Victims of International Armed Conflicts: "Reaffirming further that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are

assessment of the Russian actions as aggression, and thus as a violation of international law attributable to it, results in international responsibility on the part of Russia (the obligation to cease the act, to offer appropriate assurances and guarantees of non-repetition, and to make a full reparation).[36] Secondly, aggression, being the most severe example of violation of the prohibition of the use of force, is considered as a peremptory norm,[37] which entitles or even obliges other states and international organizations to react (i.e. to cooperate to bring to an end, through lawful means, the serious breach of this norm, as well as the obligation to not recognize as lawful a situation created by a serious breach, nor to render aid or assistance in maintaining that situation).[38] Thirdly, an act of armed aggression (*aggression armé*) or armed attack is required to justify the use of force in self-defence, hence Russia's use of force justifies the steps undertaken by Ukraine in order to protect its territorial integrity. Fourthly, if Russia committed aggression, then theoretically individuals responsible for the crime of aggression can be prosecuted before Ukrainian and Russian courts, inasmuch as the criminal codes of both states penalize the crime of aggression.[39]

2. IUS IN BELLO

2.1. Crimea

According to the law of armed conflict (LOAC) in order for an armed conflict to classify as an international armed conflict it is sufficient to find that there is an armed conflict between two or more states.[40] A declaration of war or any other formal recognition of a state of war by either side of an armed conflict is not necessary in order to apply the Geneva Conventions of 12 August 1949 on the protection of victims of war (GC) and their First Additional Protocol of 8 June 1977 relating to the Protection of Victims of International Armed Conflicts (AP I).[41] It is sufficient to verify if the situation is characterized by hostility between parties and that the use of armed force

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protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict."

[36] *See* Arts. 30-31 of the International Law Commission (ILC), *Articles on Responsibility of States for Internationally Wrongful Acts 2001*, GA resolution 56/83, 12 December 2001.

[37] *See* Commentary of the ILC on Articles on Responsibility of States for Internationally Wrongful Acts, Yearbook of the International Law Commission 2001, vol. II, part 2, p. 112; C. Mik, *Ius cogens in Contemporary International Law*, 33 Polish Yearbook of International Law 56 (2013).

[38] Arts. 40-41 of the International Law Commission, *Articles on Responsibility of States for Internationally Wrongful Acts* (2001).

[39] Art. 437 of the Criminal Code of Ukraine of 2001; Art. 353 of the Criminal Code of Russian Federation of 1996, both available at http://legislationline.org (accessed 30 March 2015).

[40] Common Art. 2 of the Geneva Conventions, 12 August 1949, 75 UNTS 287.

[41] Art. 1(3), 1125 UNTS 3. AP I broadens the concept of international armed conflict to include "armed conflicts in which peoples are fighting against colonial domination, alien occupation or racist regimes in the exercise of their right to self-determination" (Art. 1(4)).

has as its purpose to harm the enemy[42] (thus eliminating the situation of an erroneous incursion into the territory of another state, as in the case of Swiss soldiers who in 2007 entered Liechtenstein's territory by mistake).[43] Consequently, the threshold of international armed conflict is extremely low as any recourse to armed force by one state against another state triggers application of the LOAC.[44] The commentary to the Geneva Conventions of 1949 further emphasizes that, in order to classify an armed conflict as an international one: "[i]t makes no difference how long the conflict lasts, or how much slaughter takes place."[45] As a result, in case of engagement of armed forces of one state against another the LOAC must be applied from the very first bullet shot, the first detention of person, or occupation of the smallest part of the territory of another state.[46] However, it must be noted that the International Criminal Tribunal for the former Yugoslavia has suggested that requirements of intensity also apply to international armed conflicts.[47] In case of the Crimean Peninsula, it could be argued that despite the fact that about 25,000 members of armed forces were engaged in armed activities on behalf of the Russian and Crimean authorities, there was no kinetic violence, or that there were just some minor isolated incidents with few victims,[48] thus direct hostilities between two states practically did not take place and, because of the lack of armed conflict, the LOAC is not applicable.[49] Nevertheless, the Geneva Conventions

[42] S. Vité, *Typology of armed conflicts in international humanitarian law: legal concepts and actual situations*, 91(873) International Review of the Red Cross 69 (2009), pp. 72-73.

[43] M. Oliver, *Liechtenstein: no retaliation for Swiss 'invasion'*, The Guardian, 2 March 2007, available at: http://www.theguardian.com/world/2007/mar/02/markoliver (accessed 30 March 2015). There have been other similar incidents like, e.g., the invasion of British marines in Spain in 2002 (G. Tremlett, *Tell it to the marines... we've invaded the wrong country*, The Guardian, 29 February 2002, available at: http://www.theguardian.com/uk/2002/feb/19/gibraltar.world (accessed 30 March 2015).

[44] *See* the International Criminal Tribunal for the former Yugoslavia (ICTY), *The Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para. 70, where the ICTY stated: "an armed conflict exists whenever there is a resort to armed force between States."

[45] J. Pictet (ed.), *Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field,* International Committee of the Red Cross, Geneva: 1952, p. 32.

[46] M. Sassòli, A. A. Bouvier, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, Volume I, 2nd ed., International Committee of the Red Cross, Geneva: 2006, p. 116; R. Kolb, R. Hyde, *An Introduction to the International Law of Armed Conflicts,* Hart Publishing, Oxford: 2008, p. 101.

[47] *See* ICTY, *The Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70 ("These hostilities exceed the intensity requirements applicable to both international and internal armed conflicts"). *See also* A. Paulus, M. Vashakmadze, *Asymmetrical war and the notion of armed conflict – a tentative conceptualization*, 91(873) International Review of the Red Cross 95 (2009), p. 101.

[48] A. Wilk, *Russian military intervention in Crimea*, The Centre for Eastern Studies: Analyses, 5 March 2014, available at: http://www.osw.waw.pl/en/publikacje/analyses/2014-03-05/russian-military-intervention-crimea (accessed 30 March 2015).

[49] As Vladimir Putin emphasized in its address of 18 March 2014 to State Duma deputies, Federation Council members, heads of Russian regions and civil society representatives in the Kremlin: "I cannot

are clear that even in “cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation *meets with no armed resistance*” [emphasis added] the Geneva Conventions are still applicable.[50] The underlying rational of the afore-mentioned provision was to eliminate any possible gap which would result in deprivation of protection of people *hors de combat* and also to encompass such situations as the German annexation of Czechoslovakia prior to World War II.[51]

The Hague Regulation of 18 October 1907 states that “[t]erritory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”[52] Three conditions therefore must be fulfilled. Firstly, the occupant must take effective control over the territory against the will of the state to which the territory belongs. Secondly, this control must have been gained or be maintained due to the use of the army. Thirdly, the occupant must have established its authorities on the occupied territory and is able to exercise its powers. It is sufficient to have overall control over a proxy executing the authority in the field.[53] The Geneva Conventions broaden the concept of occupation in order to also cover those situations in which armed force was not used.[54] In case of Crimea it is undeniable that from March 2014 Russia has had and still has effective control over the Crimean Peninsula. It gained its control by sending thousands of soldiers and using those who were based in Crimea. Ukraine decided not to carry out armed actions, but it has not accepted the loss of Crimean territory.[55] In consequence Crimea has the status of an occupied territory and Russia must be identified as an occupant. Since the LOAC clearly emphasizes that international armed conflict may take the form of occupation,[56] so it can be stated that

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recall a single case in history of an intervention without a single shot being fired and with no human casualties”, available at: http://eng.kremlin.ru/news/6889 (accessed 30 March 2014).

[50] Common Art. 2 of the GC.

[51] *See* D. Akande, *Classification of Armed Conflicts: Relevant Legal Concepts*, [in:] Elizabeth Wilmshurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, Oxford: 2012.

[52] Art. 42, 205 C.T.S. 305.

[53] *See* ICTY, *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Judgment (Trial Chamber), 3 March 2000, para. 149 (“The occupied territory was the part of BH territory within the enclaves dominated by the HVO, namely Vitez, Busova and Kiseljak. In these enclaves, Croatia played the role of occupying Power through the overall control it exercised over the HVO, the support it lent it and the close ties it maintained with it”). *See also* Akande *supra* note 51.

[54] *See more* E. Mikos-Skuza, *Koncepcja okupacji w świetle prawa haskiego i genewskiego a współczesna praktyka okupacji* (The concept of occupation in light of the Hague and Geneva laws and contemporary practice of occupation), J. Nowakowska-Małusecka, *Międzynarodowe prawo humanitarne. Antecedencje i wyzwania współczesności* (International humanitarian law. Antecedents and challenges for the present time), Oficyna Branta, Bydgoszcz-Katowice: 2010, pp. 103-104.

[55] *See Letter dated 28 February 2014 from the Permanent Representative of Ukraine to the United Nations addressed to the President of the Security Council*, S/2014/136, 28.02.2014, in which the Ukrainian representative requested an urgent meeting of the SC due to “the deterioration of the situation in the Autonomous Republic of the Crimea, Ukraine, which threatens the territorial integrity of Ukraine.”

[56] Kolb, Hyde, *supra* note 46, p. 74; Vité, *supra* note 42, p. 73.

since March 2014 Ukraine and Russia are engaged in an international armed conflict and LOAC shall be applied in the whole territory of the belligerent states.[57]

As Crimean annexation seems to be a *fait accompli* and the perspective of *restitutio quo ante* in the near future is highly improbable, it should be kept in mind that even if the situation lasts for decades (like in the case of Israel and the Palestinian territories), at least some provisions of the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War must be applied at all times.[58] The “fact” of annexation cannot deprive protected persons of their protections under the LOAC.[59]

2.2. The Eastern Ukraine case

The situation in Eastern Ukraine has been an evolving one, thus its legal classification according to the LOAC must also be considered as evolving. Initially, in Eastern Ukraine there were only riots and sporadic clashes between pro-Russian separatists and pro-Ukrainian fighters, so LOAC could not be applied as it does not apply “to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.”[60] It is extremely difficult to determine at which moment this unrest evolved in an armed conflict, as according to the LOAC the threshold of a non-international armed conflict is paradoxically higher than that of an international one.[61]

There is no conventional definition of an armed conflict, but nonetheless the jurisprudence has attempted to define this term. According to the International Tribunal for the former Yugoslavia, a non-international armed conflict exists when there is “protracted armed violence between governmental authorities and organised armed

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[57] Kolb, Hyde, *supra* note 46, p. 94. However, it must be noted that Marco Sassòli and Antoine A. Bouvier consider occupation which did not encounter an armed resistance as a situation in which law of international armed conflicts is applied, but there is no armed conflict (Sassòli, Bouvier, *supra* note 46, p. 187).

[58] Arts. 1-12, 27, 29-34, 47, 49, 51-53, 59, 61-77, 143 in connection with Art. 6 of the IV GC. For more about occupation, *see* Y. Dinstein, *The International Law of Belligerent Occupation*, Cambridge University Press, Cambridge: 2009; R. Kolb, S. Vité, *Le droit de l'occupation militaire: perspectives historiques et en jeux juridiques actuels*, Bruylant, Brussels: 2009; Y. Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with International Human Rights Law*, Martinus Nijhoff, The Hague: 2009; E. Benvenisti, *The International Law of Occupation*, Oxford University Press, Oxford: 2012. *See also* R. Kwiecień, *Okupacja wojenna w świetle prawa międzynarodowego: natura, skutki, nowe tendencje* (Belligerent occupation in light of international law: its nature, results, and new tendencies), 60(1) Annales Universitatis Mariae-Curie Skłodowska Lublin Polonia 65 (2013).

[59] Art. 47 of the IV GC.

[60] Art. 1(2) AP I. *See also* Art. 8(2)(f) of the Rome Statute of the International Criminal Court, 2187 UNTS 90.

[61] However, there were situations in which armed violence was not protracted and yet the existence of armed conflict was established, like in the Tablada case (on 23 and 24 January 1989 an armed confrontation took place at the La Tablada base between attackers and Argentine armed forces for approximately 30 hours), *see* Organization of the American States, Inter-American Commission on Human Rights, Case 11.137, *Juan Carlos Abella v. Argentina*, 18.11.1997, OEA/Ser.L/V/II.98, doc. 6 rev., 13 April 1998, para. 156.

groups or between such groups within a State."[62] This statement allows for making four findings. Firstly, non-international armed conflict exists not only in a situation of hostilities between governmental forces and some organized armed group, but also in situation where there are hostilities only between organized armed groups without any engagement of governmental forces. This finding matters in assessment of the first phase of the conflict in Eastern Ukraine (from March till June 2014) when there were sporadic clashes between so-called separatists and pro-Ukrainian volunteers (territorial defence battalions which at the beginning of the conflict were not always controlled by the Ukrainian Ministry of Defence), with little or no engagement of the state's armed forces. Secondly, in order to classify a situation as an internal armed conflict a minimum level of intensity, including duration (as the ICTY's definition stresses that the conflict must be *protracted*) must be achieved in order to distinguish armed conflict from isolated acts of violence. Such factors like the deployment of armed forces instead of police, number of armed forces and partisans involved in hostilities, collectiveness and frequency of fighting , number of casualties, displacement of civilians, detention of fighters, usage of heavy weaponry, and a relatively wide geographical scope of hostilities are all indicators of an armed conflict.[63] Thirdly, non-state actors involved in the conflict should be organized to such an extent that they can be considered as a party to the conflict (the common Art. 3 of the Geneva Conventions of 1949 refers to "each Party to the conflict"), thus they must have organized armed forces with a command structure, and be able to conduct military operations. The presence of a clear command structure, launching operations involving several units, recruitment and training of fighters, control over a territory, issuing non-contradictory statements in the name of the entire armed group, and adoption of internal rules can indicate that a non-state actor is organized to a sufficient extent to be labelled "a party to the conflict."[64] Fourthly, a non-international armed conflict must occur in the territory of a state which is a party to the GC (Ukraine ratified the GC in August 1954 and both AP in January 1990; Russia ratified the GC in May 1954 and the AP in September 1989).

Similarly as in international armed conflicts, the subjective opinion of parties to the conflict about its intensity and thus the existence of an armed conflict is not decisive.[65] However, taking into account the need to weigh up all the indicative factors in every case,

[62] ICTY, *The Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 70.

[63] *See e.g. Prosecutor v. Ljube Boškoski, Johan Tarčulovski*, Judgment, IT-04-82-T, 10 July 2008, paras. 177-178.

[64] *E.g. ibidem*, paras. 199-203. In addition, the ICRC Commentary stresses that in order to classify a situation as a non-international armed conflict such indicators as e.g. level of organization of the insurgents (purporting to have the characteristics of a State), recognition of insurgents as belligerent by the state, dealing with the situation in the agenda of the UN Security Council or the General Assembly as a threat to international peace, a breach of the peace, or an act of aggression, may be taken into account, *see* J. S. Pictet (ed.), *Commentary: I Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field,* International Committee of the Red Cross, Geneva: 1952, pp. 49-50.

[65] ICTR, *Prosecutor v. Akayesu*, Judgment, ICTR-96-4, 2 September 1998, para. 603.

and the blurred line between violent riots and an armed conflict, the trigger system for the application of the law of non-international armed conflict is not as effective as that of international armed conflict, as it leaves a broad gap of doubt about the classification of the situation. In such a situation the opinion of the engaged parties to the conflict has some value. However it is stressed in the literature and in the jurisprudence that the purpose underlying the carrying out of military actions and the motivations of the fighters should not impact the application of LOAC.[66] As a result, the fact that actions of non-state actors will be labelled as, e.g., terrorism or organized crime does not impact classification of the situation from the point of view of the LOAC.

In case of Eastern Ukraine, from March until June 2014 separatists were taking control over consecutive cities and villages with little resistance.[67] Even the announcement by the Ukrainian President on 13 April 2014 of the commencement of anti-terrorist operations did not change this situation much.[68] Analysts emphasize that during the above-mentioned period there were only some minor clashes resulting in few casualties, which were exaggerated by both sides due to the upcoming presidential elections.[69] The major fights commenced in July with the launch of the governmental offensive.[70] From that moment on thousands of soldiers and partisans began taking part in hostilities in the Donbas region, which is the most densely populated region of Ukraine (apart from the capital city of Kiev).[71] One of the biggest battles was over the Donetsk Airport and lasted

[66] Vité, *supra* note 42, p. 78. *See also* ICTY, *Prosecutor v. Fatmir Limaj, Haradin Bala, Isak Musliu*, IT-03-66-T, 30 November 2005, para. 170.

[67] A. Szeptycki, *Europa Wschodnia i Kaukaz Południowy – pomiędzy hard power Rosji i soft power UE* (Eastern Europe and Southern Caucasus – between Russian hard power and EU soft power), 20 Rocznik Strategiczny (2014/2015).

[68] *See* A. Wilk, *Ukraińska operacja antyterrorystyczna w Kramatorsku i Słowiańsku – gra pozorów?* (Ukrainian anti-terror operation in Kramatorsk and Sloviansk – game of pretence?), The Centre for Eastern Studies: Analyses, 8 May 2014, available at: http://www.osw.waw.pl/pl/publikacje/analizy/2014-05-08/ukrainska-operacja-antyterrorystyczna-w-kramatorsku-i-slowiansku-gra (accessed 30 March 2015); P. Żochowski, A. Wilk, W. Konończuk, *The conflict in the Donbas – forced de-escalation?,* The Centre for Eastern Studies: Analyses, 11 June 2014, available at: http://www.osw.waw.pl/en/publikacje/analyses/2014-06-11/conflict-donbas-forced-de-escalation (accessed 30 March 2014).

[69] A. Wilk, *supra* note 68; W. Konończuk, *Eastern Ukraine: the separatists' offensive in anticipation of the 'referendum'.* The Centre for Eastern Studies: Analyses, 8 May 2014, available at: http://www.osw.waw.pl/en/publikacje/analyses/2014-05-08/eastern-ukraine-separatists-offensive-anticipation-referendum (accessed 30 March 2015); W. Konończuk, *Ukraine closer to losing the eastern part of the country,* The Centre for Eastern Studies: Analyses, 16 April 2014, available at: http://www.osw.waw.pl/en/publikacje/analyses/2014-04-16/ukraine-closer-to-losing-eastern-part-country (accessed 30 March 2015); Human Rights Watch, *Compare with Eastern Ukraine: Questions and Answers about the Laws of War,* 11 September 2014, available at: http://www.hrw.org/news/2014/09/11/eastern-ukraine-questions-and-answers-about-laws-war (accessed 30 March 2015).

[70] R. Sadowski, *The separatists are yielding to Kyiv,* The Centre for Eastern Studies: Analyses, 9 July 2014, available at: http://www.osw.waw.pl/en/publikacje/analyses/2014-07-09/separatists-are-yielding-to-kyiv (accessed 30 March 2015).

[71] A. Wilk, W. Konończuk, *Ukrainian-Russian war under the banner of an anti-terrorist operation,* The Centre for Eastern Studies: Analyses, 6 August 2014, available at: http://www.osw.waw.pl/en/publikacje/analyses/2014-08-06/ukrainian-russian-war-under-banner-anti-terrorist-operation (accessed 30 March 2015).

from September 2014 till January 2015. Artillery, tanks, combat helicopters and other heavy weaponry were used during these operations.[72] The number of civilian casualties increased enormously, especially at the beginning of 2015.[73] The Office of the UN High Commissioner for Human Rights (OHCHR) assessed that from mid-April 2014 until mid-February 2015 the overall death toll exceeded 5,358 people, with another 12,235 wounded.[74] Civilians were dying on a daily basis, as was emphasized by the UN Secretary General.[75] The Internal Displacement Monitoring Centre estimated that there are at least 1,116,618 internally displaced persons (IDPs) in Ukraine as of March 2015.[76] The insurgents have had a clear command structure from the very beginning of the establishment of the so-called "South-East Army" (Lugansk) and "Donetsk People's Army" in April 2014.[77] The duration of, for example, the battle over the Donetsk Airport also proved that they were able to sustain major military operations over an extended period of time.

Taking into account the size of territory on which fighting has taken place, the size of the engaged forces, their military character, the number of casualties, the weaponry used, and the clearly distinct parties to the conflict, it is incontrovertible that in Eastern Ukraine, at least from July 2014, there was and continues to be (as of March 2015) an armed conflict.[78] Statements and reports on behalf of the OHCHR on the commission

[72] Examples include: on 24 January 2015 the eastern outskirts of Mariupol came under fire from BM-21 Grad missile launchers (according to Ukrainians, 120 rockets were fired at the city), *see* K. Frymark, W. Konończuk, W. Rodkiewicz, A. Wilk, *The Donbas conflict after the Mariupol shelling,* The Centre for Eastern Studies: Analyses, 28 January 2015, available at: http://www.osw.waw.pl/en/publikacje/analyses/2015-01-28/donbas-conflict-after-mariupol-shelling (accessed 30 March 2015); on 17 July 2014 MH17 was hit by a rocket from a Buk-M1, *see* T. Iwański, P. Żochowski, K. Jarzyńska, *The conflict in the Donbas after the shooting down of the Malaysian plane,* The Centre for Eastern Studies: Analyses, 23 July 2014, available at: http://www.osw.waw.pl/en/publikacje/analyses/2014-07-23/conflict-donbas-after-shooting-down-malaysian-plane (accessed 30 March 2015); in May 2014 insurgents managed to shoot down in attack helicopters Mi-24, *see* Wilk, *supra* note 68. *See also* OHCHR, *Report on the human rights situation in Ukraine*, 15 November 2014, para. 27.

[73] Some incidents were noted by the UN SC in its press statements, such as fights in Debaltseve resulting in civilian losses, SC/11784, 17 February 2015; killing of civilians at a public transport stop in Donetsk, SC/11749, 22 January 2015; killing of bus passengers in Donetsk, SC/11733, 13 January 2015; killing journalists, SC/11442, 17 June 2014; the killing of ICRC Staff Member in Ukraine, SC/11588, 3 October 2014.

[74] OHCHR, *Ukraine: Dangerous escalation in conflict proving catastrophic for civilians*, 3 February 2015, available at: http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=15532&LangID=E (accessed 30 March 2015).

[75] Statement attributable to the Spokesman for the Secretary-General concerning Ukraine, New York, 4 February 2015, available at: http://www.un.org/sg/statements/index.asp?nid=8377 (accessed 30 March 2015).

[76] *See* http://www.internal-displacement.org/europe-the-caucasus-and-central-asia/ukraine/figures-analysis (accessed 30 March 2015).

[77] Human Rights Watch, *supra* note 69.

[78] *See also Ukraine: ICRC calls on all sides to respect international humanitarian law*, 23 July 2014, available at: https://www.icrc.org/eng/resources/documents/news-release/2014/07-23-ukraine-kiev-call-respect-ihl-repatriate-bodies-malaysian-airlines.htm (accessed 30 March 2015). The above statement clearly confirms that the ICRC considered, at least from July 2014, the situation in Eastern Ukraine as an armed conflict.

of war crimes, i.e. crimes which by definition can only be committed within the framework of an armed conflict, confirm the above conclusion.[79] In the beginning (July-August 2014), this conflict could be classified as a non-international one to which not only the common Art. 3 of the Geneva Conventions of 1949 (as this is "the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties") should be applied, but also the Second Additional Protocol of 1977 relating to the protection of victims of non-international armed conflicts (AP II). AP II can be applied to armed conflicts which "take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." All the conditions cited in the above provision were met in the case of Eastern Ukraine. Firstly, the conflict took place (and continues to take place) between governmental forces and dissidents. Secondly those dissidents have, from the very beginning of the conflict, controlled a distinct part of Ukrainian territory, including the Russian-Ukrainian state border. The ICRC Commentary stresses that this control can be relative "for example, when urban centres remain in government hands while rural areas escape their authority."[80] In consequence, the fact that the dissidents do not control every city and village in Donbas does not prevent the application of the AP II. Thirdly, they are able to conduct hostilities in an organized manner, which is confirmed by the simple fact of the relative long duration of the military clashes in Ukraine.

The Russian engagement in the conflict is not without an impact on the classification of the conflict in Eastern Ukraine. According to the LOAC, the engagement of a foreign state on the side of the rebels changes the qualification of the conflict in two situations: firstly when a foreign state sends its troops into the territory of another state to support a movement opposing the local government; or secondly if a foreign state intervenes by proxy, supporting and guiding the uprising from a distance.

At least from August 2014 (in response to the successes of the Ukrainian army in regaining control over different localities in Donbas), the Russian involvement was direct.[81] There is convincing evidence that regular Russian armed forces participated in

[79] OHCHR, *Report on the human rights situation in Ukraine*, 17 August 2014, paras. 11, 177, available at: http://www.refworld.org/docid/548ff2db4.html (accessed 30 March 2015); OHCHR, *Report on the human rights situation in Ukraine*, 15 November 2014, paras 26, available at: http://www.refworld.org/docid/546ef1a94.html (accessed 30 March 2015); OHCHR, *Report on the human rights situation in Ukraine*, 15 December 2014, paras. 7, 11, available at: http://www.refworld.org/docid/548ff3374.html (accessed 30 March 2015).

[80] Y. Sandoz et al. (eds.), *Commentary on Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949,* International Committee of the Red Cross, Martinus Nijhoff Publishers, Geneva: 1987, para. 4467.

[81] R. Sadowski, *The ceasefire in eastern Ukraine,* The Centre for Eastern Studies: Analyses, 10 September 2014, available at: http://www.osw.waw.pl/en/publikacje/analyses/2014-09-10/ceasefire-eastern-ukraine (accessed 30 March 2015).

hostilities on the territory of Ukraine,[82] which would mean that undoubtedly the conflict was internationalized. However, this internationalization could even have happened earlier if it were confirmed that the insurgents in Eastern Ukraine were from the very beginning inspired and supported by Russia to the extent that Russia had overall control over the dissident forces. The "overall control" test established by the ICTY (and adopted also by the International Criminal Court) does not require that specific orders relating to every military action must be issued by the foreign state. It is sufficient to establish that a foreign state's organs were involved in the planning, coordinating, organizing and supervising of the entire military operation, as well as in financing, training and equipping, or providing operational support to it.[83] The ICTY identified some indicators based on which the overall control can be assessed, like e.g. sharing personnel, paying wages by the foreign state, coordination of actions, aiming at the same goals, a similar military structure, and some more obvious indicators like the issuance of orders by a foreign state.[84]

From the very beginning of the conflict there was evidence that Russia provides the insurgents with weapons, shields them with its air-defense system, allows the flow of Russian volunteer fighters, that Russian agents are among the commanders of the insurgents' armed forces, and what is most important, that the insurgents' operations are consulted with the Russian command.[85] This allows to at least suspect that Russia has had overall control over the separatist armed groups.

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[82] *See e.g. Opening remarks by NATO Secretary General Jens Stoltenberg at the joint press point with the Latvian President*, 18 February 2015, available at: http://www.nato.int/cps/en/natohq/opinions_117517.htm?selectedLocale=en (accessed 30 March 2015); L. Smith-Spark, J. Sciutto, A. Fantz, *'It is crystal clear' Russian military is on the ground, Ukraine PM says*, CNN 5 February 2015, available at: http://www.cnn.com/2015/02/05/europe/ukraine-conflict/ (accessed 30 March 2015); A. E. Kramer, M. R. Gordon, *Ukraine Reports Russian Invasion on a New Front*, The New York Times, 27 August 2014, available at: http://www.nytimes.com/2014/08/28/world/europe/ukraine-russia-novoazovsk-crimea.html?_r=2 (accessed 30 March 2015); *Ukraine crisis: 'Column from Russia' crosses border*, BBC, 15 August 2014, http://www.bbc.com/news/world-europe-28924945 (accessed 30 March 2015); N. MacFarquhar, M. R. Gordonaug, *Ukraine Leader Says 'Huge Loads of Arms' Pour in From Russia*, 28 August 2014, available at: http://www.nytimes.com/2014/08/29/world/europe/ukraine-conflict.html (accessed 30 March 2015).

[83] ICTY, *The Prosecutor v. Dusko Tadic*, Appeal Judgment, IT-94-1-A, 15 July 1999, para. 137; *The Prosecutor v. Mladen Naletilic, Vinko Martinovic*, Judgment, IT-98-34-T, 31 March 2003, paras. 183-184; *The Prosecutor v. Tihomir Blaskic*, Judgment, IT-95-14-T, 3 March 2000, para. 100; ICC, *The Prosecutor v. Thomas Lubanga Dyilo*, 14 March 2012, para. 541.

[84] ICTY, *The Prosecutor v. Tihomir Blaskic*, Judgment, IT-95-14-T, 3 March 2000, paras. 101-118; *The Prosecutor v. Dusko Tadic*, Appeal Judgment, para. 151; *The Prosecutor v. Mladen Naletilic, Vinko Martinovic*, Judgment, IT-98-34-T, 31 March 2003, para. 200.

[85] W. Konończuk, *Ukrainian statehood in the face of Russian aggression,* The Center of Eastern Studies, Analyses, 20 August 2014, available at: http://www.osw.waw.pl/pl/publikacje/analizy/2014-08-20/panstwowosc-ukrainska-w-obliczu-rosyjskiej-agresji (accessed 30 March 2015). *See also* records of the talks between dissidents and the Russian army which were revealed after the shooting down of MH17, available at: https://www.youtube.com/watch?v=BbyZYgSXdyw (30 March 2015). *See also* O. Zadorozhny, T. Korotkyi, *Legal Assessment of the Russian Federation's Policy in the Context of the Establishment and Activities of Terrorist Organizations "Donetsk People's Republic" ("DPR") and "Lugansk People's Republic" ("LPR") in Eastern Ukraine,* 2(1) European Political and Law Discourse 8 (2015), pp. 11-12.

The International Court of Justice applied a different test of *an effective control*, according to which the dissidents should be dependent on a foreign state and fully controlled by it, which would mean be equated either with an organ of that state or as acting on behalf of its government.[86] The ICJ's test puts at a much higher level than the ICTY the degree of control which must be attained in order to trigger a state's responsibility. However, even if we agree that the overall control test cannot be applied to the issue of state responsibility, as it broadens it too much and was several times rejected by the ICJ,[87] the test of overall control still merits consideration in classification of a conflict as international or non-international in light of LOAC.[88]

It is not agreed among scholars if a foreign engagement internationalizes the entire conflict,[89] or if it means that two types of conflicts – international and non-international – are taking place simultaneously, i.e. that there exists a mixed conflict.[90] The second option results in a complication of legal regimes applied in the case of Ukraine as it means, e.g., a necessity to distinguish between members of Russian armed forces – having combatant and prisoners of war rights – and dissident forces without any combatant privileges; and the application of different rules concerning the detention of civilians or fighters and separate regimes of responsibility for war crimes. Even if some standards (like the protection of civilians) of international and non-international armed conflicts are merging nowadays, still too many important issues are resolved in different ways depending on the classification of the armed conflict,[91] thus the Ukrainian case is an excellent example that the call to establish one definition of an armed conflict must be finally answered positively.[92]

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[86] *See* ICJ, *Military and Paramilitary Activities in and against Nicaragua*, paras. 115-116.

[87] *See e.g.* ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, para. 160.

[88] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, paras. 404-405, *See also* A. Cassese, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia,* 18(4) European Journal of International Law 649 (2007).

[89] *See e.g.* I. Detter, *The Law of War*, Cambridge University Press, Cambridge: 2000, pp. 47-49. Sylvain Vité emphasizes although that the ICRC proposal made in the 1971 Report on the Protection of Victims of Non-International Armed Conflicts, according to which the whole conflict would be internationalized if there was external intervention, was rejected. Vité, *supra* note 42, p. 86.

[90] *See* ICJ, *Military and Paramilitary Activities in and against Nicaragua*, para. 219 ("The conflict between the Contras' forces and those of the Government of Nicaragua is an armed conflict which is 'not of an international character'. The acts of the contras towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts"). Compare the ICTY, *Prosecutor v. Dusko Tadic*, Appeal Judgment, para. 84.

[91] *See* M. Milanović, V. Hadzi-Vidanovic, *A taxonomy of armed conflict,* [in:] N. White, Ch. Henderson (eds.), *Research Handbook on International Conflict and Security Law*, Edward Elgar Publishing, Cheltenham: 2012.

[92] *See* J. G. Stewart, *Towards a single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict*, 85(850) International Review of the Red Cross 313 (2003).

The question of classification of the conflict between Ukraine and Russia can be also dealt from the point of view of international criminal law, particularly from the perspective of the Rome Statute, as it could potentially be of great relevance, taking into account the Ukrainian announcement of its willingness to make an Art. 12(3) Rome Statute declaration, which would give the ICC jurisdiction over the Ukrainian situation.[93] The Rome Statute does not create a separate definition of international armed conflict, but in case of a non-international armed conflict it differentiates between armed conflicts which are within the common Art. 3 of the GC[94] and those which are *protracted* (so the time factor is added in).[95] This distinction is incomprehensible taking into account, for example, the ICTY jurisprudence which added the time element to the general definition of an non-international armed conflict. However, taking into account the duration of the Ukrainian-Russian conflict it may be said that without doubt all articles concerning war crimes committed in a non-international armed conflict could be applied (under the condition that the ICC would have jurisdiction based on e.g. Ukraine's Art. 12(3) Rome Statute referral, or the SC's referral – Art. 13(b) of the Rome Statute).

However, it must be emphasized that the fact that some violent incidents resulting in many civilian losses took place during the conflict between Ukraine and Russia (including the shooting down on 17 July 2014 of MH17 with 298 passengers on board), this does not mean that those responsible for them (even if they are captured and evidence of their involvement is collected) could be sentenced for, e.g., war crimes or even crimes against humanity. Killing civilians not taking part in hostilities is obviously prohibited by the LOAC but in order to attach individual responsibility the appropriate *mens rea* must be proven.[96] In consequence, the attacker will be found guilty only if he was aware of all the circumstances of the attack (including the civilian status of the victims) and intended to commit a crime. Paradoxically, because in Eastern Ukraine there is an armed conflict, it is much easier to avoid responsibility, inasmuch as if the attack was performed in relation to the conflict it is sufficient to demonstrate that the perpetrator was convinced that he was targeting a military object (e.g. a military transport plane) in order to be found not guilty. In contradiction to ordinary crimes for which responsibility can be attached in cases of recklessness as well, those accused of war crimes (or crimes against humanity) can be sentenced only if the war crimes were

[93] *See* Ukrainian parliament recognizes Hague Court jurisdiction and proposes to charge Russian officials with war crimes, 4 February 2015, available at: http://www.unian.info/politics/1040303-ukrainian-parliament-recognizes-hague-court-jurisdiction-and-proposes-to-charge-russian-officials-with-war-crimes.html (accessed 30 March 2015). Ukraine has already submitted an Art. 12(3) of the Rome Statute Declaration on 17 April 2014 accepting the ICC's jurisdiction for events that occurred in Ukraine between 21 November 2013 and 22 February 2014 to the ICC, see: http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/ukraine/Pages/ukraine.aspx (accessed 30 March 2015).

[94] *See* Art. 8(2)(c)–(d).

[95] *See* Art. 8(2)(f). See more on this distinction in Vité, *supra* note 42, pp. 81-82.

[96] *See e.g.* Art. 30 of the Rome Statute of the International Criminal Court, 2187 UNTS 90.

committed with *dolus directus* or *dolus eventualis*. A war crime cannot be committed by recklessness. In the case of insurgents, even if it is impossible to judge them for war crimes because of, e.g., a lack of *mens rea*, it is still possible to prosecute them for merely taking part in hostilities (unless it is determined that in Eastern Ukraine there is only an international armed conflict and all fighters, including Ukrainian insurgents, enjoy combatant immunity).[97]

CONCLUDING REMARKS

The situation in Crimea and Eastern Ukraine can be qualified from the perspective of two separate branches of law, namely the LOAC and the law on the use of force. In light of the LOAC, there is definitely an international armed conflict between Russia and Ukraine as the territory of the Crimean Autonomous Republic and city of Sevastopol is occupied. Even if this occupation lasts for decades, Crimean territory cannot become a part of Russian state as *debellatio* is not legally possible, and thus at least some provisions of the GC IV will continue to be applied. The case of Eastern Ukraine should not be artificially separated from the Crimean one, thus from the point of view of LOAC it should be treated as a mere expansion of the geographic scope of the battlefield of an international armed conflict between two states, due to the direct and indirect involvement of Russia on that territory. In addition, it can be assumed that because of the Ukrainian insurgents' military actions, simultaneously with the international armed conflict there is also non-international one, to which not only is the common Art. 3 of the GC applied, but also the AP II, inasmuch as insurgents control a part of Ukrainian territory and have proven that are able to carry out sustained and concerted military operations.

From the point of view of the law on the use of force, undoubtedly in both cases – Crimea and Eastern Ukraine – Russia committed aggressions in light of the definitions contained in GA resolution 3314. The members of the UN SC are fully aware of this, as reflected in various statements made during SC meetings.[98] There is no legal justification for the Russia's use of force in light of the UN Charter. Russia's acts of aggression constitute armed attacks and entitle Ukraine to self-defence. In addition, Russia is responsible for the commission of an internationally wrongful act and, inasmuch as it violated a peremptory norm (prohibition of aggression) other states and international organizations are obliged to not recognize its unlawful annexation and undertake steps to bring to an end the serious breach of this norm.

[97] Protocol II encourages signatories "to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained" (Art. 6(5) AP II), which means that it does not prohibit the prosecution of insurgents with no combatant status for taking part in hostilities.

[98] SC/11375, 29 April 2014; SC/11417, 28 May 2014; SC/11488, 24 June 2014; SC/11645, 12 November 2014.

However, Russia's position as a permanent member of the SC prevents this body from any official condemnation of Russian actions.[99] It is significant that, despite the blatant violation of the prohibition of the use of force, the vote in the GA (concerning only Crimea) gathered a majority of only 52% of states.[100] This is proof that even in a situation when the law is clear, policy still matters more.

[99] *See* S/2014/189, 15 March 2014. The SC managed to adopt resolutions referring only to the downing of the MH17 airplane (S/RES/2166, 21 July 2014) and endorsing the Minsk Accords of February 2015 (S/RES/2202, 17 February 2015).

[100] *See* GA resolution 68/262, 27 March 2014. *See also* R. Goodman, *How "Overwhelming" was the UN General Assembly Vote on Crimea?*, 24 February 2014, available at: http://justsecurity.org/9809/overwhelming-general-assembly-vote-crimea/ (accessed 30 March 2015).

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THE LEGALITY AND CERTAIN LEGAL CONSEQUENCES OF THE "ACCESSION" OF CRIMEA TO THE RUSSIAN FEDERATION

Abstract:
On 11 March 2014 Crimea declared independence. Ukraine and international society has not recognised that act. However Crimea's independence was recognised by Russia and on 18 March 2014 an agreement on the accession of the Republic of Crimea to the Russian Federation was signed. Many countries and international organisations have condemned that step, viewing it as illegal annexation. Regardless of how this situation is treated however, it is at present a fait accompli. Such a situation evokes legal consequences both in the internal law of Ukraine and Russia as well as on the plane of international law. The residents of Crimea appear to be in the worst situation. Legal certainty is a fiction for them now. There are also problems on the international plane. Despite the fact that in the opinion of international society Crimea remains an integral part of Ukraine, in practice there are many conflicting problems of a legal nature that cannot be solved, at least for the time being.

This article analyses the legality and certain legal consequences of the "accession" of Crimea to Russia and the effect of this accession on the legal situation for residents of Crimea. The article concludes that legal situation of Crimeans will not improve anytime soon, and that the legal problems which have arisen on the international plane will not be resolved soon either.

Keywords: accession, annexation, aggression, Crimea, declaration of independence, Russian Federation, Ukraine

INTRODUCTION

In March 2014 the accession of Crimea, which was an integral part of Ukraine, to the Russian Federation took place – an event which has put in doubt the validity of certain principles international law. The Russian side has presented the whole situation as an expression of the Crimean people's right to self-determination.[1] But within many

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[1] *E.g.* President Putin's interview to radio "Europe 1" and the TV channel "TF1", 3 June 2014.

other countries there is a perception that this accession has to be qualified as an illegal annexation.[2] However, regardless of how this situation is treated by international law, we are faced with a *fait accompli*. On 18 March 2014 an agreement was signed between the Russian Federation and the Republic of Crimea on the accession of the Republic of Crimea and Sevastopol to the Russian Federation,[3] pursuant to which the Republic of Crimea became a federal subject of the Russian Federation. Obviously, this fact has not been recognised by the Ukrainian authorities. This whole situation has certain legal consequences, both in the internal legislation of the Russian Federation and Ukraine (which Crimea was an integral part of), as well as on the plane of international law.

This article analyses the legality and legal consequences of the accession of Crimea to the Russian Federation and the effect of this accession on the legal situation of the residents of Crimea. The so-called "transition period" was set by the Russian Federation to last until 1 January 2015. Up until this date the laws adopted by the Autonomous Republic of Crimea were used in the Republic of Crimea, unless they were in contradiction with Russian law. People residing within the territory found themselves in a legal chaos, which some called a "legal vacuum". Legal certainty, which is one of the basic criteria for the quality of life of both whole societies as well as individuals in the contemporary world, was (and still is) a fiction for the Crimeans.

Part 1 of this article analyzes the legal framework for Crimea's accession to the Russian Federation and examines whether the supporting documents are in accordance with both, either, or neither of the Russian and Ukrainian laws. Part 2 examines the effects caused by changes in the jurisdiction of Crimea with respect to matters governed by international law. Part 3 analyzes the legal situation of Crimea after the "accession". The last part summarizes and offers conclusions.

1. ACCESSION OF CRIMEA TO THE RUSSIAN FEDERATION

1.1. Legal background of the accession

On 17 March 2014 the Republic of Crimea proclaimed itself an independent and sovereign state, with Sevastopol as a city with a special status. That decision was taken

[2] *E.g. The Opinion by the Legal Advisory Committee to the Minister of Foreign Affairs of the Republic of Poland on the annexation of the Crimean Peninsula to the Russian Federation in light of international law*, available in this volume. *See also* P. Grzebyk, *Aneksja Krymu przez Rosję w świetle prawa miedzynarodowego* (The annexation of the Crimea by Russia in the light of international law), 1 Sprawy Międzynarodowe 19 (2014); J. Kranz, *Kilka uwag na tle aneksji Krymu przez Rosję* (Some remarks on the annexation of the Crimea by Russia), 8 Państwo i Prawo 23 (2014).

[3] Договор между Российской Федерацией и Республикой Крым о принятии в Российскую Федерацию Республики Крым и образовании в составе Российской Федерации новых субъектов (подписан в г. Москве 18 марта 2014) (The Agreement between the Russian Federation and the Republic of Crimea on the Accession of Republic of Crimea to the Russian Federation and on Forming New Federal Constituent Entities within the Russian Federation [signed in Moscow on 18 March 2014]), Собрание законодательства РФ (The Collection of Legislation of the Russian Federation), 7 April 2014, No. 14, item 1570.

on the basis of results of the Crimean referendum and the Declaration of independence of Crimea.[4]

Initially, the referendum was supposed to be held on 25 May 2014 and to raise questions of improvement of the status and competence of the region.[5] However, on 1 March 2014 the Chairman of the Council of Ministers announced that a referendum would be held on 30 March 2014 as the Ukrainian crisis had spun out of reasonable control. On 6 March 2014 the Presidium of the Supreme Council of Crimea adopted Resolution no. 1702-6/14 "On holding the Crimean referendum",[6] according to which the referendum would be held on 16 March 2014. Each time the changes of the dates of the referendum were justified by the increasing aggravation of the political and social situation in Ukraine. Finally, the questions for the referendum planned on 16 March were finalized into the following two: "1. Do you support the reunification of Crimea with Russia with all the rights of a federal subject of the Russian Federation? 2. Do you support the restoration of the Constitution of the Republic of Crimea of 1992 and the status of the Crimea as part of Ukraine?"

Just before the referendum, on 11 March, the Supreme Council of Crimea and the Sevastopol City Council adopted the "Declaration on the independence of the Autonomous Republic of Crimea and the city of Sevastopol".[7] In accordance with the provisions of this document, if a decision to become part of Russia was made at the referendum of 16 March 2014, Crimea, including the Autonomous Republic of Crimea and the city of Sevastopol, would be proclaimed an independent and sovereign state with a republican order.

On 17 March the official results of the referendum were published: 1,274,096 persons entitled to vote in the referendum took part (83.10%); 1,233,002 persons positively answered the first question (96.77%); 31,997 answered affirmatively to the second question (2.51%). After the referendum results were announced, the Supreme

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[4] Постановление Верховной Рады Республики Крым от 17 марта 2014, № 1745-6/14 "О независимости Крыма" (Resolution of the Supreme Council of the Republic of Crimea of 17 March 2014, No. 1745-6/14 "On the independence of the Crimea"), Сборник нормативно-правовых актов Республики Крым (Collection of normative legal acts of the Republic of Crimea), 2014, No. 3, part 1, item 244.

[5] Постановление Верховной Рады АРК от 27 февраля 2014 № 1630-6/14 "Об организации и проведении республиканского (местного) референдума по вопросам усовершенствования статуса и полномочий Автономной Республики Крым" (Resolution of the Supreme Council of the Autonomous Republic of Crimea of 27 February 2014, No. 1630-6/14 "On the organization and holding of the local referendum on improving the status and powers of the Autonomous Republic of Crimea"), Collection of normative legal acts of the Republic of Crimea, 2014, No. 3, part 1, item 203.

[6] Постановление Верховной Рады АРК от 06 марта 2014 № 1702-6/14 "О проведении общекрымского референдума" (Resolution of the Supreme Council of the Autonomous Republic of Crimea of 6 March 2014, No. 1702-6/14 "On holding the Crimean referendum"), Collection of normative legal acts of the Republic of Crimea, 2014, No. 3, part 1, item 208.

[7] Декларация независимости Автономной Республики Крым и города Севастополя (Declaration on the independence of the Autonomous Republic of Crimea and the city of Sevastopol), Collection of normative legal acts of the Republic of Crimea, 2014, No. 3, part 1, item 230.

Council of Crimea adopted the resolution "On the independence of Crimea".[8] In that document Crimea was proclaimed an independent sovereign state as the Republic of Crimea, and the city of Sevastopol was given a special status within it. At the same time the Supreme Council of the Autonomous Republic of Crimea, on behalf of the Republic of Crimea, requested the Russian Federation to accept the Republic of Crimea as a new constituent entity of the Russian Federation with the status of a republic. On the same day (17 March), the President of the Russian Federation signed an executive order on recognition of the Republic of Crimea as a sovereign and independent state.[9]

The next day, President Putin notified the Federation Council of the Federal Assembly, the State Duma of the Federal Assembly and the Government of proposals by the State Council of the Republic of Crimea – the Parliament of the Republic of Crimea and the Legislative Assembly of the city of Sevastopol regarding the accession of the Republic of Crimea, including the city of Sevastopol, to the Russian Federation and the formation of new constituent territories within the Russian Federation. Such action was taken pursuant to Art. 6 of the Federal Constitutional Law on the Procedure of Admission to the Russian Federation and the Formation within It of New Constituent Territories.[10] Also on 18 March 2014, the Agreement between the Russian Federation and the Republic of Crimea on the Accession of the Republic of Crimea to the Russian Federation and on Forming New Constituent Entities within the Russian Federation was signed by the President of the Russian Federation, the Chairman of the State Council of the Republic of Crimea, the Prime Minister of the Republic of Crimea and the Chairman of the Coordinating Council for the establishment of the Sevastopol municipal administration.[11] According to the Agreement the Republic of Crimea is considered to have acceded to the Russian Federation from the date of the Agreement's signing. Beginning on the day that the Republic of Crimea acceded to the Russian Federation, two new constituent entities were formed within the Russian Federation: the Republic of Crimea and the Federal City of Sevastopol. This document included provisions concerning the accession of the Republic of Crimea to the Russian Federation and the formation of new constituent entities within the Russian Federation, including provisions regarding the territories of the new Russian constituent entities, their residents' citizenship, and the constituent entities' governmental bodies. The Agreement was applied provisionally from the date of signature and entered into force on the date of its ratification.

The State Duma and the Federation Council ratified the Agreement on 20 and 21 March, respectively. The Federal Constitutional Law "On Accession to the Russian

[8] Resolution of the Supreme Council of the Republic of Crimea, *supra* note 4.

[9] Указ Президента Российской Федерации от 17 марта 2014 № 147 "О признании Республики Крым" (Order of the President of the Russian Federation of 17 March 2014, No. 147 "On recognition of the Republic of Crimea"), The Collection of Legislation of the Russian Federation, 24 March 2014, No. 12, item 1259.

[10] This is discussed in more detail in section 1.3.

[11] See reference in note 3.

Federation of the Republic of Crimea and Establishing within the Russian Federation the New Constituent Entities of the Republic of Crimea and the City of Federal Importance Sevastopol" (FCL) was also adopted.[12] President Putin immediately signed both documents: the FCL and the federal ratification law.[13] According to Art. 1.3 of the FCL, Crimea's admission to the Russian Federation was considered retroactive as of 18 March.[14]

The unprecedented speed of adoption and implementation of the decisions concerning this issue must be noted. On 6 March 2014 the decision was taken by Crimea's authorities regarding the referendum that would be held on 16 March 2014 and on 21 March, the Russian parliament finished the process of Crimea's accession to the Russian Federation.

No one doubted the outcome of the Crimean referendum, which was also swiftly announced the very next day, on 17 March. But the rapid pace of the accession of Crimea and Sevastopol to the Russian Federation was even more amazing: the State Duma and the Federation Council both took their decisions within two days. This was truly breakneck speed for such a significant act, one which changed the borders of the country. It seems that the members of the Russian parliament simply followed the motto: "What is there to discuss, if we are in agreement on everything?". This whole situation perhaps most precisely was confirmed by Senator Lyskov at the meeting of the Federation Council dedicated to President Putin's request to use military force in Ukraine, "(…) we are losing the President time".[15]

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[12] Федеральный конституционный закон от 21 марта 2014 № 6-ФКЗ "О принятии в Российскую Федерацию Республики Крым и образовании в составе Российской Федерации новых субъектов – Республики Крым и города федерального значения Севастополя" (The Federal Constitutional Law of 21 March 2014, No. 6-FCL "On the Accession to the Russian Federation the Republic of Crimea and Establishing within the Russian Federation new constituent entities of the Republic of Crimea and the City of Federal Importance Sevastopol"), The Collection of Legislation of the Russian Federation, 24 March 2014, No. 12, item 1201.

[13] Федеральный закон от 21 марта 2014 № 36-ФЗ "О ратификации Договора между Российской Федерацией и Республикой Крым о принятии в Российскую Федерацию Республики Крым и образовании в составе Российской Федерации новых субъектов" (The Federal Law of 21 March 2014 No. 36-FL "On Ratifying the Agreement between the Russian Federation and the Republic of Crimea on the Accession of the Republic of Crimea in the Russian Federation and on Forming New Constituent Entities within the Russian Federation"), The Collection of Legislation of the Russian Federation, 24 March 2014, No. 12, item 1202.

[14] "The Republic of Crimea shall be considered admitted to the Russian Federation as of the date of signing of the Agreement between the Russian Federation and the Republic of Crimea on the Accession of the Republic of Crimea in the Russian Federation and on Forming New Constituent Entities within the Russian Federation."

[15] Стенограмма триста сорок седьмого (внеочередного) заседания Совета Федерации 1 марта 2014 года, Федеральное собрание Российской Федерации, Совет Федерации, Исх. № Ст-347 от 01 марта 2014, Москва, (Transcript of three hundred forty-seventh (extraordinary) meeting of the Federation Council of 1 March 2014, the Federal Assembly of the Russian Federation, the Federation Council, Ex. Number St-347 of 1 March 2014 Moscow), p. 26.

1.2. Secession and Ukrainian law

Ukraine obviously has not recognized the secession of Crimea. In response to the statement by the Russian Foreign Ministry on 11 March 2014 recognizing the legality of the Declaration on the independence of the Autonomous Republic of Crimea and the city of Sevastopol, the Ukrainian Ministry of Foreign Affairs issued a statement the same day, in which it lodged a protest against the position of the Russian Federation and declared the decision on the declaration of independence by Crimea as "unconstitutional, illegal and having no legal effect".[16] On 14 March 2014 the Acting President of Ukraine issued the order "On reversal of the decision of the Supreme Council of the Autonomous Republic of Crimea of 11 March 2014 'The Declaration of Independence of the Autonomous Republic of Crimea and Sevastopol city'."[17] This document stressed that the decision of Crimea's Supreme Council had to be set aside because of its incompatibility with the Constitution and laws of Ukraine.

The Constitution of Ukraine upholds the principle of territorial integrity and the inviolability of its borders. According to Art. 2 "The territory of Ukraine within its present border is indivisible and inviolable."[18] The Constitution also proclaims that any changes with regard to the territory of Ukraine shall be made exclusively on the basis of a national referendum (Art. 73 of the Constitution of Ukraine). It is true that according to the Constitution of Ukraine and the Constitution of the Autonomous Republic of Crimea, organising and conducting a local referendum was within the competence of the Autonomous Republic of Crimea (Art. 138.2 of the Constitution of Ukraine and Art. 18(1)(7) of the Constitution of the Autonomous Republic of Crimea[19]), hence a referendum could be legally carried out in Crimea. The main issue, however, remains whether the topic of the referendum was within the authority and competence of the Crimean local government or exceeded them. Art. 73 of the Constitution of Ukraine gives a clear answer: "Issues with respect to altering the territory of Ukraine shall be resolved exclusively by an All-Ukrainian referendum". Also, the law of Ukraine "On the national referendum in Ukraine" states that any territorial changes of Ukraine are the subject of a national referendum (Art.

[16] Заява Міністерства закордонних справ України, 11 березня 2014 (Statement of the Ministry of Foreign Affairs of Ukraine, 11 March 2014), available at: http://mfa.gov.ua/ua/press-center/news/19328-zajava-ministerstva-zakordonnih-sprav-ukrajini (accessed 30 March 2015).

[17] Указ Президента України від 14 марта 2014 № 296/2014 "Про зупинення дії Постанови Верховної Ради Автономної Республіки Крим від 11 березня 2014 року 'Про Декларацію про незалежність Автономної Республіки Крим і міста Севастополя'" (Order of the President of Ukraine of 14 March 2014 No. 296/2014 "On reversal of the decision of the Supreme Council of the Autonomous Republic of Crimea on 11 March 2014 'The Declaration of Independence of the Autonomous Republic of Crimea and Sevastopol city'"), Офіційний вісник Президента України (Official Journal of the President of Ukraine), 14 March 2014, No. 9, item 261.

[18] Конституція Украіни (The Constitution of Ukraine), Відомості Верховної Ради України (Bulletin of the Supreme Council of Ukraine), 1996, No. 30, item 141.

[19] Конституция автономной Республики Крым (the Constitution of the Autonomous Republic of Crimea), Collection of normative legal acts of the Republic of Crimea, 1998, No. 12, item 1008.

3.3(2)).[20] Therefore, issues with respect to the territory of Ukraine cannot be resolved by a local referendum, and the decision to hold a referendum on the issue of secession as decided by the local authorities in the Crimea contradicted the existing Ukrainian laws.[21]

This was confirmed by the judgment of the Constitutional Court of Ukraine of 14 March 2014, recognising the decision as unconstitutional.[22] The judgment stressed that the Supreme Council of Crimea, having adopted a Resolution "On holding the Crimean referendum", violated the constitutional principle of territorial integrity of Ukraine and exceeded its powers. The Constitutional Court of Ukraine ruled that the Resolution "On holding the Crimean referendum" ceased to have any legal effect from the date of the issuance of the decision of the Constitutional Court of Ukraine.

It should be mentioned that the prohibition in the Constitution of Ukraine against holding a referendum on secession is not contrary to international law. The majority of the world's sovereign states do not recognize any right of secession in their constitutions.[23] So in the light of international law the Ukrainian choice not to grant a right of secession in its Constitution cannot be criticised.

Ukraine considers the territory of the Autonomous Republic of Crimea as temporarily occupied. On 15 April 2014, the Supreme Council of Ukraine adopted the law "On Securing the Rights and Freedoms of Citizens and the Legal Regime on the Temporarily Occupied Territory of Ukraine".[24] This law established a special legal regime on the territory of Crimea and Sevastopol. The Autonomous Republic of Crimea, Sevastopol, internal waters and territorial waters around the peninsula, the air space above them, and exclusive economic zone are considered as occupied territories. The law declares

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[20] Закон України "Про всеукраїньский референдум" (law of Ukraine "On the national referendum in Ukraine", Відомості Верховної Ради України (Bulletin of the Supreme Council of Ukraine), 2013, Nos. 44-45, item 634.

[21] On the accordance of the referendum with Ukrainian law, see further Venice Commission, *Opinion no. 762/2014*, CDL-AD(2014)002.

[22] Рішення Конституційного Суду України у справі за конституційними поданнями виконуючого обов'язки Президента України, Голови Верховної Ради України та Уповноваженого Верховної Ради України з прав людини щодо відповідності Конституції України (конституційності) Постанови Верховної Ради Автономної Республіки Крим "Про проведення загальнокримського референдуму" (справа про проведення місцевого референдуму в Автономній Республіці Крим) від 14.03.2014, № 2-рп/2014 (The Decision of Constitutional Court of Ukraine in relation to the case arising from the constitutional petition of the Acting President of Ukraine, Chairman of the Verkhovna Rada of Ukraine and the Ukrainian Parliament Commissioner for Human Rights on compliance with the Constitution of Ukraine (constitutionality) of the Resolution of the Supreme Council of the Autonomous Republic of Crimea "On holding the Crimean referendum" (the case of local referendum in the Autonomous Republic of Crimea), Офіційний вісник України (Official Journal of Ukraine), 2014, No. 26, item 766.

[23] A. Kreptul listed nine constitutions which contained or still contain procedures for constitutional secession. *See* A. Kreptul, *The Constitutional Right of Secession in Political Theory and History*, 17(4) Journal of Libertarian Studies 39 (2003).

[24] Закон України "Про забезпечення прав и свобод громадян та правовий режим на тимчасово окупованій території України" (law of Ukraine "On Securing the Rights and Freedoms of Citizens and the Legal Regime on the Temporarily Occupied Territory of Ukraine"), Bulletin of the Supreme Council of Ukraine, 2014, No. 26, item 892.

that any activity of bodies and/or officials in the Crimean Peninsula that are created, appointed or elected without the authorization of the Government of Ukraine are unlawful. Moreover, any document or decision issued by self-proclaimed bodies or officials is deemed null and void, and does not bring about any legal consequences.

Ukraine has not recognised the compulsory automatic enrolment of Ukrainian citizens who reside on the temporarily occupied territory to citizenship of the Russian Federation. Pursuant to the law, the responsibility for human rights violations in the temporarily occupied territory shall be borne by the Russian Federation and compensations for material and moral damages caused by the temporary occupation of Crimean territory to businesses and individuals are to be referred to the Russian Federation as the state which carries out the occupation.

According to the above law, the status of this territory also changes the jurisdiction of the courts of Crimea and Sevastopol. The competent courts in Kiev shall accept and consider all cases under the jurisdiction of the Crimean and Sevastopol courts.

1.3. Accession and Russian law

The Russian legislation provides clauses for the incorporation of a foreign state or its part into the Russian Federation. Such a possibility is foreseen under Art. 65 of the Constitution of the Russian Federation and the federal law, enacted pursuant to the Constitution, "On the Procedure of Admission to the Russian Federation and the Formation Within It of New Constituent Territories".[25] Although that law has been in existence for a long time (since 2001), it had never been used previously.

According to Art. 4.2 of the law:

> [t]he admission to the Russian Federation as a new entity of a foreign country or its part is carried out by mutual agreement of the Russian Federation and of the foreign state in accordance with international agreement on the admission to the Russian Federation as a new entity of a foreign country or its part ([…]), signed by the Russian Federation with the foreign country.

The law also provides the following procedure for admission of the new entity to the Russian Federation: the foreign state takes the initiative for accession to the Russian Federation of the foreign state or its part; the President of the Russian Federation notifies the State Duma and the Federation Council about this initiative; the Russian Federation and the foreign country sign an international agreement; following the signing of such an agreement the President of the Russian Federation appeals to the Constitutional Court with a request to verify the compliance of the agreement with the Constitution of the Russian Federation; if the Constitutional Court confirms the compliance, the agreement

[25] Федеральный конституционный закон Российской Федерации № 6 – ФКЗ от 17 декабря 2001 "О порядке принятия в Российскую Федерацию и образования в ее составе нового субъекта Российской Федерации" (The Federal Constitutional Law of the Russian Federation No 6 - FCL of 17 December 2001 "On the Procedure of Admission to the Russian Federation and the Formation Within It of New Constituent Territories"), The Collection of Legislation of the Russian Federation, 24 December 2001, No. 52, part 1, item 4916.

in question is submitted to the Federal Assembly for ratification, together with a draft federal constitutional law on the admission to the Russian Federation of the new entity.

As it was described in section 1.1 above, the actions taken by the Russian authorities are, at least formally, compliant with the federal legislation in question. After the agreement was signed, the President of the Russian Federation sent the requisite request to the Constitutional Court. The Court issued its decision on 19 March, in which it recognized the Agreement between the Russian Federation and the Republic of Crimea as compliant with the Constitution. The Court stated that it decided only questions of law and did not assess the political advisability of an international treaty of the Russian Federation. So from the legal and formal point of view of the Russian Federation, the accession of Crimea to the Russian Federation was/is in accordance with Russian law.

However, several questions arise that cannot be overlooked here. First, the Russian President signed the executive order on the recognition of the Republic of Crimea as a sovereign and independent state, referring to the outcome of the referendum. But according to its results, Crimea should be a part of Russia, which is incompatible with the status of "sovereign and independent state". The issue of state independence was not even put to a vote during the Crimean referendum.

As was mentioned above, according to Russian law a foreign state takes the initiative for accession to the Russian Federation and this particular foreign state has to sign an accession agreement. Therefore, in order to comply with this order, and with Crimea being an integral part of the state of Ukraine, an initiative of this foreign state, i.e. an initiative by Ukraine, would be required. However, the Russian side sticks to the position that after the outcome of the referendum the Republic of Crimea became an independent state, and as such it was recognised by Russia, so the international agreement was signed with the state known as the Republic of Crimea. This is a disputable position since, as was mentioned, the questions raised in the referendum did not refer to the issue of independence, but only of joining Russia.

It thus appears that during the Crimean accession process the sequence of events and the events themselves were artificially created in an attempt to ensure their compliance with the Russian legislation. This position seems highlighted by the astonishing speed of the recognition of the Crimea as a sovereign state by the Russian Federation. That act took place the same day as adoption of the resolution "On the independence of Crimea". In fact, Russia did not have time to even verify the effectiveness of power in Crimea, thereby executing a premature recognition of it.[26] Traditionally under international law, when a state recognizes the seceding unit prematurely such recognition has been considered to constitute an illegal act.[27]

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[26] With respect to premature recognition, *see* H. Lauterpacht, *Recognition in International Law*, Cambridge University Press, Cambridge: 1947, pp. 7-12; M. Jovanovic, *Recognition of Kosovo independence as a violation of international law*, 3 Annals: Belgrade Law Review 108 (2008), pp. 121-122.

[27] See the individual view of B. Roth, member of the ILA International Committees Recognition/Non-recognition in International Law in Conference Report, Washington 2014, available at: http://www.ila-hq.org/en/committees/draft-committee-reports-washington-2014.cfm (accessed 30 March 2015).

2. INTERNATIONAL LAW

2.1. Status of Crimea under international law

Both authorities, in Crimea as well as in the Russian Federation, explain the events described above by affirming that they are relying on international law. In this context they refer particularly to the right of people to self-determination, as well as the example of secession and unilateral declaration of independence by Kosovo.

First and foremost the question which should be answered is: What is secession and is secession legal under international law? International law does not provide any legal definition of "secession". Generally speaking, it is a process which results in the creation of new states.[28] But the concept of secession is not a subject of agreement among legal scholars. According to one definition a given set of actions is considered as secession, while according to another definition the same set of actions is treated as dissolution. Hence J. Crawford posits that "[s]ecession is the creation of a State by the use or threat to use force without the consent of the former sovereign".[29] In turn, M. Kohen designates a method he calls "devolution": "When a new State is formed from part of the territory of another State with its consent, it is a situation of 'devolution' rather than 'secession'."[30]

International law does not explicitly provide for a right of secession, but on the other hand neither are there any norms specifically prohibiting secession, hence it may be said that international law neither authorizes nor prohibits secession. Though this was confirmed by the ICJ Advisory Opinion of 22 July 2010 on the compliance with international law of Kosovo's unilateral declaration of independence, unfortunately that decision did not introduce any concrete instances or clarification of the matter.[31] For this reason the ICJ Advisory Opinion is often criticized for having left the scope of secession and self-determination uncertain.[32]

Let us then look at international practice in this field. According to the W. Slomanson, beginning with the creation of the United Nations (UN) it was emphasized that the right of nations to self-determination does not automatically mean the right to secession.[33] The principle of self-determination is the right of people to independence and their right to embrace their own political, economic and social system. This has two aspects: internal (i.e. right to protection of minority rights within the country); and

[28] M. Kohen, *Introduction*, [in:] M. Kohen (ed.), *Secession: International Law Perspectives*, Cambridge University Press, New York: 2006, p. 1.

[29] J. Crawford, *The Creation of States in International Law* (2nd ed.), Oxford University Press, New York: 2006, p. 375.

[30] Kohen, *supra* note 28, p. 3.

[31] ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, ICJ Rep. 2010, p. 403.

[32] *E.g.* T. Burri, *The Kosovo Opinion and Secession: The Sounds of Silence and Missing Links*, 8 German Law Journal 881 (2010).

[33] W. R. Slomanson, *Legitimacy of the Kosovo, South Ossetia and Abkhazia secessions: Violations in search of a rule*, 6(2) Miscolc Journal of International Law 1 (2009), p. 15.

external (i.e. right of secession). States very rarely sanction instances of secession.[34] As was noted by M. Kohen, "(...) existing States have shown themselves to be 'allergic' to the concept of secession at all times."[35] Moreover, in order to take effect in international law, secession should be recognized by the international community.[36] There is a duty, under customary international law, not to recognise acts in violation of a norm having the character of *ius cogens*. This has been confirmed by consistent practice of resolutions or decisions taken by international organisations calling for the non-recognition of *de facto* entities created in breach of the prohibition of the use of force,[37] as well as by the International Law Commission (ILC) in its Draft Articles on the Responsibility of States for Internationally Wrongful Acts, adopted in 2001 (Arts. 40, 41).[38] The recent events in the Crimea have again drawn attention to this topic. Obviously, the duty not to recognise acts in violation of *ius cogens* norms is a principle which is broadly accepted, but it is sometimes difficult to determine the exact legal circumstances and consequences of its implementation. Having that in mind, it is necessary to draw attention to the recent Polish initiative regarding a new theme for the ILC: "Duty of non-recognition as lawful of a situation created by a serious breach by a State of an obligation arising under a peremptory norm of general international law."[39] It should be noted that the acceptance of this topic by the ILC would allow for the development of treaty norms regarding the obligation of non-recognition, which could contribute to the consistent implementation of that obligation.

It may be said that in the practice of States the principle of territorial integrity is the overriding principle, and secession without the consent of the "home" state remains illegal.[40] However, there is also the concept of so-called "remedial secession" in international law.[41] This is a secession of last resort, when the right to self-determination cannot be implemented within a given state. In such a case, in order for the secession to

[34] For a list of the successful post-1945 secessions, *see* Crawford, *supra* note 29, p. 391.

[35] Kohen, *supra* note 28, p. 3.

[36] *E.g.* M. Radziejowska, *Law and Lawlessness: The Secession and Russia's Absorption of Crimea*, PISM Bulletin, No. 43(628), 26 March 2014, available at: https://www.pism.pl/files/?id_plik=16914 (accessed 30 March 2015).

[37] *See e.g.* the cases of Southern Rhodesia (SC Res. 216 of 12 November 1965), South West Africa (SC Res. 276 of 18 March 1970), South African Bantustans (UN G.A. Res. 2775E (XXVI) of 29 November 1971), The Turkish Republic of Northern Cyprus (UN GA Res. 37/253 of 13 May 1983, SC Res. 541 (1983) of 18 November 1983).

[38] For the text and comments to the articles, *see* the Official Records of the General Assembly, 56th session, Supplement No. 10 (A/56/10), Ch. V.

[39] Statement of the Polish representative J. Stańczyk, *see* GA Official Records, Sixth Committee, A/C.6/69/SR.20, paras. 30-36.

[40] *See generally* Crawford, *supra* note 29, pp. 391-415.

[41] *See* L. C. Buchheit, *Secession: The Legitimacy of Self-Determination*, Yale University Press, New Haven: 1978, p. 222; J. Vidmar, *Remedial Secession in International Law: Theory and (Lack of) Practice*, 6(1) St. Anthony's International Review 37 (2010). For a detailed account of the academic support for "remedial secession", *see* A. Tancredi, *A Normative 'Due Process' in the Creation of States Through Secession*, [in:] Kohen, *supra* note 28, pp. 171-207.

be recognized by the international community it must apply the doctrine of "exceptional circumstances".[42]

It has been emphasized in the above-cited judgment of the Supreme Court of Canada that the precise meaning of the term "people" is not entirely certain. But it remains obvious that the concept of "people", used for the purposes of secession, may cover only a part of the population of a state.[43] Moreover, as noted by the Supreme Court of Canada in the leading judgement in the area, such "people" should be governed as "part of a colonial empire", be "subject to alien subjugation, domination or exploitation", and be "denied any meaningful exercise of its right to self-determination within the state of which it forms a part".[44] So, if this path is applied for in the case of Crimea, it must be proven that there was a situation of domination which deprived the people from representation in the country where they lived, and that there were no possibility of self-realization of their rights within the existing power structure through the use of voting rights and political self-organisation. Crimea has always been seen as a multinational territorial entity. According to the latest Ukrainian census in 2001, Russians accounted for 58.5% of the population in Crimea, the Ukrainians 24.4%, Crimean Tatars 12.1%, Belarusians 1.5%, Tatars 0.4%, Jews, Poles, Moldavian and, Azeris 0.2%, while other nationalities constituted 0.1%.[45] The "people" always had the possibility of self-realization within the existing power structure. The secessionists in the case of Crimea may not be regarded as "people".

A gross human rights violation – the second circumstance of "remedial secession" – has to take place against members of the people, requiring the secession from the State having power over them. The judgment of the Supreme Court of Canada stressed that the human rights violations should be of a gross nature. Information available on the situation in the Crimea in the years 1991-2014 does not indicate that the Ukrainian authorities participated in any gross human rights violations against Crimeans. Also, the High Commissioner on National Minorities within the Organisation of Security and Cooperation in Europe (OSCE) found no evidence of violations or threats to the rights of Russian speakers during her visit to Kyiv and Crimea.[46]

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[42] These circumstances are best determined by the judgment of the Supreme Court of Canada in the Quebec case, *Reference Re Secession of Quebec* [1998] 2 SCR 217:

- secessionists qualify as "people",
- gross human rights violations,
- secession is a final remedy.

[43] *Ibidem*, para. 124.

[44] *Ibidem*, para. 154.

[45] Про кількість та склад населення України за підсумка-ми Всеукраїнського перепису населення 2001 року: Повідомлення Державного комітету статистики України (About number and composition of the population of Ukraine for the census of 2001: Information from the State Statistics Committee of Ukraine), Статистика України (Statistics of Ukraine), 2002, No. 4, pp. 77-85.

[46] *Developing situation in Crimea is alarming, says OSCE High Commissioner on National Minorities,* 6 March 2014, available at: http://www.osce.org/hcnm/116180 (accessed 30 March 2015).

The third condition – the lack of other opportunities for effective conflict resolution consistent with domestic or international law[47] – is also not met. As can be seen from the course of events related to the declaration of independence, the conflict between the Ukrainian authorities and the Crimean authorities had not even begun. The Crimean authorities unilaterally declared independence and after the referendum "immediately" became part of the Russian Federation.

Summarizing the above analysis it seems clear that we cannot apply the concept of so-called "remedial secession" to the case of Crimea.

The Crimean Declaration of Independence invoked the right of peoples to self-determination arising from the UN Charter and a number of other international documents. The ICJ Advisory Opinion of 22 July 2010 was also indicated.

The principle of self-determination is included in Art. 1(2) of the UN Charter.[48] Also, the 1966 International Covenant on Human Rights, particularly Art. 1, described the principle of self-determination as including the right of an entire people to determine its political status.[49] Initially that right was used in the colonial context and became the legal basis for the creation of new post-colonial states. Outside of this context the principle of self-determination is different. Later, it was balanced by the principle of the territorial integrity. According to the Vienna Declaration of 1993, the right to self-determination:

> shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.[50]

And according to the Declaration on Principles of International Law:

> nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.[51]

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[47] *E.g.* J. Dugard, D. Raič, *The role of recognition in the law and practice of secession*, in Kohen (ed.), *supra* note 28, p. 109.

[48] Art. 1(2) of the UN Charter states: "[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace." *See also* Art. 55 of the UN Charter.

[49] Art. 1 of the International Covenant on Civil and Political Rights provides that "[a]ll 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."

[50] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), UN Doc. A/8082 (24 October 1970).

[51] Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights in Vienna, Report of the world conference on human rights, A/CONF 157/24 (Part 1) (13 October 1993) p. 20.

The above-quoted provisions stress that the right to self-determination does not justify dismemberment if a state is conducting itself in accordance with the right to self-determination. The status of Crimea was designated in the Constitution of Ukraine,[52] as well as in the Constitution of the Autonomous Republic of Crimea.[53] The people of Crimea were able to participate freely in governance and were not being oppressed as a group. So, Crimea cannot separate legally from the Ukraine, because within Ukraine Crimea relied on internal self-determination, as evidenced by *inter alia*, both the Ukrainian and the Crimean constitutions.

The reference to the ICJ Advisory Opinion is also a complete misunderstanding. This ruling gives no opinion whether Kosovo had the right to secede under international law, nor did it consider the question of the existence of a right to secession in general, nor even the legal consequences of a declaration of independence. The opinion is based on a brief analysis of the norms of international law which, as pointed out by the ICJ, in principle does not contain any norms prohibiting a unilateral declaration of independence. As a consequence, the Court could not find such a unilateral act illegal. However, the ICJ noted that there are situations in which the unilateral declaration cannot be considered compatible with the norms of international law, namely when it is "(…) connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*ius cogens*)" (para. 81). So, any violation of international law is not based on the unilateral nature of the declaration, but on the fact that a declaration may be the result of violations of norms of international law. In the case of Crimea, the adoption of the declaration of independence was associated with the use of force. Crimean authorities' actions were supported by armed men, whose identity was not known initially, but later it was determined that they were connected with the security forces and the armed forces of Russia.[54] This once again confirms that the declaration of independence of Crimea on 11 March 2014 was in violation of existing international law.

As was mentioned, the decision to proclaim independence on the part of Crimea was taken on the basis of the results of the Crimean referendum. Contemporary international law is moving in the direction of requiring that all territorial realignments be democratically justified, preferably through a direct democratic decision, i.e. by a territorial referendum.[55] As a corollary it is necessary that such a referendum comply

[52] *See* Title X of the Constitution of Ukraine.

[53] Art. 1 states that "The Autonomous Republic of Crimea shall be an integral part of Ukraine and it shall solve, within the powers conferred upon it by the Constitution of Ukraine, any and all matters coming within its terms of reference."

[54] Путин признал связь российской армии и "самообороны Крыма" (Putin acknowledged the connection of the Russian army and the "self-defence of the Crimea"), available at http://sandbox.rustoria.ru/post/putin-priznal-svyaz-rossijskoj-armii-i-samooborony-kryma-1/; *see also* A. Wilk, *Russian military intervention in Crimea*, Analyses of OSW, 5 March 2014, available at: http://www.osw.waw.pl/en/publikacje/analyses/2014-03-05/russian-military-intervention-crimea (both accessed 30 March 2015).

[55] Taking into account, for example, the plebiscites held after World War I, the decolonisation referendums of the 1950s and 1960s, and referendums following the dissolution of the Soviet Union and

with basic democratic standards for the holding of referendums. Certain international standards, rules and principles on how a territorial referendum must be conducted have emerged, especially after 1989. They can be found in such documents as the Council of Europe Parliamentary Assembly Recommendation 1704 (2005) of 28 April 2005,[56] and the Venice Commission, "Code of Good Practice on Referendums" of 20 January 2009.[57] The most important legal standards are: peacefulness; universal, equal, free and secret suffrage; the framework conditions of freedom of media and neutrality of the authorities; and last, but not least, the presence of international referendum observers.

The referendum in Crimea, having been arranged in an exceptionally short time, did not satisfy the above-mentioned international standards. It was held in the presence of undefined troops, which later proved to be Russian forces. Beyond that, the referendum was characterised by a lack of transparency of the composition of voters as well as electoral commissions. Neither freedom of expression nor freedom of the press were guaranteed, and there was also an absence of internationally accepted observers (e.g. OSCE). The Venice Commission declared that "a number of circumstances make it questionable whether the referendum of 16 March 2014 could be held in compliance with international standards."[58] Having the above circumstances in mind, it is clear that the referendum could not justify the Crimean secession and the territory's integration into Russia. Hence the unilateral declaration of independence by Crimea was contrary to the international law and the international community should not (and in fact does not) recognize it. In the light of international law, the territory of Crimea remains an integral part of the territory of Ukraine.

It must be admitted, however, that the secession of the Crimea peninsula is an accomplished fact, and regardless of the lack of support for it by the international community, there is no indication that this situation will change in the near future. This situation raises many practical problems on the international plane, some of which are discussed below.

2.2. International consequences of the accession of Crimea to the Russian Federation

Generally, in accordance with the position of most international organisations, the Crimean peninsula belongs to Ukraine and its annexation to Russia is illegal. For instance, the UN General Assembly adopted resolution 68/262 on 27 March 2014, entitled "Territorial integrity of Ukraine".[59] The resolution affirmed the UN commitment to

Yugoslavia after 1991. For more on referendums in international law, *see broadly*, I. G. Sen, *Sovereignty Referendums in International and Constitutional Law*, Springer International Publishing, Dordrecht: 2015.

[56] Parliamentary Assembly Recommendation 1704 (2005), "Referendums: towards good practices in Europe", CM/AS(2005)Rec1704prov.

[57] Study No. 371/2006, CDL-AD(2007)008.

[58] Venice Commission, *supra* note 21, para. 22.

[59] Territorial Integrity of Ukraine: resolution adopted by the General Assembly, UN Doc A/RES/68/262 (1 April 2014).

recognize Crimea within Ukraine's international borders and underscored the invalidity of the 2014 Crimean referendum.

On 2 July 2014, the Parliamentary Assembly of the OSCE adopted a resolution condemning the actions of the Russian Federation in relation to Ukraine.[60] According to the resolution, the OSCE considers the referendum held in Crimea 16 March 2014 illegal and calls upon all State parties to refuse to recognize the "forcible annexation" of the Crimea by the Russian Federation. On 10 April 2014, the Parliamentary Assembly of the Council of Europe (PACE) adopted a resolution condemning Russia's actions as the "annexation" of Crimea.[61] In this resolution the PACE declared that the military occupation of Ukrainian territory, threat of military force, recognition of the illegal so-called referendum, and annexation of Crimea "constitute, beyond any doubt, a grave violation of international law".

However, despite the fact that in the opinion of many international organizations and states Crimea remains an integral part of Ukraine, in practice we have to deal with many problems that cannot be solved explicitly, at least not for the time being.

For example, the International Civil Aviation Organisation (ICAO), a specialised agency of the UN,[62] in a letter of 2 April 2014 to states and international organisations about the safety of civil aircraft operating in the Simferopol Flight Information Region (FIR) has confirmed that the Simferopol FIR is under the responsibility of Ukraine.[63] While the ICAO has not issued an unequivocal statement concerning the overall situation in Crimea, the official position of the ICAO as an agency of the UN has to reflect the position of the UN. Due to the unsafe situation with respect to aviation, where more than one air traffic services provider may be controlling flights within the same airspace, the organisation suggested avoiding the airspace and circumnavigating the Simferopol FIR using alternative routings.

It is worth adding that this organisation has been participating, from the beginning of the conflict, in negotiations between Ukraine and the Russian Federation on the issue of safety in the airspace over the Crimea and the open sea, which is under the jurisdiction of Ukraine. The first round of negotiations took place on 8 April 2014 in the European and North Atlantic Office of the ICAO in Paris.[64] Despite having conducted several meetings, the parties have not reached an agreement yet and the ICAO still

[60] *Resolution on Clear, Gross and Uncorrected Violations of Helsinki Principles by the Russian Federation*, OSCE PA, Baku Declaration and resolutions adopted by the OSCE Parliamentary Assembly at the twenty-third annual secession, Baku, 28 June to 2 July 2014, pp. 17-19.

[61] Resolution 1990 (2014), *Reconsideration on substantive grounds of the previously ratified credentials of the Russian delegation*, Assembly debate on 10 April 2014 (16th Sitting).

[62] The ICAO concluded a cooperation agreement with the United Nations on 13 May 1947. The text may be found in the Yearbook of the United Nations, 1946-47, part 2, pp. 741-45. The official webpage is: http://www.icao.int/Pages/default.aspx.

[63] Safety of civil aircraft operating in the Simferopol Flight Information Region (FIR), Safety Bulletin, IFALPA The Global Voice of Pilots, 15SAB001, 3 April 2014.

[64] A. Turner, *ICAO backs Ukraine's rights over Black Sea*, available at: http://www.airtrafficmanagement.net/2014/04/icao-backs-ukraines-rights-over-black-sea (accessed 30 March 2015).

continues to carry on informal talks with both sides of the process to facilitate dialogue in order to ensure the safety of air navigation in the area.

From March 2014 onwards, all international flights to the Simferopol Airport, with the exception of flights originating from Russia, were cancelled. Actually the Crimean airport, which is under Russian control, operates flights with destinations to Russia (which qualify as domestic flights), Yerevan (Armenia), Istanbul and Antalya (Turkey). All flights are conducted by Russian airlines. Since April 2014 the Russian company "Krymaeronavigatsiya" *de facto* took over air traffic control in the region. Airlines of other states suspended routes to Crimea due to the position of ICAO and Eurocontrol.[65]

The current state of affairs indicates that the air traffic situation in Crimea will be administered semi-officially for a long time. In the long term Ukraine is likely appeal to the ICAO to resolve disagreements. This is possible through the provisions of Art. 84 of the Chicago Convention, to which both Ukraine and the Russian Federation are parties.[66] The question arises, however, whether the ICAO will be able to definitively solve the problem. One may be sceptical about this and it seems that only the complete elimination of disagreements between parties to the dispute concerning jurisdiction over Crimea can solve the problem.

A complicated situation has also now arisen with respect to international shipping to the Crimean peninsula. In May 2014 Ukraine informed the International Maritime Organisation (IMO),[67] a specialised agency of the UN, that in connection with Russia's annexation of Crimea Ukraine could no longer provide an adequate level of navigational safety and compliance with international obligations arising from the need to preserve human life at seaports in Evpatoria, Kerch, Sevastopol, Theodosia, and Yalta.[68] The waters and ports of the Crimea, according to the IMO documents, are the responsibility of Ukraine. On 16 June 2014 a decree of the Ministry of Infrastructure was issued closing the above-mentioned ports,[69] and asking the IMO to recommend to the vessels of all member countries that they avoid going into the waters of Crimea and Crimean ports because of a lack of certainty about who is in control. Contrary to the ICAO, the IMO has yet to make such an official recommendation. Despite that, this organisation,

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[65] EUROCONTROL, *Network Manager strongly recommends airspace users to avoid the airspace and circumnavigate the Simferopol FIR using available alternative routings*, EASA SIB No: 2014-10.

[66] Convention on International Civil Aviation, 7 December 1994, 15 UNTS 295.

[67] Agreement between the UN and IMCO (now IMO), The Yearbook of the United Nations 1948-49, pp. 1115-18. The official web page is: http://www.imo.org/Pages/home.aspx.

[68] *Ukraine informs IMO member-states of inability to assure required level of maritime security at the Crimean sea ports*, Press Center of Embassy of Ukraine to the United Kingdom of Great Britain and Northern Ireland, available at: http://uk.mfa.gov.ua/en/press-center/news/23515-ukraine-informs-imo-member-states-on-inability-to-assure-required-level-of-maritime-security-at-the-crimean-sea-ports (accessed 30 March 2015).

[69] Наказ Міністерства Украіни "Про закриття морських портів" від 16 червень 2014, № 255 (Decree of the Ministry of Infrastructure of Ukraine of 16 June 2014, No. 255 "On the closure of sea ports"), 54 Official Journal of Ukraine 2014, item 1461.

as a specialised agency of UN, has to reflect the position of the UN. For ship owners this means that in the current legal limbo they bear all the risks themselves. Despite the Ukrainian ban, vessels of some foreign countries continue to conduct shipping in the ports of Crimea. From the point of view of Ukraine and the IMO, international shipping in Crimean ports is illegal. If foreign vessels continue to conduct shipping at the "closed" Crimean ports, they might be subjected to arrest and legal proceedings against the crew and owner for their breach of Ukrainian law. Thus, in fact, Crimea becomes an area of short sea shipping.

Another specialized agency of the UN which has to resolve a problem connected with Crimea is the International Atomic Energy Agency (IAEA).[70] There are two nuclear facilities – a 200-kilowatt research reactor and a critical assembly – under IAEA safeguards at the Sevastopol National University of Nuclear Energy and Industry, located in Crimea. They are covered under Ukraine's safeguards agreement with the IAEA. The Agency must take a decision whether it can still validate that these facilities are under its formal safeguards, given Ukraine's inability to provide access to these sites. Up until the present time, the IAEA has not yet adopted a formal position on the status of Crimea, emphasizing that it will continue to implement safeguards according to IAEA statute and international law. Considering the complexity of the situation, the IAEA seems to want to avoid addressing this problem as long as possible. As a result, the international legal and regulatory status of these reactors remains undefined. Although the IAEA database of research reactors continues so far to list both of the Crimean facilities as located in Ukraine,[71] the IAEA's putting off its decision in the matter could have consequences for nuclear safety in the region.

Another problem has risen in the area of protection of cultural property. Following the accession of Crimea to the Russian Federation, the Allard Pierson museum in Amsterdam faces the dilemma of where it should return its artefacts from Crimea: to Ukraine or to Russia. Before the outbreak of the Crimean crisis the museum signed a loan agreement with the Ministry of Culture of Ukraine regarding exhibits stored in five Ukrainian museums, including four located in Crimea. The exhibits will be part of an exhibition until mid-May 2015.[72] The authorities of the museum have asked the Dutch Ministry of Foreign Affairs for advice whether to return the artefacts to Ukraine or to Russia. From the legal point of view the answer seems to be simple: the only possible solution is to return these artefacts to Ukraine, due to the fact that the loan agreement was signed with the Ukraine and the artefacts are owned by this state. It is obvious that the museum does not want to be held responsible for its decision, which

[70] The IAEA concluded a cooperation agreement with the United Nations on 14 November 1957, text available in The Yearbook of the United Nations, 1957, part 1, pp. 29-32. The official webpage is: https://www.iaea.org.

[71] This list of research reactors is available at: http://nucleus.iaea.org/RRDB/RR/Utilization.aspx?RId=689; http://nucleus.iaea.org/RRDB/RR/HeaderInfo.aspx?RId=690 (accessed 30 March 2015).

[72] Press release of 29 January 2014 of Allard Pierson Museum, *The Crimea: Gold and Secrets of the Black Sea*, available at http://www.allardpiersonmuseum.nl/en/press (accessed 30 March 2015).

is rather a political issue. As of this moment the official position of the Dutch ministry is not yet known.[73]

The examples given above obviously do not reflect all the problems that international organizations and the international community will have to deal with as a result of Russia's *de facto* annexation of Ukraine. They are presented only to indicate the fact that, regardless of the consensus in the international community in assessing the status of Crimea, in practice a quite complicated and controversial legal situation has arisen, creating a very tense and ambiguous legal environment whereby two legal systems of two states operate simultaneously in the same space.

3. THE LEGAL SITUATION OF CRIMEAN RESIDENTS

1 January 2015 marked the end of the "transition period" for the integration of Crimea's economic, financial, credit and legal system into Russia's. During that period (i.e. starting at the end of the March 2014) the inhabitants of Crimea lived in a legal limbo, or chaos. That chaos reigned in all spheres of life: judiciary, taxation, banking, civil affairs, etc., touching upon all important issues in people's lives such as problems of citizenship, business, taxation, healthcare etc. But in my opinion the fundamental questions are those arising in sphere of the judiciary and human rights.

According to Art. 9 of the FCL, during the transition period in the Republic of Crimea and Sevastopol the courts of the Russian Federation (the federal courts) were to be created in the Republic of Crimea and Sevastopol in accordance with the legislation of the Russian Federation on the judicial system. Immediately following the entry into force of this law, the Crimean courts temporarily ceased to adjudicate, although claims that were based on the norms of Russian law were accepted. However, in practice, the judicial system in Crimea has remained almost wholly inactive. The reason for this collapse was the collision of legal systems of two different states on the peninsula. Such dualism in the legal regulation of various aspects of social relations has created severe difficulties in resolving a number of issues. Despite the genetic relatedness of the procedural legislation of the Russian Federation and Ukraine, there are nevertheless a number of differences, starting with the procedure for determining the amount of the state's court costs, the procedure for notifying participants in the process and collecting evidence, and ending with the issuance of the writ of execution.[74] Furthermore, according to Art. 9.5 of the FCL "persons holding positions of judge in courts (in Crimea on the day of its accession to the Russian Federation), shall continue to administer justice until the creation and launching of the courts of the Russian Federation in these territories,

[73] Press release of 20 August 2014 of Allard Pierson Museum, *The Crimea Exhibition*, available at: http://www.allardpiersonmuseum.nl/en/press (accessed 30 March 2015).

[74] Регулирование международного гражданского процесса в странах СНГ [в:] *Международное частное право*, под ред. Н. Марышева (Regulation of international civil procedure in the CIS, [in:] N. Maryshev (ed.), International Private Law), Wolters Kluver, Moscow: 2011, pp. 836-844.

if they have Russian citizenship." During the first months after Crimea's accession to the Russian Federation not so many people obtained Russian citizenship. Hence, there were situations whereby citizens of Ukraine had to make judicial decisions on behalf of Russia. The judges working in the Crimean courts generally do not have an appropriate knowledge of Russian law. Thus the peculiar situation arose whereby a person who was a citizen of one country and had not lost or given up such citizenship and was appointed by the previous governing state to a specific position and given the required oath, suddenly – without being released from these positions either at his own request or for other reasons – began to serve the interests of another State that had not even nominated him or her to that position. Realizing the inconsistency of this situation, which was not governed by relevant legislation, and given the absence of their own knowledge and skills, the judges tried not to make any decisions and simply delayed trials.

In order to resolve this situation, on 23 June 2014 the President of the Russian Federation signed a number of federal laws aimed at the formation of the judicial system of the Republic of Crimea and Sevastopol. Among them there are: (i) the Federal Law "On the Creation of Courts of the Russian Federation in the Republic of Crimea and the City of Federal Importance Sevastopol and on Amending Some Legislative Acts of the Russian Federation";[75] and (ii) the Federal Law "On the procedure of selection of candidates for the initial composition of the federal courts, established in the territory of the Republic of Crimea and the City of Federal Importance Sevastopol."[76]

The latter act establishes the procedure for selecting judges. The selection is made on a competitive basis, taking into consideration the legal education, professional experience and the results of the admittance examination. This law established a pre-emptive right for individuals holding the position of judge in courts operating in the territory of the Republic of Crimea and Sevastopol on 18 March 2014 to fill the positions of judge of the federal courts of general jurisdiction and arbitration courts, if they acquire Russian citizenship and comply with the requirements for candidates for the post of judge in accordance with Russian federal law. For such individuals the law establishes an exception from the requirement that they cannot hold foreign citizenship if the refusal of citizenship of a foreign state is impossible owing to reasons beyond their control. In such a case the basic document confirming the existence of a foreign nationality (passport), together with a disclaimer of it, must be transferred to the Judicial Department of the Supreme Court of the Russian Federation. In accordance with the legislation of Ukraine

[75] Федеральный закон от 23 июня 2014 № 154-ФЗ "О создании судов Российской Федерации на территориях Республики Крым и города федерального значения Севастополя и о внесении изменений в отдельные законодательные акты Российской Федерации", The Collection of Legislation of the Russian Federation, 30 June 2014, No. 26 (part 1), item 3360.

[76] Федеральный закон от 23 июня 2014 № 156-ФЗ "О порядке отбора кандидатов в первоначальные составы федеральных судов, создаваемых на территориях Республики Крым и города федерального значения Севастополя", The Collection of Legislation of the Russian Federation, 30 June 2014, No. 26 (part 1), item 3362.

the date of renunciation of citizenship is the date of publication of a relevant decree of the President of Ukraine. Thus in practice it is possible that active judges of the Russian Federation will officially be citizens of Ukraine as well. Accordingly, the transfer of their Ukrainian passport together with a letter of resignation of their Ukrainian citizenship is supposed to serve, according to the Russian legislators, as a certain guarantee of the intention of such persons to resolve the situation with their citizenship in the future.

Despite the adopted laws, the situation with the judiciary in Crimea remained unclear until 23 December 2014. On that day the Plenum of the Supreme Court of the Russian Federation, in accordance with the specified federal constitutional law, adopted a resolution regarding the day when the activities of the courts were to start in Crimea.[77] Thus the courts of the Russian Federation officially started their activities only on 26 December 2014 in accordance with the above-mentioned resolution. Prior to this date judicial decisions were imprinted with Ukrainian court stamps.[78] In practice, there were situations when a court's decision was clearly contrary to the laws of the Russian Federation. In addition there was a judicial "grey area" as the Ukrainian laws did not apply to many situations either. In such cases the law was not on the side of people, but on the side of the authorities, who could treat it in any manner favourable for themselves. One of the consequences of this situation was the "blurring" of the law. People felt insecure before the law, and the absence of a right to a fair trial deprived them of the opportunity to defend themselves legally.

A similar situation existed in the Police and Prosecutors' offices. Officially, the Russian Interior Ministry issued an order establishing the territorial bodies of the Ministry of Interior of the Republic of Crimea on 25 March 2014.[79] But initially the police only accepted notifications of an offense, conducted interrogations and inspected crime scenes in accordance with the legislation of the Russian Federation. Interestingly, none of the employees of law enforcement agencies before this time took exams testing their knowledge of the laws of the Russian Federation. Probably due to that fact, criminal proceedings were not initiated during this period. Notwithstanding the provisions of Russian law, it can be argued that in the early stages of the "transition" the Ukrainian legislation continued to act within a certain scope in Crimea. For example,

[77] Постановление Пленума Верховного Суда РФ "О дне начала деятельности федеральных судов на территориях Республики Крым и города федерального значения Севастополя" (Resolution of the Plenum of the Supreme Court of the Russian Federation "On the date for beginning the activity of the federal courts in the Republic of Crimea and the federal city of Sevastopol"), Российская газета (Rossijskaja Gazeta), No. 6566, 25 December 2014, p. 2.

[78] В. Фридман, По работе судов в Крыму на данный момент (V. Fridman, The courts in the Crimea at the moment), available at: http://www.prison.org/content/po-rabote-sudov-v-krymu-na-dannyy-moment (accessed 30 March 2015).

[79] Приказ МВД России от 25 марта 2014 № 175 "О внесении изменений в нормативные правовые акты МВД России" (Order of the Ministry of Interior of Russia from 25 March 2014, No 175 "On Amendments to normative legal acts of the Ministry of Interior of Russia"). The text of the order has not been published officially. It is available on the website of legal information of the Russian Federation: http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=EXP;n=591974 (accessed 30 March 2015).

the police used Ukrainian printed forms of protocols and other documents required for the registration of offences. The first examinations for the police on Russian law commenced only at the end of April 2014. Prior to that date, Crimean policemen had to ask their Russian colleagues about the procedures and documents in Russia through the All-Russian forum for police employees.[80] According to the information obtainable from this forum, the formal employment of Crimean policemen as members of the new authorities started in mid-May 2014. Up until that moment the situation was unclear to say the least: in the Republic of Crimea a Police and Prosecutor's Office of the Russian Federation were organised; policemen and prosecutors were citizens of Ukraine and they executed their job according to the Russian legislation, but without knowledge of this law. This was a vivid case of legal impasse. For example, from a legal point of view evidence collected in a criminal proceeding could be deemed inadmissible as it had been collected by Ukrainian officials who did not have authority in Russia, and according to Ukrainian legislation, and who were no longer authorized to act in Crimea, or collected by persons who were not competent in the prescribed manner.

The work of notary offices (it should be noted, primarily for Anglo-Saxon readers, that notaries are lawyers under Russian law) was suspended in some areas. It is true that Art. 20 of the above-discussed law allowed Crimean notaries to implement notarial acts in Crimea under the laws of Ukraine prior to the creation of the Notary Chamber of the Republic of Crimea. But Crimean notaries were disconnected from the State Register of Ukraine, so they were not able to prepare notarial deeds of inheritance rights and property transfers.[81] The Notary Chamber of the Republic of Crimea was created on 7 July 2014.[82] From that date on, the law of the Russian Federation is applied for the execution of notarial acts by Crimean notaries. Unfortunately, Crimean notaries are unable to either prepare notarial deeds related to transfer of the ownership of real estate, nor to issue a certificate of inheritance, as up until the present time there are no valid state registers of real estate and of civil status in Crimea. Notaries in Crimea are – on their own initiative and in order to protect the interests of citizens and legal entities – manually restoring the database concerning arrests and bans on disposal of property, based on previously documented data.[83] The implementation of many social

[80] Internet forum available at: http://www.police-russia.ru/showthread.php?t=86704&page=16 (accessed 30 March 2015).

[81] Нотариус для крымчанина – сложная задача (Notary for Crimean residents – a complicated task), available at: http://krymsos.com/2014/09/22/notarius-dlia-krimchanina-slozhnaiia-zadacha/ (accessed 30 March 2015).

[82] Информационное сообщение Федеральной нотариальной палаты от 7 июля 2014 г. "О создании Нотариальной палаты Республики Крым (Information Report of the Federal Notary Chamber of 7 July 2014 "On the establishment of the Chamber of Notaries of the Republic of Crimea"), available at the website of legal information of the Russian Federation at: http://www.garant.ru/products/ipo/prime/doc/70589358/ (accessed 30 March 2015).

[83] Чистая сделка. Нотариусы готовы обезопасить крымчан от мошенничества. Интервью с президентом Нотариальной палаты Республики Крым Любовь Елисеева-Бора (A clear matter. Notaries are ready to protect the Crimean from fraud. Interview with the President of the Chamber of

and economic rights, for example inheritance of property,[84] contract of real estate as collateral,[85] or an annuity contract,[86] are inextricably linked with the services of notaries. During the "transition period" Crimeans were practically devoid of notary services.

The foregoing descriptions point to the fact that the residents of Crimea found themselves in a situation whereby the laws of two states – Ukraine and the Russian Federation – were applicable at one and the same time on the same territory. In addition, the citizens were not sufficiently aware of and prepared for the fact that the Russian and the Ukrainian laws are quite different. Furthermore, the professionals whose task is to apply the law – judges, employees of judicial authorities and notaries – faced the same problem. In such a situation the rights to a fair trial and an effective remedy were, for Crimean residents, severely limited if not absent.

Following the accession of Crimea to the Russian Federation human rights protections in Crimea have been severely curtailed.[87] There have been cases of deaths and disappearances under suspicious circumstances which occurred after February 2014. The Human Rights Watch documented fifteen cases in which people (Crimean Tatars and pro-Ukrainian activists) have disappeared or gone missing.[88] A person's enforced disappearance is considered as a grave violation of human rights, as was emphasized by the Commissioner of Human Rights of the Council of Europe.[89] Admittedly, the authorities of Crimea have stated that criminal proceedings into these cases have been initiated, but they still remain ineffective. Accordingly, this raises serious concerns over the violation of the right to protection of human rights and to an effective remedy.

Crimean authorities have also restricted the right to freedom of expression, peaceful assembly, freedom of association and freedom of religion or belief. Violations of the right to freedom of expression are numerous. The amendments to the Russian criminal

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Notaries of the Republic of Crimea, Lubov Eliseeva-Bora), available at the official website of Chamber of Notaries of the Republic of Crimea: http://npcrimea.ru/news/chistaya-sdelka-notariusyi-gotovyi-obezopasit-kryimchan-ot-moshennichestva (accessed 30 March 2015).

[84] In the Russian Federation inheritance has to be done as a notary act (Art. 1125 of the Civil Code of the Russian Federation), the same in Ukraine (Art. 1247 of the Civil Code of Ukraine).

[85] In the Russian Federation such contracts have to be done as notary acts (Art. 339 of the Civil Code of the Russian Federation), the same in Ukraine (Art. 577 of the Civil Code of Ukraine).

[86] In the Russian Federation such contracts have to be done as notary acts (art. 584 of the Civil Code of the Russian Federation), in Ukraine only contracts with real estate has to be done as notary acts (Art. 732 of the Civil Code of Ukraine).

[87] *See generally* Report by N. Muiznieks Commissioner of the Human Rights of the Council of Europe following his mission in Kyiv, Moscow and Crimea from 7 to 12 September, 2014, Council of Europe, CommDH(2014)19; OSCE/HCNM and OSCE/ODIHR, Ukraine, Human Rights Assessment Mission, *Report on the Human Rights and Minority Rights Situation*, March-April 2014, pp. 49-76, 109-119; A. Klymenko, *Human Rights Abuses in Russian-Occupied Crimea*, Atlantic Council, Freedom House, March 2015; *Report of the UN High Commissioner for Human Rights on the situation of human rights in Ukraine,* GA A/HRC/27/75, pp. 8-9.

[88] *See generally Rights in retreats*, at official website of the Human Rights Watch, available at http://www.hrw.org/ru/node/130593/section/5 (accessed 30 March 2015).

[89] Report by Muiznieks, *supra* note 87, p. 7.

code that took effect on 9 May 2014 made illegal public calls for actions aimed at violating the territorial integrity of the Russian Federation.[90] So, for example, statements against the annexation, including in the media, in social networks, or in a public place are recognised as a crime, which carries with it the threat of punishment – including imprisonment – for people who express their disagreement over the annexation of the Crimea, both in Russia as well in Crimea. Local authorities have cut all broadcasts of Ukrainian TV networks.[91] Only a few Ukrainian channels are still left on cable systems, mostly entertainment.[92] Internet traffic from Ukraine was also cut. The Russian company Rostelecom started providing service to Crimea in July 2014. It should be mentioned that under Ukrainian law, Crimea was host to a relatively pluralistic media environment. Now Crimea's Internet service providers must operate under the more strict media laws of the Russian Federation.[93] For example, in accordance with Russian law they must disable access to any site if so ordered by Russia's Federal Security Service.

Freedoms of assembly and association are also restricted, as well as freedom of religion. On the pretext of ensuring security, authorities have limited the locations where mass gatherings can be held. For example, authorities blocked plans by the Crimean Tatars to organise a rally in Simferopol on 18 May 2014 to mark the anniversary of their 1944 deportation. A small-scale commemoration event was allowed to take place on 17 May, although not in the centre of Simferopol.[94] Local authorities often target Ukrainian religious institutions. Numerous cases of intimidation and harassment, by the authorities or unknown attackers, of members and leaders of Ukraine's indigenous religious groups who have spoken out against Russia's annexation of Crimea are well-documented in Klymenko's report.[95]

Particular attention should be paid to the situation of the Crimean Tatar community and ethnic Ukrainians residing in the Crimea. The new Crimean authorities have exerted severe pressure on the Crimean Tatars. A number of searches have been carried out in Muslim religious institutions as well as in private homes and companies belonging to members of the Crimean Tatar community.[96] The Mejlis, a self-governing body, is the highest

[90] Федеральный закон от 28 декабря 2013 № 433-ФЗ "О внесении изменения в Уголовный кодекс Российской Федерации" (The Federal Law of 28 December 2013 No 433-FL "On Amendments to the Criminal Code of the Russian Federation"), The Collection of Legislation of the Russian Federation, 30 December 2013, No. 52, item 6998.

[91] *Media freedom under siege in Crimea, Ukraine, says OSCE representative*, OSCE news release, 8 March 2014, available at: http://www.osce.org/fom/116240 (accessed 30 March 2015).

[92] Klymenko, *supra* note 87, p. 9.

[93] For more on internet regulations in Russia, *see e.g.* M. Kramer, *The Clampdown on Internet Activities in Russia and the Implications for Western Policy*, PONARS Eurasia Policy Memo No. 350, September 2014, available at: http://www.ponarseurasia.org/sites/default/files/policy-memos-pdf/Pepm350_Kramer_Sept2014.pdf (accessed 30 March 2015).

[94] В. Никифиров, *Крымские татары собрались в Симферополе в годовщину депортации* (V. Nikiforov, The Crimean Tatars gathered in Simferopol on the anniversary of the deportation), available at: http://www.kommersant.ru/doc/2474178 (accessed 30 March 2015).

[95] Klymenko, *supra* note 87, pp. 11-12.

[96] *See generally* Muiznieks, *supra* note 87, pp. 7-8; Klymenko, *supra* note 87, pp. 12-14.

executive body of the Crimean Tatar people and represents them in their dealings with the authorities and international bodies.[97] The Mejlis criticized Russia's occupation of Crimea and called on Crimean Tatars to boycott the March referendum on Crimea's status and the September local elections. The prosecutor issued several statements warning the Mejlis against "extremist" activities.[98] Even Russian legal experts underlined that those statements were announced wrongfully,[99] since neither meetings, nor calls for the reconstruction of autonomy are signs of extremist activity, as defined in the Federal Law "On Countering Extremist Activity".[100] The situation of ethnic Ukrainians in Crimea is also worrisome. There are violations of their linguistic and cultural rights. The Crimean department of education announced that the Ukrainian language and literature would be studied only as electives.[101] The possibility to receive an education in any language other than Russian, and particularly in Ukrainian, has been diminished. The only newspaper in the Ukrainian language operating in Crimea *Krymskaya Svetlitsa* is under threat of closure. The distribution network refuses to distribute the newspaper in its newsstands and it has not been included in the subscription catalogue. There are also cases of public harassment of individuals on the grounds speaking Ukrainian in public places.[102] The ongoing situation has pointed out the fact that, at one hand, the local authorities are not able to guarantee the safety of national minorities, and on the other hand they flagrantly violate their rights by their own actions.

The situation of residents of Crimea after the accession of Crimea to the Russian Federation leaves no illusion that we will soon have to deal with numerous individual applications to the European Court of Human Rights (ECtHR). As of today there are more than 20 individual applications related to the events in Crimea. They involve complaints about the deprivation of liberty of persons; violation of the right to have one's private life respected; to peaceful enjoyment of one's possessions; restrictions on the freedom of movement; and various aspects of criminal proceedings which were commenced by the authorities of the Russian Federation in Crimea.[103] Applications have been lodged against Ukraine, or Russia, or both. Obviously, that does not mean that all these cases will be processed. If the Court decides that the application is manifestly inadmissible, it will reject it right away.

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[97] The official website of Mejlis of the Crimean Tatar People, available at: http://qtmm.org/en, (accessed 30 March 2015).

[98] В. Никифиров, М. Иванов, *Крымским татарам вменяют экстримизм* (V. Nikiforov, M. Ivanov, The Crimean Tatars are imputed the extremism), available at: http://www.kommersant.ru/doc/2521129 (accessed 30 March 2015).

[99] Broadly on this issue, *Ibidem*.

[100] Федеральный закон от 25.07.2002 № 114-ФЗ "О противодействии экстремистской деятельности" (The Federal Law of 25.07.2002 No. 114-FL "On Countering Extremist Activity"), The Co llection of Legislation of the Russian Federation, 29 July 2002, No. 30, item 3031.

[101] D. Kolesnyk, *Russia bans Ukrainian language from schools in Crimea*, available at: http://info-news.eu/russia-bans-ukrainian-language-from-schools-in-crimea/ (accessed 30 March 2015).

[102] *See* OSCE Report, *supra* note 87, pp. 67-68.

[103] *European Court of Human Rights deals with cases concerning Crimea and Eastern Ukraine*, Press Release issued by Registrar of the Court, ECHR 345(2014), 26 November 2014, p. 2.

In admissible cases the issue of the territorial jurisdiction of the Contracting Parties under Art. 1 of the European Convention of Human Rights and Fundamental Freedoms (Convention) will be reviewed in the first instance.[104] In accordance with the governing principles, jurisdiction is presumed to be exercised normally throughout a state's territory. However, the presumption of jurisdiction may be limited in exceptional circumstances, notably where a state is actually prevented from exercising its authority in part of its territory, and another state, which exercises effective control in that territory, is responsible for human rights violations. Such a situation was found by the ECtHR in the case *Ilascu and others v. Moldova and Russia.*[105] There it was declared that "'the Moldovan Republic of Transdniestria, set up in 1991-92 with the support of Russia, vested with organs of power and its own administration, remains under the effective authority, or at the very least under the decisive influence, of the Russian Federation."[106] Moreover, in the case Loizidou v. Turkey, the ECtHR held that the responsibility of a member state might be a consequence of military action – whether lawful or unlawful – when it exercises effective control over an area outside its national territory.[107] Besides these cases, the ECtHR has dealt with several cases which presented issues of jurisdiction over a territory beyond the geographical borders of the respondent state.[108]

Hence in applications which concern cases after 18 March 2014, when Russia legally acknowledged its control over Crimea, the situation is clear. The Russian Federation could be held responsible under the Convention for violation of human rights in Crimea. But in applications concerning cases which took place before the official Russian declaration and recognition of the annexation took place, the ECtHR will have to establish whether Russia is responsible for said alleged violations of human rights.

CONCLUSIONS

The accession of Crimea to the Russian Federation is inconsistent with international law. Regardless of this fact, we are faced with a *fait accompli*. The situation is very complicated and difficult to comprehend – there are actually still legal systems of the two states – Ukraine and the Russian Federation – in operation on the same territory. This causes a lot of confusion and misunderstanding in both the internal and international law arenas. One of the most aggrieved parties to the secession are the residents of this territory themselves, because the negative effects of the collision of two legal systems are reflected

[104] *European Convention on Human Rights and Fundamental Freedoms,* available at official website of ECHR http://www.echr.coe.int/Documents/Convention_ENG.pdf (accessed 30 March 2015).

[105] *Ilascu and others v. Moldova and Russia* (App. no. 48787/99), Judgment of 8 July 2004, ECHR Reports 2004-VII, p. 179.

[106] *Ibidem*, para. 392.

[107] *Loizidou v. Turkey* (App. no. 15318/89), Judgment of 18 December 1996, ECHR Reports 1996-VI, p. 207, para. 52.

[108] *E.g. Bancovic and Others v. Belgium and Others* (App. no. 52207/99); *Cyprus v. Turkey* No. 25781/94; *Georgia v. Russia (II)* (App. no. 38263/08) (still pending).

primarily on them and in their lives. Only problems in certain areas of international law as well as internal law have been presented in this article. However, the residents of Crimea have faced problems in all spheres of their life: in fact their civil and political rights are limited. They are forced to initiate cases or continue previously-initiated cases in the Crimean courts and operate in accordance with the Federal Constitutional Law of the Russian Federation of 21 March 2014. The Russian and Ukrainian legal systems exhibit many differences in all fields, and the residents of Crimea were not and are not familiar with the Russian legislation. Furthermore, professionals whose task is to apply the law – judges, lawyers, and employees of judicial authorities – have faced the same problem. The situation of national minorities in the Crimea has deteriorated sharply following the accession of Crimea into the Russian Federation. Obviously aggrieved persons have the right to bring their complaints against authorities to the ECtHR, but only after they have exhausted local remedies, and very often such litigation takes years. Furthermore, there is a big risk that correspondence from the court would not reach the addressee. The Order of the Federal Communications Agency on 31 March 2014 No. 61 "On assignment of postcodes to the post offices" in the territory of the Republic of Crimea introduced Russian postal codes.[109] The implementation of that order in fact began in May 2014. In turn, the Ukrainian State Postal Enterprise (Ukrposhta) has informed all designated operators of Universal Postal Union's member countries to suspend the dispatching to Ukraine of any international postal items addressed to Crimea (postal codes in the range 95000–99999).[110] All official institutions, organizations and international bodies, in connection with their official non-recognition of the incorporation of Crimea into the Russian Federation, cannot use the "new" codes of Crimea in their correspondence or use addresses like "The Republic of Crimea" or "The Russian Federation". And correspondences with the Ukrainian post indexes indicating "Crimea, Ukraine" does not reach the addressee on the peninsula, and is returned as "sent to the wrong address".

One should ask: what are the chances that the situation of the residents of the Crimea will improve? In the nearest term this seems rather impossible. The solution to the above problems lies finding a way to completely eliminate disagreements between parties to the dispute over the ownership of Crimea. Today both Ukraine and the international community consider Crimea as part of Ukraine, while Russia on the other hand recognises it as part of the Russian Federation. It is hard to avoid the opinion that the problems of the residents of Crimea will continue along the same path as the problems between all involved parties.

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[109] The text of the order has not been published officially. It is available at the website of legal information of the Russian Federation: http://base.garant.ru/70625652/ (accessed 30 March 2015).

[110] *See Ukraine cites temporary difficulties in delivering mail to Crimea*, available at the official website of the UPU: http://news.upu.int/no_cache/nd/ukraine-cites-temporary-difficulties-in-delivering-mail-to-crimea/ (accessed 30 March 2015).

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THE BUDAPEST MEMORANDUM OF 5 DECEMBER 1994: POLITICAL ENGAGEMENT OR LEGAL OBLIGATION?

Abstract:
Ukraine, upon giving up the nuclear arsenal left on its territory by the USSR, entered in 1994 into a Memorandum on Security Assurances with the United Kingdom, United States and Russian Federation (Budapest Memorandum). Since the crisis began between the Russian Federation and Ukraine in February 2014, a number of States have invoked the Budapest Memorandum. Unclear, however, is whether this instrument constituted legal obligations among its Parties or, instead, is a political declaration having no legal effect. The distinction between political instruments and legal instruments is a recurring question in inter-State relations and claims practice. The present article considers the Budapest Memorandum in light of the question of general legal interest – namely, how do we distinguish between the legal and the political instrument?

Keywords: treaties, legal obligations, political commitments, use of force, international security, non-proliferation and disarmament, general rule of interpretation, supplementary means of interpretation, subsequent practice, treaty text, treaty context, object and purpose, Budapest Memorandum, Russian Federation, Ukraine, United States, United Kingdom

INTRODUCTION

The Memorandum on Security Assurances in Connection with Ukraine's Accession to the Treaty on the Non-Proliferation of Nuclear Weapons (Budapest Memorandum) was adopted on 5 December 1994 by the Russian Federation, Ukraine, United Kingdom, and United States.[1] "Noting the changes in the world-wide security situation",[2] the four Parties

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[1] Letter dated 7 December 1994 from the Permanent Representatives of the Russian Federation, Ukraine, the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the Secretary-General: A/49/765 – S/1994/1399, annex I.

[2] Budapest Memorandum, preambular para. 3.

"reaffirm[ed] their commitment to Ukraine, in accordance with the principles of the Final Act of the Conference on Security and Cooperation in Europe, to respect the independence and sovereignty and the existing borders of Ukraine."[3] The three nuclear weapons States also "reaffirm[ed] their commitment to Ukraine (…) to refrain from the threat or use of force against the territorial integrity or political independence of Ukraine."[4]

France on the same day adopted a Statement on the Accession of Ukraine to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT).[5] France's Statement indicated, *inter alia,* that "France, as a permanent member of the Security Council, reaffirms its intention to obtain from the Council immediate steps to provide, in accordance with the Charter, the necessary assistance to Ukraine as a non-nuclear weapons State under the NPT, if it is the victim of an act of aggression or a threat is made against it with nuclear weapons" and "its commitment to respect the independence and sovereignty of Ukraine within its present borders."[6]

In view of the acts of armed aggression by the Russian Federation against Ukraine since February 2014, including the putative annexation of Ukraine's territory of Crimea on 21 March 2014,[7] the question arises whether the Budapest Memorandum created

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[3] *Ibidem*, para. 1.

[4] *Ibidem*, para. 2.

[5] Treaty on the Non-Proliferation of Nuclear Weapons (adopted 12 June 1968, entered into force 5 March 1970), 729 UNTS 168.

[6] For the text of France's Statement, *see* http://www.exportlawblog.com/docs/security_assurances.pdf (accessed 30 March 2015). The statement reads as follows in the original:

La France, en tant que membre permanent du Conseil de Sécurité, affirme son intention d'obtenir que le Conseil prenne des mesures immédiates en vue de fournir, conformément à la Charte, l'assistance né[ce]ssaire à l'Ukraine en tant qu'Etat non possesseur d'armes nucléaires partie au TNP, au cas où celle-ci serait victime d'un acte d'agression ou ferait l'objet d'une menace d'agression avec emploi d'armes nucléaires.

La France réaffirme son engagement de respecter l'indépendance et la souveraineté d'Ukraine dans ses frontières actuelles, conformément aux principes de l'Acte final d'Helsinki et de la Charte de Paris pour une nouvelle Europe. Elle rappelle son attach[e]ment aux principes de la CSCE selon lesquels le frontières ne peuvent être modifiées que par des moyens pacifiques et par voie d'accord, et les Etats participants s'abstiennent de recourir à la menace ou l'emploi de la force soit contre l'intégrité territoriale ou l'indépendance politique d'un Etat, soit de toute autre manière incompatible avec les buts de Nations Unies.

[France, as a permanent member of the Security Council, affirms its intention to obtain from the Council immediate steps to provide, in accordance with the Charter, the necessary assistance to Ukraine as a non-nuclear weapons State under the NPT, if it is the victim of an act of aggression or a threat is made against it with nuclear weapons.

France reaffirms its commitment to respect the independence and sovereignty of Ukraine within its present borders, in accordance with the principles of the Helsinki Final Act and the Charter of Paris for New Europe. It recalls its attachment to CSCE principles according to which borders can be changed only by peaceful means and agreement, and the participating States shall refrain from the threat or use of force against the territorial integrity or political independence of a State, or in any other manner inconsistent with the purposes of the United Nations.]

[7] Federal Constitutional Law, *On Admitting to the Russian Federation the Republic of Crimea and Establishing within the Russian Federation the New Constituent Entities of the Republic of Crimea and the*

legal obligations on the part of the States which adopted it and, to the extent that it did, what those obligations are.[8] The initial problem is to establish whether the guarantees set out in the Memorandum (and France's associated Statement) are legal obligations or, instead, political undertakings having no distinct legal effect.

1. THE LAW OF (NON)TREATIES: WHAT RULES APPLY?

Under what rules is it to be established what character – legal or political – an instrument possesses? It would be question-begging to say that the general rule of interpretation for treaties[9] necessarily applies to an instrument like the Budapest Memorandum: the very question to be answered is whether the instrument is a treaty creating legal obligations or not. Also, it is to be asked whether establishing the character (legal or political) of the instrument as a whole is really the question – or, instead, whether the real question is what character is possessed by each of its provisions. After all, an instrument of undoubted treaty character well may contain provisions that are purely hortatory as well as declarations of a purely political character. In that case, the question is to distinguish between the legal and the non-legal within a given instrument.

In practice, however, the question typically has been posed like this: what character is possessed by the instrument as a whole? And, in practice, the conceptual problem of applying the general rule of interpretation for treaties has not been an obstacle. The conceptual problem notwithstanding, courts and tribunals have been ready to consider whether an agreement creates legal rights or obligations, and they have done so by considering the instrument as a whole.

In both *Aegean Sea Continental Shelf* and *Qatar* v. *Bahrain,* the International Court of Justice ("ICJ" or "the Court") was called upon to consider an instrument upon which one party sought to base jurisdiction and which the other party asserted was a mere political undertaking (and thus not an effective basis for jurisdiction). The ICJ reasoned that it "must have regard above all to [the] actual terms and to the particular circumstances in which [the instrument] was drawn up."[10] The Court said that whether or not an instrument constitutes a legal agreement "essentially depends on the nature of the act or transaction to which the [instrument] gives expression."[11]

City of Federal Importance Sevastopol, 21 March 2014, available at: http://eng.kremlin.ru/events/president/news/20625 (accessed 30 March 2015). Further to the situation, *see* T. Grant, *Aggression against Ukraine: Territory, Responsibility, and International Law*, Palgrave Macmillan, New York: 2015.

[8] *See e.g.* Prof. Stephen MacFarlane, interview by France 24, 3 April 2014, available at: http://www.france24.com/en/20140303-ukraine-us-uk-diplomacy-russia-budapest-memorandum/ (accessed 30 March 2015).

[9] Art. 31 of the Vienna Convention on the Law of Treaties (signed 23 May 1969, entered into force 27 January 1980), 1155 UNTS 331 (VCLT).

[10] ICJ, *Aegean Sea Continental Shelf,* Jurisdiction, 18 December 1978, ICJ Rep. 1978, p. 3, 39, para. 96. Quoted [in:] ICJ, *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Jurisdiction and Admissibility, 1 July 1994, ICJ Rep. 1994, p. 112, 121, para. 23.

[11] *Aegean Sea Continental Shelf,* Jurisdiction, p. 39, para. 96.

This would suggest a method of analysis akin to that indicated under the general rule of interpretation – i.e., the rule set out under Article 31.1 of the VCLT: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose." To say that one "must have regard above all to [the] actual terms" is a directive similar to that which says "[a] treaty shall be interpreted (…) in accordance with the ordinary meaning to be given to the terms." The straightforward case, then, would be the instrument in which the parties have declared, by its "actual terms," their intention to create (or not to create) legal obligations. But not all instruments say "we, the parties, herein intend to create legal obligations [or not]." So the interpreter may have to look further.

To have regard to "the particular circumstances in which [the instrument] was drawn up" and to treat the character of the instrument as "essentially depend[ent]" upon "the nature of the act or transaction to which the [instrument] gives expression" are less tightly connected to the standard language by which the rule of interpretation is expressed. A link between these phrases and the standard language nevertheless may be discerned. The "nature of the act or transaction" arguably evokes the "object and purpose" of the treaty, albeit loosely. It could be, then, that what the Court had in mind was that the object and purpose of the instrument in question is to be considered in order to arrive at a conclusion whether the instrument creates legal obligations or not.

Applying the phrase "object and purpose" when interpreting an instrument, it has been remarked, gives rise to questions, not least of all concerning how the plain text of the instrument is to be related to teleological considerations.[12] There are good reasons to take care in applying teleological considerations, not least of all the violence that a free-wheeling interpretative approach can do to an intention set out in the plain terms of the text. However, where a real contest exists as to whether the text in question has any legal content at all, teleological considerations have a special salience. A text that says "the States Parties shall do X", where X is a clear course of action, gives rise to little or no need for a teleological approach – *if* it is accepted that the text is legally binding. If, by contrast, a question exists whether the text is legally binding, then the otherwise clear directive to "do X" no longer has an uncontested meaning. To identify its meaning, the interpreter must form a judgment as to whether the object and purpose of the parties was to create a legal obligation or, instead, merely to declare a political *desideratum*. The interpretive approach to be taken in respect of an undoubted obligation-creating instrument thus is not quite the same as that to be taken in respect of an instrument the legal character of which is contested. In respect of the latter, a certain shift of stress is entailed in the direction of teleological considerations.

When the legal or political character of the instrument is contested, a shift is also entailed toward what the standard rule of interpretation identifies as the supplementary

[12] *See e.g.* E. Bjorge, *The Evolutionary Interpretation of Treaties*, Oxford University Press, Oxford: 2014, pp. 113-118; D. S. Jonas & T. N. Saunders, *The Object and Purpose of a Treaty: Three Interpretive Methods*, 43 Vanderbilt Journal of Transnational Law 565 (2010), pp. 580-582.

means of interpretation. The Court suggested this in *Aegean Sea Continental Shelf*, when it said that regard should be given "to the particular circumstances in which [the instrument] was drawn up." This evokes the language of Art. 32 of the VCLT – "Supplementary Means of Interpretation." Supplementary means, however, are a sort of residual mechanism – to be reserved for: (1) confirming the meaning when this is already evident on the application of the general rule (text in its context and in light of the instrument's object and purpose); or (2) determining the meaning if the interpretation that would be arrived at by applying the general rule "*(a)* [would] leave (…) the meaning ambiguous or obscure;" or *(b)* "[would] lead (…) to a result which is manifestly absurd or unreasonable." When the legal or political character of the instrument is contested, confirming a meaning which is already evident on the application of the general rule (the first case under Art. 32) is not likely to serve much purpose. A provision of the instrument may have a clear meaning, to the extent that the legal character of the instrument is assumed; but here it is the legal character itself which is in question. And if the text on its own answers the question of legal character (the hypothetical clause that says "we, the parties, herein intend to create legal obligations [or not]"), then, there too, it does not seem that supplementary means of interpretation add much to the analysis.

The second branch of the second case under Art. 32 – determining the meaning if the meaning would otherwise be "manifestly absurd or unreasonable" – is not applicable here either: there is nothing "manifestly absurd" about a political undertaking which creates no legal obligation; and it is not "unreasonable" to conclude that some instruments are only that – political instruments, not legal agreements.

As for the first branch of the second case – where the interpretation arrived at by applying the general rule would leave the meaning "ambiguous or obscure" – this may be the more natural interpretative device to apply where the question of the legal character of the instrument arises. If from the text of the instrument taken in its context and in light of the instrument's object and purpose, one cannot be sure whether the instrument was intended to create legal obligations, then the meaning of the instrument is "ambiguous." Under the scheme of Arts. 31 and 32, this would open the door to the supplementary means of interpretation – e.g., to "the preparatory work of the treaty and the circumstances of its conclusion."

When the Court said that, to judge whether the instrument creates legal obligations or not, one is to consider "the particular circumstances in which [the instrument] was drawn up,"[13] it might appear that the Court was applying this scheme. Judge Oda evidently thought that this was the right approach (though he disagreed with the Court's conclusion). In his dissenting opinion in the jurisdiction phase of *Qatar* v. *Bahrain,* Judge Oda referred to Art. 32 and said that this directed the interpreter to consider "the

[13] *Aegean Sea Continental Shelf,* Jurisdiction, p. 3, 39, para. 96. Quoted in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Jurisdiction and Admissibility, p. 112, 121, para. 23.

preparatory work of the treaty and the circumstances of its conclusion."[14] Judge Oda concluded that, when they accepted the 1990 Minutes (by which Qatar said jurisdiction was to be founded), the parties had adopted no legally binding commitment.[15] In Judge Oda's words, when "the three Foreign Ministers (…) did sign the Minutes of the meeting (…) they certainly did so without the slightest idea that they were signing a tripartite treaty or convention."[16] It might be asked whether the Court (and the dissenting Judge) were strictly applying the approach laid out in Art. 31 and 32. Would it not have been possible to reach the same conclusion(s) by reference to the object and purpose that the parties had evinced?

Courts and tribunals in practice have implicitly accepted the applicability of the general rule of interpretation and its supplementary part notwithstanding conceptual questions the approach may raise. As with the interpretation of undoubted treaty instruments, the task will be to determine the intention of the parties. As has recently been observed, "the very taproot of treaty interpretation is the objective establishment of the intentions of the parties."[17] It is natural to apply the same standard when asking whether there exists a legally binding treaty to interpret.

When applying the standard of "objective establishment of the intentions of the parties" to determining the legal or political character of the instrument, much the same questions arise as when determining the meaning of an undoubted legal text. In particular, it is to be asked, by what indications does one tell what the parties intended? The Court in *Qatar v. Bahrain* rejected the argument that statements or conduct after the adoption of the 1990 Minutes determined the parties' intentions. As to subsequent statements, the Court said as follows:

> The Court does not find it necessary to consider what might have been the intentions of the Foreign Minister of Bahrain or, for that matter, those of the Foreign Minister of Qatar. The two Ministers signed a text recording commitments accepted by their Governments, some of which were to be given immediate application. Having signed such a text, the Foreign Minister of Bahrain is not in a position subsequently to say that he intended to subscribe only to a 'statement recording a political understanding,' and not to an international agreement.[18]

This in itself does not explain why the text in question is to be viewed as creating legal obligations. The Court rejected that the national constitutional procedures for the adoption of the Minutes or the lateness of their registration under Article 102 of the Charter determined that they lacked legal character[19] (the question of registration will be

[14] In particular to Art. 32 of the VCLT concerning supplementary means of interpretation: Dissenting Opinion of Judge Oda, ICJ Rep. 1994 at 138-39, para. 16.

[15] *Ibidem*, paras. 14-17.

[16] *Ibidem*, para. 16.

[17] E. Bjorge, *The Evolutionary Interpretation of Treaties*, Oxford University Press, Oxford: 2014, p. 56.

[18] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain)*, Jurisdiction and Admissibility, at pp. 122-23, para. 27.

[19] *Ibidem* at 122, para. 29.

considered further below). In any event, the Court concluded that "any such intention, even if shown to exist, [could not] prevail over the actual terms of the instrument in question."[20] So the terms as adopted are the starting point for analysis. If they evince the shared intention of the parties to create legal obligations, then the instrument is to be interpreted as doing so. This again is in accordance with the approach generally taken to questions of treaty interpretation.

While undoubtedly practical, the Court's approach to the prior question has been eased by the conclusion that the instruments in dispute were in truth legal instruments. A case in which that conclusion could not be supported would perhaps put a greater onus on a court or tribunal to say how exactly the rules of treaty interpretation apply – and why. It is not altogether clear that the drafting history of the Vienna Convention would furnish the answers; it tends rather to suggest that the adopted text resulted from a decision to elide the questions.

In both the International Law Commission (ILC) and the Diplomatic Conference, disagreement arose as to the scope of the term "treaty". One of the problems was that jurists and States did not agree how to ensure that the term extends to all agreements that create legal rights or obligations. A drafting approach which excluded political agreements met with objection, perhaps for that reason; the exact grounds for objection here were not perfectly clear. Mr. Talalaev, the Soviet representative, said that

> [b]y limiting the notion of a treaty to agreements which provided for rights and obligations, [a] Swiss amendment unduly restricted the scope of the draft articles by excluding from their sphere of application important international agreements, such as the Atlantic Charter, the Yalta and Potsdam Agreements and many political declarations which not only provided for 'rights and obligations' but also laid down very important rules of international law.[21]

The objection here seems to have been that some instruments are of mixed character – containing both legal and political terms – and that the provision on use of terms should not exclude an agreement simply because some of its terms are non-binding. This seems a valid concern, but other States had the opposite concern: that an expansive approach would sweep into the scope of the Convention instruments of purely political character.

Sepulveda Amor, as representative of Mexico in the Diplomatic Conference, agreed with the Swiss approach that would exclude political instruments from the term "treaty" expressly:

> The purpose of a treaty was to establish legal relations between the parties, which was not true of declarations of principle or political instruments such as the Atlantic Charter…

[20] *Ibidem*. The Court had reached a similar result, though with reference to rather elaborate private law analogies, in *Temple of Preah Vihear (Cambodia v. Thailand)*, Preliminary Objections, 26 May 1961 ICJ Rep. 1961, p. 17, paras. 31-32.

[21] Committee of the Whole, 87th meeting, 14 April 1969, *Official Records, UN Conference on the Law of Treaties* (Second Sess.), p. 226 (para. 22).

> The Mexican delegation therefore considered that the existence of a legal relationship between States which concluded a treaty should be regarded as an essential element of the legal act.[22]

The United Kingdom's representative took a similar view, saying that the USSR had

> expressed too broad a view of the concept of a treaty within the framework of the draft convention. International practice had consistently upheld the distinction between international agreements properly so-called, where the parties intended to create rights and obligations, and declarations and other similar instruments simply setting out policy objectives or agreed views.[23]

So participants in the Diplomatic Conference and later parties to the Convention held the view that the law of treaties as set out therein is not to be interpreted as applying to political instruments. The differences on the point found expression through the work of the ILC and the subsequent Diplomatic Conference.

In fact, a compromise had been proposed in the ILC the year before adoption of the draft articles and three years before the opening of the Diplomatic Conference. Briggs, in the 1965 session of the ILC, suggested that, to address the concern of the States which objected to applying the draft articles to "agreed statements of policy" (i.e., political instruments not creating legal rights or obligations), a simple change in drafting would suffice. Draft article 1(b) in the set of draft articles reported by Waldock in 1962 read as follows:

> '*Treaty*' means any international agreement in any written form, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (treaty, convention, protocol, covenant, charter, statute, act, declaration, concordat, exchange of notes, agreed minute, memorandum of agreement, *modus vivendi* or any other appellation).[24]

Briggs's suggestion was to replace the word "any" with the word "an".[25] Thus, instead of a treaty being used in the convention to mean "*any* international agreement," it would be used to mean "*an* international agreement." This wording entails the possibility of a more limited scope. True, under Brigg's wording, it *could* be that a treaty includes international agreements regardless of their content (political or legal); but the wording as adopted makes clear that it might not.

Moreover, the proposal to switch from "any" to the potentially more restrictive "an" was made in a particular context. This was amidst a disagreement over whether the text

[22] Committee of the Whole, 4th meeting, 29 March 1968, *Official Records, UN Conference on the Law of Treaties* (First Sess.), p. 23 (para. 26).

[23] Mr. Sinclair (United Kingdom), *ibidem*, p. 228 (para. 35). To similar effect, *see* Mr. Rodriguez (Chile), *ibidem*, pp. 226-27 (para. 24); and in the ILC discussions in 1965 the observations by de Luna: ILC 777th meeting, 5 May 1965, ILC Yearbook (1965), vol. I, p. 10 (para. 20).

[24] Sir Humphrey Waldock, Special Rapporteur, First report, 26 March 1962: ILC Yearbook (1962), vol. II, p. 31.

[25] Briggs, ILC 777th meeting, 5 May 1965, ILC Yearbook (1965), vol. I, p. 10 (para. 10).

should expressly exclude political agreements. Objectors against an exclusion worried that it would exclude too much – i.e., instruments with mixed legal and political terms. Proponents of an exclusion worried that the scope of the text, without the exclusion, would be misinterpreted as extending to purely political instruments. The text as eventually adopted was as follows:

> *Article 2*
> *Use of terms*
> 1. For the purposes of the present Convention:
> *(a)* 'treaty' means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.[26]

The Commentary to draft article 2 mentioned that the drafters decided to drop the proposal to expressly restrict the definition of treaties to instruments having the element of "intention to creation obligations under international law."[27] It attributed this to concerns that the phrase would lead to confusion as between instruments under international law and domestic law.[28] It did not mention Briggs's solution – the one in fact adopted – or the context in which that solution was adopted – namely, a disagreement over how to deal with political agreements.

Of course, we have no Convention on the Law of Non-Treaties; and the convention we do have sets out a rule of interpretation which, its controversies notwithstanding, serves its purpose. Future interpreters seem likely to apply its terms, *mutatis mutandis,* to the question of the legal or political character of an instrument.

Some writers have suggested that the interpreter might measure the parties' intention (legal or political) by starting outside the text.[29] The mainstream view affirms that the starting point is the text, as the text provides the objective evidence of intention.[30] The difference of views seems to be one of emphasis, not of substance. Nobody would say that the text of the instrument does not matter; and to speak about subjective measures of party intention would seem simply to be another way of speaking about the context, object and purposes – another way of distinguishing between text and the other branches of the general rule of interpretation. As suggested above, when the character of the instrument as legal or political is in doubt, the interpretative problem

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[26] Adopted 23 May 1969, entered into force 27 January 1980, 1155 UNTS 331, 333.

[27] For a still earlier version *see* H. Lauterpacht, Special Rapporteur, First Report, 24 March 1953, ILC Yearbook (1953), vol. II, p. 90: "Article 1. Essential Requirements of a Treaty. Treaties are agreements between States, including organizations of States, intended to create legal rights and obligations of the parties."

[28] Draft Art. 2, Comment (6): ILC Yearbook (1966), vol. II, p. 189.

[29] D. B. Hollis & J. J. Newcomer, '*Political' Commitments and the Constitution*, (2009) 49 Virginia Journal of International Law 507 (2009), p. 523, n. 57.

[30] *See e.g.* Ch. Chinkin, *A Mirage in the Sand? Distinguishing Binding and Non-Binding Relations between States*, 10 Leiden Journal of International Law 223 (1997), pp. 236-37. Cited by Hollis & Newcomer (*ibidem*).

is not precisely the same as entailed by contested provisions within an undoubted legal instrument. The interpretative tools that have been used, however, are derived from, if not identical to, those belonging to the law of treaties. Sir Hersch Lauterpacht, as special rapporteur on the topic of the law of treaties, said that the legal effectiveness of an instrument "must be evidenced by the terms of the treaty and any other available evidence."[31] This was a defensible approach at the time; it remains so today.

So the guarantees by the Russian Federation, United Kingdom, United States and France to Ukraine are to be considered, first, in view of the terms by which the Parties expressed those guarantees; and then in the context in which they were expressed and in the light of their object and purpose.

2. TEXT OF THE BUDAPEST MEMORANDUM

The Budapest Memorandum sets out a series of assurances to Ukraine. The assurances are contained in six operative paragraphs, each of which the three Permanent Members of the Security Council which are parties to the Memorandum "confirm." The operative paragraphs are as follows:

> 1. The Russian Federation, the United Kingdom (…) and the United States of America reaffirm their commitment to Ukraine, in accordance with the principles of the Final Act of the Conference on Security and Cooperation in Europe, to respect the independence and sovereignty and the existing borders of Ukraine;
> 2. [The three P5 Parties] reaffirm their obligation to refrain from the threat or use of force against the territorial integrity or political independence of Ukraine, and that none of their weapons will ever be used against Ukraine except in self-defence or otherwise in accordance with the Charter of the United Nations;
> 3. [The three P5 Parties] reaffirm their commitment to Ukraine, in accordance with the principles of the Final Act of the Conference on Security and Cooperation in Europe, to refrain from economic coercion designed to subordinate to their own interest the exercise by Ukraine of the rights inherent in its sovereignty and thus to secure advantages of any kind;
> 4. [The three P5 Parties] reaffirm their commitment to seek immediate United Nations Security Council action to provide assistance to Ukraine, as a non-nuclear weapon State party to the Treaty on the Non-Proliferation of Nuclear Weapons, if Ukraine should become a victim of an act of aggression or an object of a threat of aggression in which nuclear weapons are used;
> 5. [The three P5 Parties] reaffirm, in the case of Ukraine, their commitment not to use nuclear weapons against any non-nuclear-weapon State party to the Treaty on the Non-Proliferation of Nuclear Weapons, except in the case of an attack on themselves, their territories or dependent territories, their armed forces, or their allies, by such a State in association or alliance with a nuclear-weapon State;

[31] Lauterpacht, Special Rapporteur, Second Report on the Law of Treaties, ILC Yearbook (1954), vol. II, p. 125, para. 11.

> 6. [All four Parties] will consult in the event a situation arises that raises a question concerning these commitments.[32]

A preliminary point is that these provisions, with the exception of the consultation provision in paragraph 6, are expressed as renewals or reaffirmations. The Parties evidently believed themselves already subject to the commitments or obligations which the Memorandum "reaffirm[ed]." Many a legal rule is expressed by more than one treaty and also by treaty and in general international law. So too, however, can a political commitment be expressed in more than one place.

Another point is that four of the five paragraphs refer to "commitment" and only one to "obligation." It is certainly an obligation (subject to the established exceptions) to refrain from threat or use of force against Ukraine's territorial integrity. That obligation existed before the conclusion of the Budapest Memorandum, which "reaffirm[ed]" the obligation in paragraph 2. Whether the variation in the Memorandum between "obligation" and "commitment" has legal consequences is doubtful. Paragraph 5 reaffirms the P5 Parties' "commitment" not to use nuclear weapons against Ukraine except in case Ukraine in alliance with a nuclear-weapon State attacked one of them (or their armed forces or allies). To posit that the P5 Parties, in the absence of the Memorandum, would have had a right to use nuclear weapons against Ukraine – in the absence of an attack by Ukraine – is untenable.[33] So the non-use of nuclear weapons, as indicated in paragraph 5, is non-use as a matter of legal obligation, but this is not to say that the legal obligation arises out of paragraph 5; it pre-exists that provision. The articulation of a commitment as a political matter does not change the legal character of an obligation which already exists in the same terms.

Respect for borders is an existing legal obligation as well. The Memorandum (under paragraph 1) refers to the Final Act of the CSCE in connection with that obligation. The Final Act is widely understood to be a political statement and not to constitute legal obligations.[34] The reference in the Memorandum to the Final Act is not a *renvoi*; it does not incorporate the Helsinki commitments by reference. Even if it had, it would not, without more, have changed the character of those commitments. Again, to refer to an existing commitment – such as the legal obligation to respect settled boundaries – does not in itself change the legal character of the commitment.

The Memorandum refers to the Final Act again (in para. 3) when reaffirming a commitment to "refrain from economic coercion designed to subordinate to their

[32] A/49/765 – S/1994/1399, pp. 2-3.

[33] Which follows from the general prohibition against threat or use of force other than in self-defence (Charter Art. 2(4)), and from the conclusions of the ICJ in *Legality of the Threat or Use of Nuclear Weapons* that the threat or use of nuclear weapons "would generally be contrary to the rules of international law applicable in armed conflict" – except perhaps in "an extreme circumstance of self-defence, in which the very survival of a State would be at stake": Advisory Opinion, 8 July 1996, ICJ Rep. 1996, p. 226, 266 (para. 105 (E)).

[34] *See* with citations to literature J. J. Paust, *Transnational Freedom of Speech: Legal Aspects of the Helsinki Final Act*, 45 Law and Contemporary Problems 53 (1982), pp. 55-57.

own interest the exercise by Ukraine of the rights inherent in its sovereignty and thus to secure advantages of any kind." This "commitment" is reminiscent of others which States have asserted to be purely political – like the commitment in the Algiers Declaration to non-interference, to be noted shortly again below. There is plausible ground for treating the content of such a commitment as political and not legal. Establishing that the commitment had been breached would entail a difficult and inevitably highly contentious exercise in appreciation: "economic coercion" is not a term of art; the Memorandum does not define it. Legal obligations certainly can entail difficult questions; but it would be surprising for three economically powerful States to accept an obligation to refrain from economic influence; where their influence becomes coercion might be determinable in some cases but a large area of uncertainty exists with such appreciations. Similarly, it would be surprising if they would have accepted, as a legal obligation, a prohibition against "secur[ing]" over Ukraine "advantages of any kind"; it would be hard to see how in practice they could assure that they did not.

Then there are paragraphs 4 and 6. These are the only provisions of the Memorandum requiring that the three P5 Parties take affirmative steps, rather than refrain from prohibited actions. Paragraph 4 seems to be restricted to acts of aggression or threats of aggression "in which nuclear weapons are used." It might be argued, with reference to the English language text, that the qualifying clause ("in which nuclear weapons are used") applies only to the threat of aggression and that, thus, any act of aggression (nuclear or other) triggers the commitment to seek Security Council action.[35] However, this is by no means an unimpeachable interpretation. The overall concern of the Memorandum with nuclear disarmament is relevant as context.

The conduct required under paragraph 4 is political conduct – "to seek immediate (…) action" by the Security Council "to provide assistance to Ukraine." This in itself is not determinative as to whether the commitment in paragraph 4 itself is legal or political. Many legal obligations are obligations to do things having a political character. A challenge, however, could be raised on other grounds whether a State may enter into a legally binding commitment to seek Security Council action. Libya and the United States both seemed to accept that a member of the Security Council could not be obliged to vote or refrain from voting on a particular Security Council action.[36] The

[35] The French language text of paragraph 4 also suggests that the concern is with threats or use of nuclear weapons, referring as it does to Security Council action "*en cas d'agression ou de menace d'agression avec recours à l'arme nucléaire dirigée contre l'Ukraine*." The words "*en cas*" refer to the whole clause that follows; and the words "*dirigée contre l'Ukraine*" refer to the whole clause that comes before; but the clause "*avec recours à l'arme nucléaire,"* while probably intended to modify both "*agression*" and "*menace*", could arguably be restricted to the latter.

[36] See *Lockerbie,* Request for the Indication of Provisional Measures, Eric Suy (for Libya), Public Sitting, Thursday 26 March 1992, translation, p. 72; Public Sitting (morning), Saturday 28 March 1992, translation, p 44. And Rashkow (for the United States), Public Sitting (morning), Friday, 27 March 1992, p. 31; Edwin Williamson (for the United States), Public Sitting (afternoon), Saturday, 28 March 1992, p. 31.

European Court of Human Rights has doubted whether international responsibility could attach to a State for the way it voted in the Security Council.[37] By contrast, when it came to a pledge to vote (or to refrain from exercising a veto) in a regional security organization, the ICJ apparently did not judge a State to be prevented from making that pledge as a legally binding commitment; the Court judged that Greece had "breached its obligation" when it objected to the admission of the former Yugoslav Republic of Macedonia to NATO;[38] and it said in its reasoning that the question of the accordance of Greece's conduct with the treaty provision requiring Greece not to object to Macedonia's NATO candidacy was a "legal question pertaining to the interpretation and implementation" of that treaty[39] – i.e., a "legal dispute".[40] It would seem to follow that it was open to the Russian Federation, United Kingdom and United States to make a legal commitment to Ukraine to take action in the Security Council.

Paragraph 6 provides that the three P5 Parties "will" activate a consultation mechanism if "a situation arises that raises a question concerning these commitments." They might have said "shall" but the chosen verb is not at all inconsistent with an intention to create a legal obligation. The Ukrainian party well may have asked whether, following an act of aggression by one of the guarantor Parties, an obligation to consult with that party would have had much substance. There was a multi-party consultation mechanism under Article IV of the Treaty of Guarantee of 1960 and that did little good at any phase of the long crisis in the Republic of Cyprus.[41] But this is not a question of the character (legal or political) of the consultation provision; it is a question instead of the efficaciousness of consultation as a dispute settlement mechanism in situations of armed conflict or aggression. States are free to accept legal commitments to do things that may have little or no useful policy effect. "The fact that the obligation provided for in the instrument can be fulfilled by a somewhat nominal act of the parties does not necessarily detract from its character as a treaty."[42]

States also well may adopt instruments in which they both create legal rights and obligations and address matters in purely political terms. Thus the United States under Point I, paragraph 1, of the General Declaration of 19 January 1981 (Algiers Declaration) "pledge[d] that it is and from now on will be the policy of the United States not

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[37] *Behrami and Behrami* v. *France,* Application No. 71412/01*; Saramati* v. *France, Germany and Norway,* Application No. 78166/01, ECtHR (Grand Chamber), 2 May 2007, para. 149.

[38] ICJ, *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece*), Judgment, 5 December 2011, ICJ Rep. 2011 p. 644, 693, para. 170, dispositive para. (2). The author acted as adviser to Greece in this matter.

[39] *Ibidem* at p. 664, para. 58.

[40] *Ibidem* at p. 665, para. 61. It nevertheless might be noted that the obligation breached, as indicated in the *dispositif*, was not described there as a "legal" obligation.

[41] Treaty of Guarantee, 16 August 1960 (Republic of Cyprus-Greece-Turkey-United Kingdom), Art. IV, para. 1: "In the event of a breach of the provisions of the present Treaty, Greece, Turkey and the United Kingdom undertake to consult together with respect to the representations or measures necessary to ensure observance of those provisions."

[42] Lauterpacht, *supra* note 27, p. 97.

to intervene, directly or indirectly, politically or militarily, in Iran's internal affairs,"[43] a provision which the United States indicates is of political character only.[44] The Declaration sets out a range of further provisions, e.g., requiring the return of assets and the settlement of claims; requiring the discontinuation of ICJ proceedings; and creating the Iran-United States Claims Tribunal, participation in which is obligatory and the awards of which are binding. There is no doubt that those provisions are not mere political declarations. But the presence of a legal provision in an instrument is not conclusive as to the character of the other provisions, any more than the presence of one political clause renders the rest merely political.

The Memorandum contains a clause verifying the equal validity of its drafting languages; and a clause indicating that the Memorandum "will become applicable upon signature." Such apparatus is certainly expected in legally binding instruments, but its presence does not as such determine the character of an instrument. Political commitments can be dressed in legal forms.

In summary, the text of the Memorandum sets out a number of commitments which, whether legal or political, would not add much if anything to the existing legal obligations of the Parties. In particular, these are the provisions concerning respect for settled boundaries and non-use of nuclear weapons. The provisions articulate obligations which already possess legal character by virtue of other legal instruments or general international law.

The Memorandum also, however, sets out commitments to take particular steps in the event of particular situations arising. These are the commitments to seek Security Council action, to activate a consultation mechanism, and to furnish assistance to Ukraine. These commitments do not overlap with existing commitments found in other sources. They are specific to the Memorandum. If they are legally binding, then they add materially to the legal obligations of the Parties. Moreover, if they are legally binding, then they also affect the substance of the other provisions. The provision stipulating respect for settled boundaries, for example, if the Memorandum expresses this as a legal obligation, standing on its own would add little to the Parties' legal obligations. However, the provisions stipulating concrete steps by the parties, if legally binding, introduce obligations if the other obligations are breached. Thus even the provisions of the Memorandum which might at first appear at most to re-iterate existing legal obligations could be significant if the instrument taken as a whole is of legal character. The inclusion of the well-worn substantive obligation in an instrument containing a binding dispute settlement clause adds a significant dimension to the obligation. The Budapest Memorandum contains no binding dispute settlement clause; but it combines a restatement of pre-existing obligations with new procedural commitments.

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[43] http://www.iusct.net/General%20Documents/1-General%20Declaration%E2%80%8E.pdf (accessed 30 March 2015).

[44] *See* U.S. Statement of Defense, *Islamic Republic of Iran* v. *United States,* Claim A-30 (Iran-United States Claims Tribunal) 40-5. The example is Duncan Hollis: *see* D. B. Hollis, *Defining Treaties*, [in:] D. B. Hollis (ed.), *The Oxford Guide to Treaties*, Oxford University Press, Oxford: 2012, pp. 11, 34 and n. 150.

3. CIRCUMSTANCES OF THE ADOPTION OF THE BUDAPEST MEMORANDUM

As suggested above, the text of the Memorandum by no means excludes in terms (as some instruments do) that its Parties intended to create legal obligations. It falls, then, to consider "the particular circumstances in which [the Memorandum] was drawn up."

To start, the Budapest Memorandum was adopted as part of a particular security architecture. This constitutes a central aspect of the circumstances of the Memorandum's adoption. Salient aspects of that architecture are these. The three P5 Parties to the Memorandum had been on opposite sides of the Cold War divide. Two of them remained members – and central members – of NATO. The other had been the leader of the former Warsaw Pact. Ukraine is a country of over 40,000,000 people located in between the Parties. A legal commitment by any of the other Parties to a State in that position – the largest non-bloc State in Europe – would have been a commitment of considerable strategic significance. It is to be wondered whether the United States and the United Kingdom, without domestic ratification procedures, would have entered into a mutual defence pact creating a new security arrangement with Ukraine. A binding security commitment in that circumstance would have been a significant change in the security architecture of the Euro-Atlantic area. The accession of new members to NATO suggests the formal steps (legal and political) that such a change would be expected to involve.[45] It would be strange for the Parties to have finalized such a change in a short text and absent any further specification of modalities of commitment.

However, that is only one side of the story. It is also to be asked whether a nuclear weapons State would have given up its arsenal in exchange for a mere political commitment.[46] The same day that the Parties concluded the Memorandum, Ukraine deposited in London, Moscow, and Washington the instruments of accession[47] as a non-nuclear-weapon State to the NPT. The preamble to the Memorandum "[w]elcomed the accession of Ukraine to the Treaty on the Non-Proliferation of Nuclear Weapons as a non-nuclear-weapon State." It also "[took] into account the commitment of Ukraine to eliminate all nuclear weapons from its territory within a specified period of time."[48] Ukraine on 21 September 1995 adopted an Agreement with the International Atomic Energy Agency for the application of safeguards in connection with the NPT.[49] The

[45] *See e.g.* P. E. Gallis, *NATO Enlargement: The Process and Allied Views*, Congressional Research Service, Washington, DC: 1997. *See also Case concerning the application of Article 11(1) of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia* v. *Greece)*, Counter-Memorial of Greece, 19 January 2010, pp. 69-88.

[46] *See* L. Gelb, *Firing back at my Ukraine critics*, Daily Beast 2 April 2014, available at: http://www.thedailybeast.com/articles/2014/04/02/les-gelb-puts-russia-in-its-place-and-critics-in-theirs.html (accessed 30 March 2015).

[47] http://disarmament.un.org/treaties/s/ukraine (accessed 30 March 2015).

[48] Budapest Memorandum, preamble, paras. 1, 2.

[49] Entered into force 22 January 1998 by notification: 2015 UNTS 691. For text, *see* IAEA, INFCIRC/550.

Safeguards Agreement provides for binding and compulsory dispute settlement in the event of a dispute which Ukraine and the Agency prove unable to settle by other means.[50] Ukraine and the Agency adopted an additional protocol to the Safeguards Agreement in 2000.[51] Prior to the adoption of the Budapest Memorandum, Ukraine had entered into engagements concerning the technical modalities for disarmament.[52]

Ukraine had not arrived immediately at the decision to relinquish nuclear weapons.[53] The national security guarantees in the Memorandum "were the principal factors and (…) had a key role in the Ukrainian Parliament's decision in favour" of disarmament.[54] That the nuclear disarmament of Ukraine was important to the other Parties can at least be surmised. Even as serious differences exist between them as to the forums and modalities for achieving non-proliferation,[55] these are all States to which the obligation of NPT Article I applies. Though it is not an obligation of the nuclear-weapons States under NPT Article I to achieve disarmament as such, it is an obligation under Article VI to "pursue negotiations in good faith on effective measures relating to (…) nuclear disarmament"; and, more generally, a *desideratum* to increase the number of non-nuclear weapons States well may be inferred from the other obligations in the Treaty. At least one State views the Article VI obligation as having enough substance to merit the institution of an inter-State claim.[56] It would be astonishing if the Russian

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[50] Ukraine – IAEA Safeguards Agreement, Art. 22. Note the default appointment procedure in Art. 22, para. 1.

[51] Protocol additional to the Agreement between Ukraine and the International Atomic Energy Agency for the application of safeguards in connection with the Treaty on the Non-Proliferation of Nuclear Weapons, 15 August 2000, entered into force 24 January 2006, 2402 UNTS 161.

[52] *See e.g.* Letter dated 1 October 1993 from the Representative of the Russian Federation addressed to the President of the Conference on Disarmament transmitting the texts of an agreement between the Government of the Russian Federation and the Government of Ukraine on the recycling of nuclear warheads as well as basic principles governing the recycling of nuclear warheads from strategic nuclear forces deployed in Ukraine, signed on 3 September 1993: CD/1225, 5 October 1993.

[53] *See* H. Hamant, *Démembrement de l'URSS et problèmes de succession d'Etats*, Editions Bruylant, Brussels: 2007, pp. 398-399.

[54] Mr. Zlenko (Ukraine), Security Council, 3514th meeting, 11 April 1995: S/PV.3514, pp. 2-3.

[55] *See e.g.* Letter dated 31 January 2014 from the Permanent Representative of the Russian Federation addressed to the Acting Secretary-General of the Conference, transmitting Joint Statement by interested States in support of the Conference on Disarmament in Geneva (Algeria, Argentina, Armenia, Belarus, Brazil, China, Egypt, India, Indonesia, Iraq, Kazakhstan, Pakistan, Russian Federation, Syrian Arab Republic, Tajikistan, Ukraine), CD/1971, 21 February 2014: "We believe that the Conference, as the single multilateral negotiating forum with its fundamental principle of consensus and its membership, cannot be substituted by any other forum in addressing the complex tasks that it already has on its agenda."

[56] It is by reference, *inter alia,* to Art. VI that the Republic of the Marshall Islands bases its claims against India, Pakistan, and the United Kingdom in *Obligations concerning Negotiations relation to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *India; Marshall Islands* v. *Pakistan; Marshall Islands* v. *United Kingdom)*. *See* Application Instituting Proceedings against the Republic of India by the Republic of the Marshall Islands, 24 April 2014, p. 6 (para. 10); against Pakistan, p. 6 (para. 10); against the United Kingdom, p. 7 (para. 12).

Federation saw the de-nuclearization of Ukraine as anything other than a step to be encouraged and, once achieved, a status to be maintained.

It is of interest that the Memorandum is "in Connection with" the accession of Ukraine to the Non-Proliferation Treaty. The Memorandum does not identify itself as a protocol to the Treaty. There is, however, no general rule excluding a side agreement by certain parties to a multilateral convention.[57] Moreover, the Non-Proliferation Treaty does not exclude "regional treaties in order to assure the total absence of nuclear weapons" in the territories affected.[58] In implementation of Article III of the Treaty, an extensive series of safeguard agreements exist between States Parties and the International Atomic Energy Agency.[59] Side agreements to achieve the object and purpose of the NPT are envisaged therein – and are part of the practice which has emerged since NPT's entry into force.

One more aspect of the circumstances of the adoption of the Memorandum is worth noting. This is the immediate setting in which the Parties adopted it. The Memorandum was adopted at a high-level meeting of the Parties at which they adopted a number of other statements and instruments. The Memorandum is specifically a follow-on document. A Joint Declaration issued the same day, noting, *inter alia,* "the historical changes in the world", is in the language of political expression, not legal obligation.[60] When the Permanent Representatives of the four parties requested that the Memorandum be circulated as a document of the General Assembly and of the Security Council, they attached the Memorandum as Annex I and the Joint Declaration as Annex II.[61] The two documents are concerned with the same parties and the same overall theme. There is no rule against adopting two political declarations on the same day, but it may be asked why a further statement of purely political purpose but dressed in legal forms would have been adopted in tandem with a political declaration. Again, like other considerations adduced above, this in itself does not conclusively establish whether or not the Memorandum possesses a legal character. It is one among the range of circumstances surrounding the adoption of the instrument.

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[57] *Cf.* Art. 41 of the VCLT.

[58] Art. VII of the NPT.

[59] *See e.g.* Agreement between the Kingdom of Saudi Arabia and the International Atomic Energy Agency for the application of safeguards in connection with the Treaty of [sic] the Non-Proliferation of Nuclear Weapons, June 16, 2005, entered into force Jan. 13, 2009: 2587 UNTS 29; Agreement between the Socialist People's Libyan Arab Jamahiriya and the International Atomic Energy Agency on the application of safeguards in connection with the Treaty on the Non-Proliferation of Nuclear Weapons, adopted and entered into force 8 July 1980, 1227 UNTS 161 and Additional Protocol, 10 March 2004, entered into force 11 August 2006, 2432 UNTS 227. Further to the structure and content of safeguards agreements, *see* IAEA INFCIRC/153 (*corrig*.), June 1972.

[60] A/49/765 – S/1994/1399, annex II.

[61] Letter dated 7 December 1994 from the Permanent Representatives of the Russian Federation, Ukraine, the United Kingdom and the United States addressed to the Secretary-General, A/49/765 – S/1994/1399, p. 1.

4. SUBSEQUENT PRACTICE OF THE MEMORANDUM PARTIES

The ICJ, as noted above, rejected that subsequent practice determined whether or not the adopted Minutes in *Qatar* v. *Bahrain* created legal obligations. This is not, however, to say that subsequent practice is irrelevant. The Court was considering an argument that one party's practice in itself determined whether the Minutes possessed a legal character; this is not how subsequent practice affects the meaning of a text under the general rule of interpretation.

Subsequent practice affects the meaning of a text, instead, in the manner set out under Art. 31.3 of the VCLT, which provides as follows:

> There shall be taken into account, together with the context:
> (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> (c) Any relevant rules of international law applicable in the relations between the parties.

Again, as with the general rule of interpretation taken as a whole, a problem of question-begging arises if the treaty rules are applied mechanistically. Whether or not the instrument in question is a treaty is the very question that needs to be settled. To attempt to settle it by applying the rules of *treaty* interpretation assumes the answer that needs to be found.

What may be said about subsequent practice and an instrument of indeterminate character is this. Subsequent practice may be relevant in at least two distinct ways. First, the parties may adopt a new text (Art. 31.3(a) applied *mutatis mutandis*), or they may participate in subsequent practice which establishes a new agreement (para. 3(b)); and, through either of these modalities, they may shed light on the meaning of the original text. Second, practice in connection with an agreement (whether the agreement is political or legal) may form the basis for new customary law relations. In other words, the original text, whether or not it possessed a legal or a political character, may have become a reference point for further action, and the States performing that action may have done so in a manner giving rise to a new legal rule – i.e., they have generated a new rule of international law (applicable at least between themselves) that derives from and reflects a practice that they accept as law.[62]

The Parties to the Memorandum have referred to it in their later official statements. When referring to the Memorandum, they have drawn attention to its relevance to the NPT regime as a whole. For example, the United States and Russian Federation, on the occasion of the expiry of START in 2009, recalled the role of the Memorandum as part of the disarmament régime overall. The disarmament of Ukraine (and of Belarus

[62] *See* M. Wood, Special Rapporteur, *Second report on identification of customary international law*, 22 May 2014, Draft Conclusion 2, A/CN.4/672, p. 68, para. 20.

and Kazakhstan) "enhanced the NPT regime, had a beneficial impact on international security and strategic stability, and created favourable conditions for further steps to reduce nuclear arsenals."[63] Such language might be said to concern strategy and political relations only. An act or commitment which "enhanced the NPT regime" was not necessarily a legal act or commitment. Confidence-building measures, for example, typically do not entail legal obligations[64] but may be necessary to a disarmament regime.[65]

In the same Joint Statement, the United States and the Russian Federation said as follows:

> The fulfilment by these states [Ukraine, Belarus and Kazakhstan] of their obligations under the Protocol to the START Treaty of May 23, 1992, (Lisbon Protocol) and their accession to the NPT as non-nuclear-weapon states, strengthened their security, which was reflected, inter alia, in the Budapest Memoranda of December 5, 1994. In this connection, the United States of America and the Russian Federation confirm that the assurances recorded in the Budapest Memorandum will remain in effect after December 4, 2009.[66]

There would be a degree of asymmetry in saying that one political document "will remain in effect" after the expiry of another clearly legal instrument. The December 2009 Statement seems to place START and the Budapest Memorandum, instead, on the same footing. Whatever conclusion as to the character of the Memorandum that might be drawn from the Joint Statement, nothing in the Joint Statement indicated an intention to change the content or effects of the Memorandum. To say that it "will remain in effect" is to say that whatever effect it had before will continue unchanged. This was not a subsequent agreement, or subsequent practice establishing an agreement, to change the character of the Memorandum. It did however reiterate the close association between the Memorandum and certain legal obligations of the parties.

There appears to have been some doubt on the part of Ukraine whether the Memorandum in itself created a legal framework for Ukraine's security. Ukraine's parliament in July 2010 raised the possibility of a multi-party treaty to ensure the "development of the Budapest Memorandum."[67] The concerns of Ukrainian political leaders at the time of the expiry of START were registered widely as well. The government of the day was concerned that Ukraine's position was vulnerable because it did not belong to a defensive alliance. To say that the Memorandum needed further development was

[63] Joint Statement by the United States and Russian Federation regarding the expiration of the Treaty on the Reduction and Limitation of Strategic Offensive Arms (START), 4 December 2009, PRN: 2009/123, available at: http://www.state.gov/r/pa/prs/ps/2009/dec/133204.htm (accessed 30 March 2015).

[64] *See e.g.* reference to "*non-legally binding* transparency and confidence-building measures to strengthen stability in space" in U.S. Department of State Press Release No. 2013/0901, Statement on Consensus Achieved by the UN Group of Governmental Experts on Transparency and Confidence Building Measures for Outer Space Activities, 18 July 2013 (emphasis added).

[65] *See e.g. U.S. Approach to Preventing Biological Weapons Proliferation and Bioterrorism: Contemporary Practice of the United States Relating to International Law*, 104 American Journal of International Law 129 (2010), p. 131 ("We must also increase participation in the existing Confidence-Building Measures").

[66] United States – Russian Federation Joint Statement, 4 December 2009, final para.

[67] *Ukraine Seeks Additional Security Guarantees from Nuclear Powers*, ITAR-TASS, Tuesday, 6 July 2010.

to suggest that, in its present form, it did not create the binding commitments that would have assured Ukraine of its security. At the same time, it does not mean that an existing commitment is not of legal character that its beneficiary wishes to re-inforce it with further commitments. The adoption of bilateral military cooperation agreements among the members of NATO, for example, does not mean that the North Atlantic Treaty is not a legal instrument.

The United States, United Kingdom and France each mentioned the Budapest Memorandum in a meeting of the Conference on Disarmament on 3 March 2014 at which the "situation in Ukraine" was on the agenda. The United Kingdom said that it "was willing to engage on the matter on the basis of the Budapest Memorandum and was committed to a diplomatic response to the situation"[68] – a statement from which it is hard to draw any clear conclusion. The statement suggests that the Memorandum has diplomatic significance but not necessarily a binding character (otherwise, it would not have been a question of whether the United Kingdom, as a party to the Memorandum, "was willing" or not "to engage on the matter"; engagement would have been obligatory). The United States associated the Memorandum with the Helsinki Final Act, saying that "Russia's invasion and occupation of Ukrainian territory (…)" were "in full contravention (…) of Russia's obligations under [*inter alia*] the Helsinki Final Act (…) and the 1994 Budapest Memorandum."[69] The problem with this statement is that it does not expressly characterize the "obligations" one way or the other, political or legal. The United States position has been from the start (1975) that the Helsinki Final Act is a political instrument only.[70] To speak of the two instruments in the same breath without distinguishing their legal character tends to suggest that they are similar; but by no means is this a conclusive point. The United Kingdom and United States two days later in the Conference said that they fully supported convening a "high-level meeting of parties to the Budapest Memorandum."[71] Two of the Parties thus indicated their intention to carry out one of the provisions of the Memorandum (paragraph 6 on consultations); but they did not say whether they believed themselves obliged to do so. Again, this was not to express a position one way or the other as to the character of the Memorandum.

France at the Conference on Disarmament stood out among the three. France, in contrast to the United Kingdom and United States, "reminded everyone of the existing law including the 1994 Budapest Memorandum."[72] To "include" an instrument in the "existing law" is to include it as an instrument of legally binding character.

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[68] Conference on Disarmament, 3 March 2014, available at: http://www.unog.ch/80256EDD006B9C2E/(httpNewsByYear_en)/C1188DA04742DD5DC1257C9000587A9A?OpenDocument (accessed 30 March 2015).

[69] *Ibidem*.

[70] *See* Paust, *supra* note 34.

[71] Conference on Disarmament, 5 March 2014, available at: http://www.unog.ch/unog/website/news_media.nsf/(httpPages)/EC4DFA46850AD4A6C1257C920042D57F?OpenDocument (accessed 30 March 2015).

[72] Conference on Disarmament, 3 March 2014.

There have been other indications as well that the Budapest Memorandum created obligations. The Russian Ministry of Foreign Affairs, through the Information and Press Department, on 19 March 2014, said as follows:

> In the context of the situation in Ukraine, some of our partners use the opportunity to point out the obligations of the Russian Federation under the Budapest Memorandum of 1994. In this regard, we would like to remind them what these obligations were and who is responsible for their observation.

Under the Budapest Memorandum Russia, the United States and the United Kingdom are obliged to be guarantors of the rights inherent in the sovereignty of Ukraine.[73]

Ukraine has stated more clearly that the instrument created legal obligations.[74] It is not unheard of for States to communicate legal positions through press offices and the like.[75] In claims practice, the legal effect of statements even by high-level officials is not infrequently contested.[76] It is much harder, however, to contest a statement with which one's own statements agree. Here, both States have said that the Memorandum entails obligations and responsibility. The Russian Federation might argue that its statement about the Memorandum concerned only "obligations", not necessarily "legal obligations." However, the Information and Press Department statement linked those "obligations" directly to Ukraine's "rights inherent in (…) sovereignty," that is to say legal rights. An obligation that is correlative to a legal right would seem itself to be legal in character. It is true that the statements of Russia and Ukraine expressly indicating the obligatory character of the Memorandum were adopted in the midst of an extreme political situation. Political circumstances, however, have no necessary bearing on the meaning of statements which are otherwise clear on their terms. The question here is what the statements, on their terms, have to say about the commitments between these States. Both States, notwithstanding sharp discord in other matters, expressed the view that the Memorandum had established obligations.

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[73] Comment by the Information and Press Department of the Russian Ministry of Foreign Affairs regarding the Budapest Memorandum of 1994, 19 March 2014, available at: http://www.mid.ru/bdomp/brp_4.nsf/e78a48070f128a7b43256999005bcbb3/3461172e18a7ef3544257ca10032c515!OpenDocument (accessed 30 March 2015).

[74] Note verbale dated 13 March 2014 from the Permanent Mission of Ukraine addressed to the Acting Secretary-General of the Conference on Disarmament and Annex with Parliamentary statement to the guarantor States of the security of Ukraine, CD/1977. *See also* Ukraine's statement at the 3 March 2014 meeting of the Conference on Disarmament.

[75] *See e.g.* Spain's protests over the invasion of Kuwait communicated by the Office of Diplomatic Information, Unilateral acts of States, Victor Rodríguez Cedeño, Special Rapporteur, Seventh report, A/CN.4/542, p. 54, para. 116.

[76] The most famous instance being the Norwegian Foreign Minister's statement (the Ihlen Declaration): PCD, *Legal Status of Eastern Greenland (Denmark v. Norway)*, Judgment, 5 April 1933, PCIJ Ser. A/B No. 53, pp. 36-37. *See also e.g. Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, Public sittings, Murphy (for FYROM) (relying on *Nicaragua* v. *United States*), CR 2011/11, 28 March 2011, pp. 24-25, paras. 15-16; Crawford (for Greece), CR 2011/12, 30 March 2011, pp. 33-34, para. 26.

Less conclusively, the European Union Committee of the United Kingdom House of Lords, in a Report dated 20 February 2015, said that, "[a]s one of the four signatories of the Budapest Memorandum (1994), which pledged to respect Ukraine's territorial integrity, the UK had a particular responsibility when the crisis erupted."[77] A "particular responsibility" is not necessarily a legal responsibility.

The various statements of the parties could be taken to constitute subsequent practice relevant to the interpretation of the Memorandum, as envisaged under VCLT Art. 31.3. The effect of subsequent agreement between two parties to a four-party treaty would be limited.[78] True, some number of the parties to a multilateral instrument short of all the parties may reach agreement amongst themselves. In the case of the Budapest Memorandum after February 2014, Russia and Ukraine were in disagreement in fundamental ways. They did nevertheless evince a shared understanding on one point: they both referred to the Memorandum as having created legal obligations and thus would appear both to have understood the Memorandum to be a legal instrument. Subsequent practice is relevant not only in establishing an agreement to identify the meaning of an instrument; it also may be relevant in confirming the meaning or resolving an ambiguity. As the ILC said in respect of the draft provision on subsequent practice, "[t]he importance of (…) subsequent practice in the application of the treaty, as an element of interpretation is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty."[79] The "understanding" that concerned the ILC here was an understanding reflected in how the parties to the instrument fulfilled their engagements, "the fulfilment of engagements between States (…) [being] the surest commentary on the effectiveness of those engagements." ["*l'exécution des engagements [étant], entre Etats… le plus sûr commentaire du sens de ces engagements.*"][80] It might equally be said that the public statements of the parties as to the character of those engagements, where the statements are in accord, is a commentary on the character of the instrument. The statements of the parties well may be counted as "action which has been taken under the Treaty,"[81] and, as the Permanent Court

[77] European Union Committee, House of Lords, *The EU and Russia: before and beyond the crisis in Ukraine*, 20 February 2015, para. 82.

[78] As to the difficulties arising when some but not all parties to a multilateral instrument adopt new obligations which are not in clear accord with the instrument, *see generally* S. Ranganathan, *Strategically Created Treaty Conflicts and the Politics of International Law*, Cambridge University Press, Cambridge: 2014.

[79] ILC Yearbook 1966, vol. II, p. 221, Comment (15) (to draft art. 27), quoted in ICJ, *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, 13 December 1999, ICJ Rep. 1999, pp. 1045, 1075-6 (para. 49).

[80] *Russian Indemnity case (Russia/Turkey)* (Lardy, de Taube, Mandelstam, Abro Bey, Réchid Bey), Award, 11 November 1912, XI *Reports of International Arbitral Awards* 421, 433.

[81] That statements may be relevant as State conduct for purposes of identifying customary international law is not controversial. *See e.g.* Wood, First Report, p. 20 (para. 48). While identifying subsequent practice for purposes of the interpretation of a treaty is not the same thing as identifying State practice as an element in identifying customary international law, there is no obvious reason to exclude statements as a form of State action as such for purposes of treaty interpretation. The subsequent practice, to be relevant to settling a question, of course must be practice concerning the substance of that question

said, such action, "[i]f there were any ambiguity," is relevant to "arriving at the true meaning."[82]

5. TREATY REGISTRATION

Finally, a word may be said about treaty registration. Belarus on the same day in Budapest as the Ukraine Budapest Memorandum entered into a Memorandum having, *mutatis mutandis,* the same title with the same three nuclear weapons States. In the Belarus Budapest Memorandum, too, the non-weapon State's boundaries and territorial integrity were assured.[83] The Memorandum also contained a consultation provision.[84] Belarus registered the Memorandum in accordance with Charter Article 102 on 3 September 2012.[85]

From the start, the registration requirement has been understood to concern instruments by which parties "intend to establish legal obligations"[86] rather than political statements, declarations and the like, which are "not (…) subject to the formality of registration."[87] Sometimes, parties say both that an instrument is not for registration and that it is a political instrument. The Parties said neither in respect of the Budapest Memoranda. They said both in the Code of Conduct on Politico-Military Aspects of Security, an instrument adopted at the same Budapest Summit.[88] It does not appear in fact that any of the Parties (as of 8 March 2015) had registered the Ukraine Budapest Memorandum.[89] "Non-registration or late registration, on the other hand, does not

and not another, however related, one: see *Maritime Dispute (Peru v. Chile)*, Judgment, 27 January 2014, para. 171.

[82] PCIJ, *Competence of the ILO in regard to International Regulation of the Conditions of the Labour of Persons Employed in Agriculture*, Advisory Opinion, 12 August 1922, PCIJ Ser. B, No. 2, p. 39 (1922).

[83] Memorandum of Security Assurances in connection with the Accession of the Republic of Belarus to the Treaty on Non-Proliferation of Nuclear Weapons, paras. 1, 2, Budapest, 5 December, 1993, UNTS reg. no. 50069.

[84] *Ibidem*, para. 6.

[85] Certificate of registration, No. 62556. For the text (not yet assigned a UNTS volume number), see No. 50069.

[86] Memorandum of the Secretary-General, as approved by the Council of the League, 19 May 1920, para. 3: 1 LNOJ 154, 155 (1920), about which *see* M. O. Hudson, *The Registration and Publication of Treaties*, 19 American Journal of International Law 273 (1925), p. 277.

[87] Report of the Committee Appointed to Study the Scope of Article 18 of the Covenant from a Legal Point of View (Scialoja, President; Bourquin, Fernandes, Fromageot, Hurst, and Struycken, Members), 28 June 1921, C.256.1921.V, p. 3.

[88] Section X of the Code of Conduct provided as follows: "39. The provisions adopted in this Code of Conduct are politically binding. *Accordingly*, this Code is not eligible for registration under Article 102 (…)" (letter dated 21 December 1994 from the Permanent Representative of Hungary to the United Nations addressed to the Secretary-General, Annex: A/49/800—S/1994/1435, p. 31 (emphasis added)).

[89] There is also the Kazakhstan Budapest Memorandum, of the same date, parties, and form. This appears neither to have been registered nor circulated. For its text *see* http://www.exportlawblog.com/docs/security_assurances.pdf (accessed 30 March 2015).

have any consequence for the actual validity of [an] agreement, which remains no less binding upon the parties."[90]

CONCLUSION

Ukraine on 5 December 1994 entered into a four-party agreement confirming the removal of nuclear weapons from its territory. The Ukraine Budapest Memorandum, one of three such instruments adopted with the former nuclear weapons States which had recently emerged out of the disintegration of the USSR, also contained a series of security guarantees. The invasion of Ukraine by forces of the Russian Federation in February and March 2014 and the purported annexation of Ukrainian territory did not instigate a military response from the United Kingdom or the United States. To be sure, in accord with paragraph 6 of the Memorandum, there were consultations (though not jointly of all the Parties). And the Western Parties introduced a draft resolution at the Security Council, a step which was in accord with paragraph 4.[91] However, this was the extent of the response, at least in the initial months of the crisis.

Ukraine on 28 February 2014 referred to the "deterioration of the situation in the Autonomous Republic of the Crimea, Ukraine" and invoked Art. 34 and 35 of the Charter.[92] Ukraine on 13 March called upon the General Assembly to "examine the situation" in accordance with Art. 11.2, and invoked the right to individual and collective self-defence under Art. 51.[93] When Ukraine acceded to the NPT, it adopted a Declaration stating that "[t]he threat or use of force against the territorial integrity and inviolability of borders or political independence of Ukraine from a nuclear power (…) will be considered by Ukraine as exceptional circumstances which jeopardize its interests."[94] The precise meaning of the Declaration is unclear, but the "exceptional circumstances" to which it referred now have arisen; the Declaration suggests that these are circumstances which in other cases have served to preclude wrongfulness.[95] It does not appear that Ukraine (as of 8 March 2015) has invoked the Declaration.

The draft resolution introduced on 15 March 2014 in the Security Council would have affirmed that "no territorial acquisition resulting from the threat or use of force

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[90] *Maritime Delimitation and Territorial Questions (Qatar* v. *Bahrain)*, Jurisdiction and Admissibility, p. 112, 122, para. 29.

[91] 15 March 2014: S/2014/189.

[92] Letter dated 28 February 2014 from the Permanent Representative of Ukraine to the United Nations addressed to the President of the Security Council, S/2014/136.

[93] Letter dated 13 March 2014 from the Permanent Representative of Ukraine to the United Nations addressed to the President of the Security Council, Annex: S/2014/186.

[94] http://disarmament.un.org/treaties/a/npt/ukraine/acc/moscow (accessed 30 March 2015).

[95] *See* Articles on State Responsibility, Art. 25 (Necessity), and ILC Commentary. Reprinted at J. Crawford (ed.), *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries*, Cambridge University Press, Cambridge: 2002, pp. 178-86.

shall be recognized as legal."[96] The draft noted that "Ukraine has not authorized" the referendum in Crimea which would soon take place. The draft then

> [*d*]*eclare*[*d*] that this referendum can have no validity, and cannot form the basis for any alteration of the status of Crimea; and call[ed] upon all States, international organizations and specialized agencies not to recognize any alteration of the status of Crimea on the basis of this referendum and to refrain from any action or dealing that might be interpreted as recognizing any such altered status.[97]

The Russian Federation vetoed the draft. China abstained. The remaining thirteen Member States voted in favour. The draft had been put forward, *inter alia,* by France, the United Kingdom and the United States. The General Assembly, on 27 March 2014, adopted resolution 68/262 ("Territorial integrity of Ukraine").[98] It is not recorded that any of the guarantor States said that their support for action in the Security Council or General Assembly was in fulfilment of a legal commitment under paragraph 4 of the Budapest Memorandum.

The main consequence of the practice of the Parties to the Budapest Memorandum since February 2014 well may be in respect of the régime of non-proliferation and international efforts at disarmament. The Chairman of the Committee of Ministers of the Council of Europe expressed dismay about the failure to observe the Budapest Memorandum:

> On the Budapest Memorandum, I can but endorse the position that has been stated. It would be a major signal for worldwide disarmament if, 10 years on, the Budapest memorandum was seen as a meaningless piece of paper. We were talking about the preservation of the sovereignty and integrity of the territory on the proviso that nuclear weapons be relinquished. That was indeed done, but 10 years later one of the five countries that signed the memorandum has sent troops into Ukraine.[99]

The political lesson is unlikely to be lost on any State weighing the costs and benefits of nuclear armament. It did not go too far to say that "[t]he credibility of, and trust in, the multilateral disarmament machinery had been worn thin" by the breach by Russia of the provisions of the Memorandum.[100]

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[96] Draft resolution, preambular para. 3, S/2014/189, p. 1. The draft resolution was put forward by Albania, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Montenegro, Netherlands, New Zealand, Norway, Poland, Portugal, Moldova, Romania, Slovakia, Slovenia, Spain, Sweden, Turkey, Ukraine, the United Kingdom, and the United States.

[97] Draft resolution, para. 5, p. 2.

[98] The sponsors of the draft were Canada, Costa Rica, Germany, Lithuania, Poland and Ukraine, 24 March 2014, A/68/L.39.

[99] Sebastian Kurz (Austria, speaking in capacity of Chairman of the Committee of Ministers), Monday, 7 April 2014, eleventh sitting: AS (2014) CR 11 (provisional version).

[100] Mr. Balslev (Denmark), Preparatory Committee for the 2015 Review Conference of the Parties to the Treaty on the Non-Proliferation of Nuclear Weapons, 16 May 2014, NPT/CONF.2015/PC.III/SR.2, p. 9, para. 51.

Then there is the initial question – the character of the Memorandum as a legal or a political instrument. Hersch Lauterpacht, in 1954 in the Second Report on the Law of Treaties referred to above, suggested that there is (or that there should be) a presumption against denying the law-creating effect of international agreements:

> Although the parties may have intended a treaty to mean little, no assumption is permissible that they intended it to mean nothing and that the instrument concluded in the form of a treaty – with the concomitant solemnity, formality, publicity and constitutional and other safeguards – is not a treaty. [101]

The Budapest Memorandum takes the form of an international agreement. That in itself is not inconsistent with the instrument having only political effects. Its Parties, however, clearly intended that it not be devoid of meaning altogether. The commitments which the Memorandum contains are serious commitments. The State whose security the Memorandum guaranteed was a new State at the time, and it recognized the precariousness of its situation. Whatever the character of the other Parties' commitments, legal or political, the guaranteed State acceded to nuclear disarmament as its side of the bargain. Whatever character the Budapest Memorandum may have possessed, at least some of its provisions have now been opposed between the Parties as legally binding, albeit at cross-purposes. In this light, it at least can be said that this agreement adopted at the time of Ukraine's voluntary disarmament has remained a touchstone for the Parties' relations. To the extent that it is accepted that the instrument stipulates legal obligations, their context is the law of non-proliferation. The object and purpose of the instrument are to be understood in relation to that context. Even to the extent that the commitments made in 1994 were intended to be political, their non-observance will be difficult to prevent from affecting the law which surrounds them.

[101] Lauterpacht, *supra* note 27, para. 11.

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THE ADVISORY OPINION ON KOSOVO'S DECLARATION OF INDEPENDENCE: HOPES, DISAPPOINTMENTS AND ITS RELEVANCE TO CRIMEA

Abstract:
The international community anxiously awaited delivery of the advisory opinion of the International Court of Justice (ICJ) on Kosovo's declaration of independence, hoping it would clarify the controversial right of self-determination and the right of secession. Although it was hailed by many as a confirmation of both rights, the advisory opinion was disappointing regarding that part of the analysis which was based on general international law. The ICJ interpreted the question posed in a very narrow and formalistic way. It concluded that declarations of independence (not their consequences) are not in violation of international law, but it did not rule that they are in accordance with international law, as was requested in the posed question. The ICJ refused to examine whether there is a positive entitlement to secession under international law. Although Kosovo and its supporters claimed that the case of Kosovo is unique and will not set a precedent, Russia used the case of Kosovo and the advisory opinion to justify the so-called referendum in Crimea and the subsequent incorporation of Crimea into Russia. However, the situation in Crimea is only superficially comparable to Kosovo and the advisory opinion gives little or no support in the case of Crimea.

Keywords: annexation, Crimea, declaration of independence, ICJ, International Court of Justice, Kosovo, Russian Federation, Ukraine

INTRODUCTION

The political status of Kosovo has been the subject of political and territorial disputes for a long time. During the Socialist Yugoslav period (1945–1992), Kosovo was not a republic, but an autonomous province within Serbia. However, the Yugoslav Constitution of 1974 granted Kosovo various powers associated with a full-fledged republic.

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Kosovo's favourable status was possible to a large extent because of Josip Broz Tito, and it caused considerable discontent among Serbs. In the 1980s, after the death of Tito, moderate Serbian politicians tried to convince other republics to reduce the powers of autonomous provinces. The moderates were ousted by hardliners, and in 1989 Slobodan Milošević began to decisively and forcefully dismantle the autonomy of Kosovo. Almost a decade of oppressive measures led to the Kosovo War, which lasted from February 1998 to June 1999 and ended due to the intervention of NATO. The Security Council placed Kosovo under international administration, and although Serbia retained sovereignty over Kosovo, the interim regime rendered Kosovo effectively independent from Serbia. Over the next few years, little progress was made in finding a mutually acceptable political solution, and eventually Kosovo declared its independence, on 17 February 2008. There were major disagreements within the international community regarding the legality of such a unilateral act. It was finally decided to ask the International Court of Justice (ICJ) to clarify the situation. The latter found, in its advisory opinion of July 2010, that Kosovo's unilateral declaration of independence was not in violation of international law.

The advisory opinion was received with mixed feelings and has since attained a "mythical" status. It was hailed by secessionist movements as a confirmation of the people's right of self-determination and even of their right to secede from a parent state.[1] The advisory opinion was equally welcomed by states which supported Kosovo, but was denounced by states which have secessionist movements at home or are engaged in territorial disputes associated with self-determination. In actuality it offers little support to the ambitions of secessionist movements, although some conclusions in the advisory opinion are based on dangerous assumptions. In addition Russia, which opposed Kosovo's independence, paradoxically relied recently on the advisory opinion to justify the so-called referendum in Crimea and the subsequent incorporation of Crimea into Russia.

The present article aims to clarify what exactly was stated in the advisory opinion and to assess whether the advisory opinion is applicable to the case of Crimea and provides any support to Russia's claims. Because the advisory opinion "operates" in the context of self-determination, the first section gives a brief overview of the nature of self-determination. The second section examines what question was posed to the ICJ and how the ICJ understood it. The third section analyses the effect of the ICJ's conclusions under general international law. The fourth section is comprised of the author's conclusions and examines the relevance of the ICJ's ruling to the Crimean situation.

1. THE NATURE OF SELF-DETERMINATION

The "people" who seek independence turn to the right of self-determination, a right first made famous by President Woodrow Wilson in his Fourteen Points speech (1918)

[1] A state from which a secessionist movement wishes to break away.

and later enshrined in the Charter of the United Nations.[2] The Charter proclaims that one of the purposes of the United Nations is "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace" (Art. 1.3). It was considered to be a political guideline rather than a legal subjective right providing a basis for specific claims by specific peoples.[3] Although self-determination is mentioned several times in the United Nations Charter,[4] it fails to clarify its nature.

In the post-World War Two era, it is generally claimed that self-determination is one of the fundamental pillars of international law and relations, but at the same time there are considerable disagreements when it comes to its meaning, scope and relationship with other norms and principles of international law, in particular respect for territorial integrity. For the sake of brevity, a useful and common starting point for understanding self-determination is the Friendly Relations Declaration adopted by the General Assembly of the United Nations[5] (not a legally binding document, but still an authoritative one[6]). According to the Declaration self-determination means that "all peoples have the right to determine freely, without external interference, their political status and to pursue their economic, social and cultural development" and that "every State has the duty to respect this right in accordance with the provisions of the [United Nations] Charter". The exercise of self-determination results in the establishment of "a sovereign and independent state, the free association or integration with an independent state or the emergence into any other political status freely determined by a people." All states have the duty to promote realisation of the principle of self-determination and to refrain from any forcible action which deprives peoples of their right to self-determination and freedom and independence. In a few cases, the Security Council has expressed support to certain peoples seeking independence, if such course of action helps to achieve international peace and security, e.g. South Sudan[7] and Western Sahara.[8]

The documents addressing the nature of self-determination in the 1960s and the 1970s saw the principle as a means to dismantle colonial empires and free peoples from

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[2] Charter of the United Nations, adopted 26 June 1945, entered into force 24 October 1945, 1 UNTS XVI.

[3] S. Oeter, *Self-Determination*, [in:] B. Simma, D.-E. Khan, G. Nolte, A. Paulus and N. Wessendorf (eds.), *The Charter of the United Nations: A Commentary* (3rd ed.), Oxford University Press, Oxford: 2012, pp. 315-16.

[4] *E.g.* Art. 55 of the Charter of the United Nations (direct reference in the context of peaceful and friendly relations among nations) and Art. 73 (indirect reference in the context of colonial and non-self-governing territories).

[5] Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Res 2625 (XXV), 24 October 1970 (the Friendly Relations Declaration).

[6] *See e.g.* I. Sinclair, *The Significance of the Friendly Relations Declaration*, [in:] V. Lowe, C. Warbrick (eds.), *The United Nations and the Principles of International Law*, Routledge, London: 1994, pp. 1-32.

[7] Security Council Resolution 1919 (2010).

[8] Security Council Resolution 2152 (2014).

alien domination.[9] As a result, there are nowadays good reasons to doubt whether the right of self-determination has a place in the post-colonial world.[10] Outside of colonial domination or foreign occupation, self-determination means first and foremost that the "people" have a right to meaningful political participation as well as to the pursuit of economic, social and cultural development within the existing state. Such *internal self-determination* is therefore closely related to the protection of minority rights and favours solutions where a certain level of autonomy is given to minorities. If these rights are protected in practice (one may certainly discuss the requisite degree of autonomy), there is no reason and legal justification for *external self-determination* in the form of secession and thus the breaking up of an existing state. This approach finds support in the Friendly Relations Declaration, which includes a clause emphasising that self-determination should not be construed as authorising or encouraging any action which would dismember or impair the territorial integrity or political unity of sovereign and independent states who conduct themselves in compliance with the principle of equal rights of peoples and who have a government representing, without discrimination, the whole people belonging to the territory. This approach was also adopted by the Canadian Supreme Court in its advisory opinion regarding the secession of Quebec.[11] However, this does not mean that external self-determination is completely ruled out. External self-determination is available as a last resort when the people are denied the ability to exercise internally their right to self-determination (sometimes called *remedial secession*), e.g. the central government pursues restrictive and repressive policies against the people.

2. THE REQUEST FOR AN ADVISORY OPINION

Kosovo declared independence on 17 February 2008.[12] Serbia did not accept the independence of Kosovo and undertook various efforts to reverse the process. Among other things, it proposed to the General Assembly to request an advisory opinion from the ICJ. The General Assembly agreed and asked the following question: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?"[13] In less than two

[9] More than a hundred states were born in the course of decolonisation process after 1945. E. A. Laing, *The Norm of Self-Determination, 1941-1991*, 22 California Western International Law Journal 209 (1991), pp. 216-25.

[10] S. Wheatley, *Democracy, Minorities and International Law*, Cambridge University Press, Cambridge: 2005, pp. 77-85.

[11] *Reference re Secession of Quebec*, Supreme Court of Canada, 20 August 1998, 2 Canada Supreme Court Reports 217.

[12] Kosovo Declaration of Independence, Assembly of Kosovo, 17 February 2008, available at: http://www.assembly-kosova.org/?cid=2,128,1635 (accessed 30 March 2015).

[13] General Assembly Resolution 63/3, 8 October 2008.

years, the ICJ gave its opinion,[14] which was mainly based on two sources: general international law[15] and the Security Council Resolution 1244 (1999) that established the international administration in Kosovo.[16] The present article focuses on the Court's analysis of general international law, due to its potential applicability to other similar situations.

At the outset it should be stressed that the question was badly formulated by Serbia[17] (the General Assembly simply forwarded the prepared question) and gave the ICJ the possibility to take a narrow approach and answer the question in a way which was not favourable to Serbia. Before answering the question, the ICJ examined its meaning and scope. The ICJ recalled that it had previously departed from a posed question if it was not adequately formulated or did not reflect the real legal issues. Similarly, the ICJ has clarified a posed question if it was unclear or vague.[18] But in this case, the ICJ found that the posed question was "clearly formulated" and was "narrow and specific".[19] The ICJ noted that the General Assembly did not ask whether there was a right to secession, i.e. a positive entitlement under international law to break away from a parent state, but whether the declaration of independence was in accordance with international law. The ICJ continued by saying that the answer depends on whether international law prohibits the declaration of independence. In other words, the ICJ concluded its task was "to determine whether or not the declaration of independence was adopted in violation of international law."[20]

The ICJ clearly took a convenient approach. The outcome would obviously differ depending on whether one is asked to assess if certain conduct is *in violation of* international law or if such conduct is *in accordance with* international law. Furthermore, the ICJ limited itself to declarations of independence and refused to examine the more interesting and essential issues. The ICJ emphasised that it was not asked to decide the legal consequences of such declarations, i.e. whether Kosovo had achieved statehood; about the validity or legal effects of the recognition of Kosovo by other states; whether the right of self-determination exists outside the colonial context; or whether there is a positive entitlement to secession under international law, etc.[21]

In a nutshell, the ICJ concluded that the adoption of the declaration of independence did not violate general international law, the Security Council resolution 1244 (1999) or the Constitutional Framework for Provisional Self-Government.[22] The ICJ's conclusion is thus not a surprise when one considers how narrowly and formalistically it approached

[14] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 22 July 2010, ICJ Rep. (2010) 403 (the Kosovo advisory opinion).

[15] *Ibidem*, paras. 79-84.

[16] *Ibidem*, paras. 85-121.

[17] *See* UN Doc A/63/L.2 (2008).

[18] Kosovo advisory opinion, para. 50.

[19] *Ibidem*, para. 51.

[20] *Ibidem*, para. 56.

[21] *Ibidem*, paras. 51, 56 and 83.

[22] *Ibidem*, para. 122.

the posed question. Indeed, international law does not prohibit civil war or aspirations for independence (national law may well have a different attitude). It seems that the ICJ followed the *Lotus* principle, i.e. that international law governs relations between independent states, which means that legally binding rules emanate from the free will of states and that restrictions upon the independence of states cannot be presumed.[23] In other words, what is not prohibited is therefore permitted.[24] Such an approach is certainly dangerous. The *Lotus* principle is closely associated with sovereignty, but sovereignty is not a constant, absolute concept which does not or cannot change over time. Today, sovereignty is not understood in the rigid manner as it was perceived in 1927 by the Permanent Court of International Justice when it formulated the *Lotus* principle. Nowadays, sovereignty not only gives rise to privileges, but also imposes obligations and limitations – the *Lotus maximus* era is over.[25] It might also be noted that if the principle in question is supposed to protect the sovereignty of states, it is strange to use it against the sovereignty of states, i.e. in ways which favour separatist movements or endangers territorial integrity (if secession is not prohibited, it is logically permitted).

3. DEDUCTIONS FROM THE ADVISORY OPINION

As the ICJ dedicated only six paragraphs to general international law, one cannot expect them to contain a broad discussion and deep analysis. As a result, different interested parties have adopted opposite interpretations based on these six paragraphs. The Kosovo advisory opinion is sometimes viewed like a sacred text, which can be interpreted differently depending on what one wants to believe. While the advisory opinion contains statements which are not favourable to sovereignty and territorial integrity, nevertheless it does not support the right to secede from a parent state. So, what do these six paragraphs tell us (either directly or indirectly)?

3.1. Declarations of independence are not prohibited

The ICJ stated that "general international law contains no applicable prohibition of declarations of independence".[26] There are three reasons for this. First, during the 18th, 19th and 20th centuries there were numerous declarations of independence, which were often strenuously opposed by the parent state, but general state practice does not suggest that the act of promulgating the declaration was itself regarded as contrary to international law.[27]

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[23] PCIJ, *The Case of the SS Lotus (France v. Turkey)*, Judgment, PCIJ Series A, No. 10 (1927) 4, p. 18.

[24] *See also* Kosovo advisory opinion, Declaration of Judge Simma, paras. 2, 3 and 8.

[25] The nature of sovereignty is certainly a complex issue and open to debate. However it is not discussed here for reasons of feasibility.

[26] Kosovo advisory opinion, para. 84.

[27] *Ibidem,* para. 79.

Second, the principle of territorial integrity does not prohibit declarations of independence because this principle is confined to inter-state relations. During the proceedings, several states argued that the principle of territorial integrity indirectly prohibits declarations of independence, because when effected such declarations violate the territorial integrity of the parent state. They added that this principle has also been applied to intra-state conflicts.[28] Strangely, the ICJ analysed the principle of territorial integrity in light of three documents: (a) Art. 2(4) of the United Nations Charter, which contains the prohibition on the use and threat of force in international relations, including against the territorial integrity of any state; (b) the Friendly Relations Declaration, which repeats the above-mentioned provision; and (c) the Final Act of the Conference on Security and Co-operation in Europe,[29] where states promised to respect each others' territorial integrity. These documents address inter-state relations, therefore the principle of territorial integrity is also confined to inter-state relations.[30] As a result, non-state actors are not bound to respect this principle and declarations of independence do not violate this principle. The ICJ's position reflects the traditional position[31] and does not take into account the actual practice, where the principle of territorial integrity has been applied in relation to non-state actors.[32] Furthermore, such a position may encourage separatist movements in other regions, inasmuch as they may conclude, upon reading the advisory opinion, that they have the right to secede since territorial integrity is not an obstacle for them to declare their independence.

Third, the ICJ concluded that no general prohibition against declarations of independence is inferred from the practice of the Security Council. During the proceedings, several states pointed out that the Security Council has condemned declarations of independence, e.g. in South Rhodesia,[33] Northern Cyprus[34] and Republika Srpska.[35] But the ICJ noted that in all such cases, the Security Council made a determination based on a specific situation prevailing at the time these declarations of independence were made. The illegality of these declarations of independence did not stem from their unilateral character, "but from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law,

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[28] *See e.g.* Written Statement of Argentina, paras. 75-82; Written Statement of Azerbaijan, paras. 26-27; Written Statement of Cyprus, para. 80; Written Statement of Serbia, paras. 412-91; Written Statement of Spain, paras. 29-55.

[29] Final Act, Conference on Security and Co-operation in Europe, 1 August 1975, available at: http://www.osce.org/mc/39501?download=true (accessed 30 March 2015), Article IV.

[30] Kosovo advisory opinion, para. 80.

[31] *See also* Written Statement of Estonia, p 4; Written Statement of the United Kingdom, paras. 5.8-5.11; Written Statement of the United States, p. 69.

[32] *See* Th. Christakis, *Le droit à l'autodétermination en dehors des situations de décolonisation*, La Documentation Française, Paris: 1999, pp. 177-236.

[33] Security Council Resolution 216 (1965).

[34] Security Council Resolution 541 (1983).

[35] Security Council Resolution 787 (1992).

in particular those of a peremptory character (*jus cogens*)."[36] In the context of Kosovo, the Security Council has never taken this position.

The ICJ was probably right when it concluded that international law does not contain a norm which prohibits the promulgation of declarations of independence. However, it should be stressed that the ICJ was talking only about their promulgation, and did not assess the actual or potential consequences of such a declaration or how other states should react to them. The ICJ disregarded the fact that international law and state practice generally disfavours secessions, e.g. the Turkish Republic of Northern Cyprus (Cyprus), Nagorno-Karabakh (Azerbaijan), Transnistria (Moldova), Abkhazia and South Ossetia (Georgia), Somaliland (Somalia), Tamil Elam (Sri Lanka) and Chechnya (Russia). Nonetheless, while secession is not a right, nor is it necessarily a breach under international law. It is treated as a fact, i.e. secession is either successful or fails. Its success depends on political recognition by states – if the seceding state gains enough international recognition, it gradually gains legitimacy and eventually statehood.

3.2. The creation of a state is not simply a matter of fact

The ICJ did not follow the line that the creation of a state is just a matter of fact, the legality of which cannot be assessed.[37] The above-discussed analysis of the practice of the Security Council showed that it is possible to assess the legality of declarations of independence in light of international law and even pronounce them illegal. Several states also found that the creation of state can be in violation of international law,[38] for example if the achievement of independence was "connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*)." Hence military intervention by other states into intra-state conflicts or military support by other states to secessionist movements renders their 'independence' unlawful.

In case of illegality, one has to turn to the question of state responsibility to assess the consequences. The Draft Articles on State Responsibility[39] demand that no state may recognise as lawful a situation created by a breach of *jus cogens* norms nor render aid or assistance in maintaining such a situation.[40] Hence if one argues that Kosovo gained independence as a result of the NATO military intervention in 1999,[41] then the

[36] Kosovo advisory opinion, para. 81.

[37] *See e.g.* Oral Statement of Kosovo, CD 2009/25, p. 41; Oral Statement of Burundi, CR 2009/28, pp. 32-34.

[38] *See e.g.* Written Statement of Germany, p. 29; Written Statement of Estonia, p. 4; Written Statement of France, para. 2.14; Written Statement of Switzerland, para. 28.

[39] Even though these articles are not a treaty, they reflect adequately customary international law on state responsibility, according to the International Court of Justice (ICJ, *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, ICJ Rep. (1997) 7, paras. 47, 50-53, 58, 79, 83 and 123.

[40] Art. 41(2) of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc A/56/10 (2001).

[41] As the operation lacked a clear legal basis, it is widely argued that it was a violation of the prohibition to use force under the United Nations Charter. *See e.g.* A. Cassese, *Ex Iniuria Ius Oritur: Are We Moving*

recognition of Kosovo may qualify as a breach of the territorial integrity of Serbia and lead to international responsibility.[42] Thus viewed, the question becomes: Did Kosovo become independent in 2008 because of the NATO operation? The link between the two events is not direct enough to invoke state responsibility. At least no state claimed that during the proceedings.

The issue of recognition is connected with the constitutive theory of state recognition, according to which the recognition by existing states has a decisive effect on the creation of a new state.[43] In other words, a political entity may satisfy the traditional criteria of statehood and consider itself a state, but for the purpose of international law a new state is born when it is "admitted" to the international community. It is widely advocated that this traditional (conservative) approach is nowadays substituted by the declaratory theory, according which the recognition of a new state is merely a political act showing the attitude of the existing state to a new state, but has no effect on the existence of the new state as a subject of international law.[44] Combining the declaratory theory with the ICJ's position that declarations of independence are not in violation of international law, secessionist movements can easily conclude that if they are able to create a state as a fact (provided that it sufficiently resembles a functioning state) and to gather a critical number of existing states who are willing to recognise its statehood and engage in inter-state relations, then such a state is properly created. However we should not entertain an illusion that separatist movements engage in a comprehensive analysis of international law and practice, giving due regard to all nuances. They will choose those parts of the advisory opinion which support their objective, and this is not in the interests of nor does it respect the territorial integrity of the parent state.

3.3. Kosovo is not a sui generis case

The ICJ refused to treat Kosovo as a *sui generis* case, not subject to legal regulation and review in the regular manner. Kosovo and its supporters have persistently claimed that the situation of Kosovo is so unique that general international law is not suitable for its legal assessment and that it is not a precedent for others.[45] This uniqueness was mentioned already in the declaration of independence, where the preamble observes that "Kosovo is a special case arising from Yugoslavia's non-consensual breakup and is not a precedent for any other situation."[46]

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towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?, 10 European Journal of International Law 23 (1999).

[42] *See e.g.* M. Jovanović, *Recognition of Kosovo Independence as a Violation of International Law*, 3 Annals: Belgrade Law Review 108 (2008), pp 133-36.

[43] H. Lauterpacht, *Recognition in International Law*, Cambridge University Press, Cambridge: 1947, p. 55.

[44] J. Crawford, *The Creation of States in International Law* (2nd ed.), Oxford University Press, Oxford: 2006, pp. 22-26.

[45] *See e.g.* Written Statement of Estonia, pp. 11-12; Written Statement of Germany, pp. 26-27; Written Statement of the United Kingdom, paras. 0.17-0.23.

[46] Kosovo Declaration of Independence, *supra* nota 15, Preamble.

The United States summarised the arguments in support of Kosovo's independence and emphasised three aspects: the disintegration of Yugoslavia (and Kosovo's loss of autonomous status due to rising Serbian nationalism), the human rights crisis within Kosovo (massive human rights violations committed over the years), and the international response (the interim regime established by the Security Council, which led to a point whereby Kosovo's return to Serbia was not a viable option anymore).[47] In a way, every conflict is unique. But there is a difference whether the uniqueness is used as a political or a legal argument. Kosovo and its supporters attempted to persuade the Court to adopt the latter approach and tried to place Kosovo outside the realm of international law. Cyprus claimed explicitly that as Kosovo is a *sui generis* case and that "the general rules of international law do not apply to Kosovo."[48]

While the ICJ did not directly analyse such arguments, it indirectly refuted them. The advisory opinion nowhere mentions the uniqueness of Kosovo. Most importantly, the ICJ actually assessed the declaration of independence under international legal norms and principles, i.e. general international law and the Security Council Resolution 1244 (1999), thus logically confirming that Kosovo is not outside the law. Furthermore, because the ICJ applied general international law, it is possible to apply the ICJ's position by analogy to other similar situations, which debunks the argument that the case of Kosovo does not create a "precedent". In reality it would be very difficult to explain to other peoples who have aspirations for independence, e.g. Kurds, Tibetans, and Western Saharans, that they are not special and therefore they cannot use the case of Kosovo as an example. Nonetheless the claims of uniqueness did not disappear after publication of the advisory opinion.

3.4. No confirmation for external self-determination or remedial secession

The Kosovo advisory opinion is often taken as a confirmation that external self-determination is also applicable outside the colonial context and that remedial secession is permissible under certain circumstances. Actually, the ICJ did not confirm these claims. While it may be reasonable to assume that if a declaration of independence is not in violation of international law, then such act is based on a positive entitlement under international law, in fact the ICJ posited that "it is entirely possible for a particular act – such as a unilateral declaration of independence – not to be in violation of international law without necessarily constituting the exercise of a right conferred by it."[49] The ICJ quickly added that it was not explicitly asked to determine whether such a right existed and so it did not look into the matter.

A number of states who participated in the proceedings claimed (as a secondary argument) that the population of Kosovo had the right to create an independent state either as a manifestation of their right to self-determination, or pursuant to a right of remedial

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[47] Oral Statement of the United States, CR 2009/30, pp. 25-28.

[48] Written Statement of Cyprus Commenting on Other Written Statements, para. 28.

[49] Kosovo advisory opinion, para. 56.

secession in the face of the situation in Kosovo.[50] The ICJ noted that states had radically different views about whether the right of self-determination provides the people, outside the context of colonialism or other forms of foreign domination, the right to separate from a parent state. States also had different views regarding the right of remedial secession.[51] Does such a right exist in the first place? If so, what are the preconditions? Were the necessary circumstances present in the Kosovo case?[52] The ICJ raised many very interesting and highly relevant questions, but then concluded (surely with some relief) that "it is not necessary to resolve these questions in the present case" because it was not requested by the General Assembly and these questions did not concern declarations of independence, but rather the relevant consequences after such declarations, i.e. the right to separate from a parent state.[53] The ICJ said nothing which would affirm that Kosovo is a state or that it satisfies the traditional criteria of statehood.

To sum up, the ICJ added nothing substantial to the debate about external self-determination or remedial secession. Without going into a detailed discussion, there are good reasons to seriously doubt that there exists, under international law, a right to unilateral secession. The Supreme Court of Canada, in a leading judgment, confidently declared that "international law does not specifically grant component parts of sovereign states the legal right to secede unilaterally from their 'parent' state".[54] The same conclusion was reached by the Independent International Fact-Finding Mission on the Conflict in Georgia, which declared that "Abkhazia was not allowed to secede from Georgia under international law, because the right to self-determination does not entail a right to secession."[55] Self-determination is thus presented as a pillar of international law and relations, but states become have become sceptical and abandon idealistic rhetoric when it begins to threaten their territorial integrity. It should be noted that this is not a legal argument, but a practical approach. However, inasmuch international law is not effected by words alone, but also by deeds, one cannot disregard such approaches.

4. RELEVANCE OF THE ADVISORY OPINION TO CRIMEA

Russia has always opposed the independence of Kosovo. During the proceedings before the ICJ, Russia took a very narrow position with respect to the right of self-determination and the right of secession. But in the case of Crimea, Russia reversed

[50] *See e.g.* Written Statement of Estonia, pp. 4-11; Written Statement of Germany, pp. 34-35; Written Statement of the Netherlands, paras 3.5-3.7; Written Statement of Russia, para. 88.

[51] *See e.g.* Written Statement of Argentina, para. 97; Written Statement of Azerbaijan, para. 25; Written Statement of China, pp. 3-7; Written Statement of Spain, para. 24; Written Statement of Slovakia, para. 6.

[52] Kosovo advisory opinion, para. 82.

[53] *Ibidem,* para. 83.

[54] *Reference re Secession of Quebec*, *supra* nota 11, para. 111.

[55] Report, Independent International Fact-Finding Mission on the Conflict in Georgia, 30 September 2009, Volume II, p. 147.

its position and used the arguments which were put forward by the United States (and were opposed by Russia) during the proceedings.

4.1. Events in Crimea and the international response

The events in Crimea unfolded very rapidly. The peninsula was incorporated into Russia less than a month after the start of the pro-Russian rallies in Sevastopol and other places. Already on 23 February 2014, the day after the departure of Viktor Yanukovych, Russians chanted in Sevastopol and Kerch that Crimea is Russian and wanted to replace Ukrainian flags with Russian ones. Four days later, the Supreme Council of Crimea decided to hold a referendum on the status of Crimea. The referendum was set for 25 May, but later was brought forward to 30 March and then again to 16 March.

Despite both international and Ukrainian criticism, the referendum was held and reportedly about 96 percent of voters were in favour of uniting with Russia. The next day, the Supreme Council of Crimea declared independence from Ukraine and requested accession to Russia.[56] On 18 March 2014, the leaders of Crimea and Sevastopol flew to Moscow and signed the treaty on the admission of the Republic of Crimea to Russia. Overnight, the Constitutional Court of Russia produced a 14-page judgment confirming that the treaty conforms to the Russian Constitution.[57] And then, on 21 March, the Federation Council ratified the treaty and President Putin signed the ratification instrument, effectively finalising the incorporation of Crimea into Russia.

The international community has overwhelmingly rejected the secession of Crimea from Ukraine and its incorporation into Russia, treating it as a violation of international and Ukrainian law. Russia claims that everything took place in accordance with international law. After signing the treaty with Crimean leaders on 18 March, President Putin addressed the State Duma, Federation Council, regional leaders and civil society representatives in the Kremlin to justify the incorporation of Crimea.[58] Leaving aside the emotional arguments referring to shared history, national pride and military glory, this article focuses on the legal arguments. After all, the ICJ indicated that the creation of a state is not simply a matter of fact or politics, but is subject to legal review.

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[56] Парламент Крыма принял Декларацию о независимости АРК и г. Севастополя (Crimean Parliament adopted the Declaration of Independence of the Autonomous Republic of Crimea and the city of Sevastopol), 11 March 2014, available at: http://www.rada.crimea.ua/news/11_03_2014_1 (accessed 30 March 2015).

[57] Постановление по делу о проверке конституционности невступившего в силу международного договора между Российской Федерацией и Республикой Крым о принятии в Российскую Федерацию Республики Крым и образовании в составе Российской Федерации новых субъектов (Judgment on the Case concerning the Review of Constitutionality of the International Treaty between the Russian Federation and the Republic of Crimea on Admission of the Republic of Crimea into the Russian Federation and Creation of New Subjects in the Composition of the Russian Federation) Конституционный Суд Российской Федерации, 19 March 2014, 6-П/2014, available at: http://doc.ksrf.ru/decision/KSRFDecision155662.pdf (accessed 30 March 2015).

[58] Address by President of the Russian Federation, 18 March 2014, available at: http://eng.kremlin.ru/news/6889 (accessed 30 March 2015).

Russia's legal justifications are based on a superficial and opportunistic interpretation of international law and contradict with its previous positions. Unsurprisingly, Russia builds its position on the right of self-determination and the right of remedial secession, and refers to Kosovo as a supportive precedent.

4.2. Justifications for secession

In his speech, President Putin argued that in the referendum the residents of Crimea, for the first time in history, were able to peacefully express their free will regarding their own future and emphasised that when declaring independence, the Supreme Council of Crimea also referred to the United Nations Charter, which speaks of self-determination.[59] There is some merit in his speech, e.g. a referendum is the usual way to determine the will of the people, but as was discussed above the right of self-determination has preconditions and most certainly does not represent an absolute entitlement, permitting the people to unilaterally secede from a parent state at any time and without paying attention to the interests of the parent state.

It is safe to conclude that the referendum and declaration of independence in Crimea would have impossible without the support of Russian forces. It's true that Russia has insisted that the unmarked, but armed and uniformed, units operating in Crimea were not Russian troops, but spontaneously organised "self-defence forces" (the so-called "little green men"). However, these claims do not sound plausible. Months after the events in Crimea, President Putin has repeatedly confirmed that there were Russian troops in Crimea.[60] Russian troops and other Russian controlled units locked Ukrainian forces in their bases and controlled public infrastructure. This made it possible to hold the referendum and raises the question whether the people expressed their will "without external interference", as emphasised in the Friendly Relations Declaration discussed above. Because the use of force to support the secessionist activities was illegal, the declaration of independence in Crimea was also illegal.

Although according to the ICJ declarations of independence are not generally in violation of international law, it added an exception which applies in case of Crimea, i.e. that a declaration of independence is illegal if it is "connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*)."[61] President Putin, however, has claimed that the presence of Russian troops was necessary to hold an open, honest, and dignified referendum.[62] His position is very close to another claim that a state may assist those people who are exercising self-determination if the parent state does not agree with their potential secession. This claim is based on the Friendly Relations Declaration which provides that "every State has the duty to respect this right in accordance with

[59] Crimean Parliament adopted the Declaration…, *supra* nota 60.

[60] *See e.g.* Direct Line with Vladimir Putin, 17 April 2014, available at: http://eng.kremlin.ru/news/7034 (accessed 30 March 2015).

[61] Kosovo advisory opinion, para. 81.

[62] *Ibidem*.

the provisions of the [United Nations] Charter."[63] There has never been a consensus on what exactly this provision means, but it certainly does not authorise other states to intervene militarily at their discretion. Otherwise it would open the system to abuses, i.e. states disguising their politically-motivated interventions with supposedly altruistic intentions. If the parent state oppresses its own people and forcefully prevents internal self-determination, they may seek protection (possible defensive military assistance) from the international community. Such protection preferably should be authorised by the Security Council and realised by a multinational coalition. Moreover, one cannot disregard the legal framework of the use of force as provided in the United Nations Charter, which permits the use of force only for self-defence and when authorised by the Security Council.[64] An intervention in support of self-defence falls under neither exception.

In late summer 2013, the United States, the United Kingdom and other states were considering whether to intervene in Syria to support the people who were rebelling against the repressive regime of al-Assad (in a way thus also exercising their right of self-determination). President Putin opposed this intervention and stressed in September 2013 that "[w]e believe that preserving law and order in today's complex and turbulent world is one of the few ways to keep international relations from sliding into chaos. The law is still the law, and we must follow it whether we like it or not."[65] But then a half a year later Russia intervened in Crimea, even though the seriousness of the situation on the ground was not comparable to that of Syria. Hence Russia resisted collective action in a serious armed conflict, but intervened unilaterally in a situation which perhaps amounted to a riot.

Russia was among the states who answered the ICJ's call to submit written statements on the question submitted to ICJ for an advisory opinion in the Kosovo case. Its written statement followed a conservative approach. Notably, "[t]he Russian Federation is of the view that the primary purpose of the 'safeguard clause' [in the Friendly Relations Declaration] is to serve as a guarantee of the territorial integrity of States. It is also true that the clause may be construed as authorizing secession under certain conditions. However, those conditions should be limited to truly extreme circumstances, such as an outright armed attack by the parent state, threatening the very existence of the people in question. Otherwise, all efforts should be taken in order to settle the tension between the parent state and the ethnic community concerned within the framework of the existing State."[66] So it seems fair to ask: What happened to this conventional

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[63] Friendly Relations Declaration, *supra* nota 5.

[64] Arts. 2(4), 42 and 51 of the Charter of the United Nations. *See e.g.* R. Värk, *The Legal Framework of the Use of Armed Force Revisited*, 15(1) Baltic Security and Defence Review 56 (2013), for a general discussion on the legality of the use of force.

[65] *A Plea for Caution from Russia: What Putin Has to Say to Americans about Syria*, New York Times, 11 September 2013, available at: http://www.nytimes.com/2013/09/12/opinion/putin-plea-for-caution-from-russia-on-syria.html (accessed 30 March 2015).

[66] Written Statement of Russia, para. 88.

approach? Did not Russia simply abandon its earlier position and principles because it was politically convenient, or maybe it never really believed in them?

4.3. Crimea in comparison with Kosovo

Russia and the Russians in Crimea have repeatedly drawn parallels between Crimea and Kosovo. President Putin also mentioned Kosovo in his speech: "Moreover, the Crimean authorities referred to the well-known Kosovo precedent – a precedent our western colleagues created with their own hands in a very similar situation, when they agreed that the unilateral separation of Kosovo from Serbia, exactly what Crimea is doing now, was legitimate and did not require any permission from the country's central authorities."[67] As was discussed above, Kosovo and its supporters maintained and tried to show that Kosovo was a unique case and did not create a precedent. But it must be admitted that this is a fragile and dangerous argument, both politically and legally. Hence it is not a surprise that Russia refers to Kosovo as a justification for Crimea's actions. However, Crimea and Kosovo are not comparable for several important reasons. Before discussing the differences, it is fair to say that there are also some similarities, e.g. Kosovo was an autonomous region like Crimea, and in both regions the majority of people belonged to an ethnic minority. But these similarities are superficial, as shown by three essential differences.

First, Kosovo had been and still was under international administration when it declared its independence. The United Nations Interim Administration Mission in Kosovo was created by the Security Council (14 votes in favour, including Russia, only China abstaining).[68] The adopted resolution reaffirmed the commitment to the sovereignty and territorial integrity of Yugoslavia, but at the same time called for substantial autonomy and meaningful self-administration for Kosovo. The international community continued to recognise Serbia's sovereignty over Kosovo and hoped that a political solution would be found to determine the final status of Kosovo. Crimea on the other hand was under the unilateral and illegal control of Russia (numerous areas and objects were occupied by Russian troops) when the referendum was held and independence declared. This resulted in Crimea being incorporated into an occupying state. There were no attempts (or at least no meaningful and good faith efforts) to settle the concerns and differences with Ukraine. It was a divorce at gunpoint.

Secondly, Kosovo declared independence (17 February 2008) almost nine years after it was placed under international administration (10 June 1999), and only after numerous attempts to negotiate an acceptable solution between the parties had failed. As was outlined above, in Crimea the whole process of self-determination and secession took a mere month.

Thirdly, Serbia had begun to forcefully dismantle the autonomy of Kosovo in 1989. Almost a decade of oppressive measures led to the Kosovo War, which lasted from

[67] Address by President of the Russian Federation, *supra* nota 62.
[68] Security Council Resolution 1244 (1999), 10 June 1999.

February 1998 until June 1999 (and ended with the NATO military intervention). The Security Council determined several times that the situation in Kosovo constituted a threat to international peace and security.[69] The International Criminal Tribunal for the former Yugoslavia and numerous other institutions, including the Security Council, have explicitly recognised occurrences of war crimes, crimes against humanity, ethnic cleansing and massive human rights violations in Kosovo. Arguably, Kosovo was driven by the events of the 1990s and the 2000s to a point where the meaningful exercise of internal self-determination within Serbia was rendered very difficult, if not impossible. (It should be noted that Russia did not share this assessment and found that "the situation does not even begin to come close to the "extreme circumstances" under which the right to secession may be invoked.")[70] There was no comparable situation in Crimea, i.e. no impartially verified allegations of grave violations of human rights and fundamental freedoms. Crimea had an autonomous status within Ukraine. In fact, the Autonomous Republic of Crimea was created in 1996 in order to calm down separatist moods among Russians. They were given substantial linguistic and other privileges, including their own parliament and government, and the calls for separation eventually disappeared. In the light of the available facts, it is difficult to argue that the internal self-determination in Crimea was threatened or that the Ukrainian central government was dismantling Crimea's autonomy. Moreover, even if there were legitimate concerns in Crimea, the interim central government was not given a chance to address these concerns because the process of secession started within days after it was sworn in. Nevertheless, Russia believed that the situation was dangerous and necessitated rapid reaction. For example, when the Federation Council authorised the president to use force in Crimea, they mentioned that there was a real threat of bloodshed in Eastern and Southern Ukraine and of a humanitarian catastrophe throughout the country.[71] President Putin noted in his speech that the right of self-determination in Crimea was exercised in a "peaceful" manner and that it was not even necessary to resort to the authorisation from the Federation Council (at the same time reiterating that Russia had no armed forces in Crimea). He even thanked the Ukrainian armed forces for not putting up a fight, thereby avoiding violence and causalities.[72]

CONCLUSIONS

After the announcement of the advisory opinion, the Foreign Minister of Kosovo stated at a meeting of the Security Council that "[n]othing in the opinion issued by the

[69] *E.g.* Security Council Resolution 1203 (1998), 24 October 1998.

[70] Written Statement of Russia, para. 103.

[71] Обращение СоветаФедерации ФС РФ к Президенту Российской Федерации В.В. Путину о защите граждан Российской ФедерациинаУкраине (Appeal of the Federation Council to the President of the Russian Federation V. V. Putin on the Protection of Citizens of the Russian Federation in Ukraine), 1 March 2014, available at: http://council.gov.ru/press-center/news/39849/ (accessed 30 March 2015).

[72] Address by President of the Russian Federation, *supra* nota 62.

Court casts any doubt on the statehood of the Republic of Kosovo, which is an established fact" and the "[i]t is clear that Kosovo's independence has not set any precedent."[73] This was certainly not the whole truth, considering what the ICJ was asked and what the ICJ said. From the perspective of general international law, the ICJ did not say much useful or surprising. While it's true the ICJ did not question the statehood of Kosovo, this was because it answered only the posed question whether the promulgation of a declaration of independence (not its consequences) was in violation of international law. At the same time the ICJ did not confirm that Kosovo had the right to secede or that it had achieved statehood. The ICJ refused to examine the essence of external self-determination and remedial secession. The ICJ's analysis was thus incomplete and potentially dangerous, because secessionist movements may take its conclusion about declarations of independence as a defence for their cause, without actually analysing whether it actually means that they have the right of secession. The advisory opinion is certainly a precedent because it was based on general international law, and the ICJ did not consider Kosovo as a *sui generis* case. Generally, every judgment or advisory opinion is potentially a precedent and may be used as such by others. Moreover, if the issues are decided under *general* international law, the judgment or advisory opinion has potentially *general* applicability.

Predictably, the advisory opinion was used by Russia to justify the so-called referendum in Crimea and the subsequent incorporation of Crimea into Russia, but in fact the advisory opinion fails to provide any hoped-for support. Russia is advancing political and legal justifications which do not withstand criticism or, at the very least, are simply very difficult to understand. President Putin claimed that "[w]e have always respected the territorial integrity of the Ukrainian state, incidentally, unlike those who sacrificed Ukraine's unity for their political ambitions."[74] Russia has illegally orchestrated a secession of Crimea and apparently renounced their previous conservative positions. Let us recall that five years earlier Russia stated before the ICJ that "outside the colonial context, international law allows for secession of a part of a State against the latter's will only as a matter of self-determination of peoples, and only in extreme circumstances, when the people concerned are continuously subjected to most severe forms of oppression that endangers the very existence of the people". Did the situation in Crimea reflect these conditions and therefore necessitate external self-determination? The answer is clearly negative.

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[73] UN Doc S/PV.6367 (2010), p. 9.

[74] Address by President of the Russian Federation, *supra* nota 62.

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EU VALUES AND CONSTITUTIONAL PLURALISM: THE EU SYSTEM OF FUNDAMENTAL RIGHTS PROTECTION

Abstract:
This article seeks to explore whether the EU system of fundamental rights protection allows room for constitutional pluralism. By looking at recent developments in the case law of the Court of Justice of the European Union (the Court of Justice), it is submitted that the Court has answered that question in the affirmative, thereby respecting the diversity of the cultures and traditions of the peoples of Europe as well as their national identities. The application of the Charter does not rule out a cumulative application of fundamental rights. That being said, pluralism is not absolute, but must be weighed against the indivisible and universal values on which the European Union is founded.

Logically, the question that arises is how we order pluralism. In this regard, I shall argue that it is not for the Court of Justice to decide when an EU uniform standard of fundamental rights protection is to replace (or coexist with) national standards. That decision is for the EU political institutions to adopt, since they enjoy the necessary democratic legitimacy to determine the circumstances under which the exercise of a fundamental right is to be limited for reasons of public interest.

However, this deference to the EU political branches does not mean that EU legislative decisions are immune from judicial review. On the contrary, cases such as Schwarz and Digital Rights demonstrate that the Court of Justice is firmly committed to examining whether those legislative choices comply with primary EU law, and notably with the Charter.

In this regard, when interpreting the provisions of the Charter, the Court of Justice – in dialogue with national courts and, in particular, constitutional courts – operates as the guarantor of the rule of law within the EU, of which fundamental rights are part and parcel. It is thus for those courts to make sure that each and every EU citizen enjoys a sphere of individual liberty which must, as defined by the Charter, remain free from public interferences.

Keywords: Charter of Fundamental Rights, CJEU, Court of Justice of the European Union, EU, European Union, fundamental right

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INTRODUCTION

We Europeans are very different. We all come from Member States each of which has a strong identity. We speak different languages; we have different cultures, and we have, through the centuries, established different traditions. "Pluralism" pervades the four corners of Europe from the Gulf of Finland to the Strait of Gibraltar and from the Irish Sea to the Aegean.

This was known to the authors of the Treaties, who rightly decided that the European Union "shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced."[1]

Pluralism may be defined as the capacity of each national society to remain free to evolve differently according to its own values. It is thus ensured by respecting each and every national identity. As Art. 4(2) of the Treaty on the European Union (TEU) states, the European Union (EU) is committed to respecting the national identities of its Member States. Value diversity must, where possible, be respected and preserved by the EU.

However, in order for the European integration project to succeed, pluralism cannot be absolute. This is so because "the peoples of Europe, in creating an ever closer union among them, are resolved to share a peaceful future based on common values."[2] In spite of our differences, we Europeans agree that the EU must be founded on the indivisible, universal values of human dignity, freedom, equality and solidarity. We also agree that the EU must be based on the principles of democracy and the rule of law. This means that compliance with those founding pan-European values may sometimes make it necessary to set aside certain aspects of national diversity. A commonality of values inevitably implies some degree of unity. The survival of the EU requires that what brings us together must remain stronger than what pulls us apart. Logically, the question then is to what extent and in what fields does the EU legal order leave space for diversity.

This article aims to shed some light on that difficult question, which is of paramount constitutional importance. More specifically, it explores the interaction between EU values and constitutional pluralism specifically in the context of the EU system of fundamental rights protection.

Fundamental rights may be examined from two different, albeit closely-related, perspectives. On the one hand, fundamental rights are the fruit of Europe's common humanist inheritance. Fundamental rights are to be understood as a pan-European good. On the other hand, they are also an expression of pluralism. The level of protection that a national society gives to a fundamental right tells us something about that society's own set of values. Accordingly, when examining the EU system of fundamental rights protection, one is also looking at the way in which the EU legal order strikes the balance between unity and diversity.

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[1] *See* Art. 3(3) TEU.

[2] *See* the Preamble to the Charter of Fundamental Rights of the European Union [2012] OJ C 326/02.

This article is divided into three parts. Part 1 examines the scope of application of fundamental rights within the EU legal order. In my view, one cannot fully understand how the EU system of fundamental rights protection operates without first exploring the scope of application of the Charter of Fundamental Rights of the European Union (the Charter). In Part 2, I shall explore the idea that EU values are the result of a constitutional consensus. This means that the EU legislator may only adopt a uniform standard of fundamental rights protection where that standard corresponds to common EU values. Subject to that proviso, it is thus for the EU political process to determine where different national standards of fundamental rights protection are to be replaced with a common EU standard. Indeed, since the EU is governed by the principle of democracy, it is for the EU political institutions, each acting within the competences that have been conferred on it, to draw the line between unity and diversity. Part 3 is devoted to examining the situations where pluralism may emerge. In this regard, I shall argue that, where there is no EU legislative consensus and where national law implementing EU law complies with the values on which the EU is founded, EU law allows room for constitutional pluralism. Put simply, EU law does not rule out a cumulative application of EU and national fundamental rights. Finally, I shall express the view that neither unity, nor diversity, is absolute. The European Union must be respectful of both, given that neither suffices to explain the European integration project as a whole.

1. THE SCOPE OF APPLICATION OF FUNDAMENTAL RIGHTS

With the entry into force of the Treaty of Lisbon, the Charter now enjoys "the same legal value as the Treaties". Stated differently, in light of Art. 6(1) TEU, the EU legal order now has a written and legally binding catalogue of fundamental rights which stands on an equal footing with the Treaties.

From the fact that the Charter is now legally binding it does not follow that the EU has become a "human rights organisation" or that the Court of Justice has become "a second European Court of Human Rights (ECtHR)."[3] 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 Art. 51(2) of the Charter.[4] It requires that, in interpreting and

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[3] *See generally* K. Lenaerts & J. A. Gutiérrez–Fons, *The Place of the Charter in the EU Constitutional Edifice*, [in:] S. Peers, T. Hervey, J. Kenner & A. Ward (eds.), *The EU Charter of Fundamental Rights: A Commentary*, Hart Publishing, Oxford: 2014, p. 1557. *See also* T. von Danwitz & K. Paraschas, *A Fresh Start for the Charter: Fundamental Questions on the Application of the European Charter of Fundamental Rights*, 35 Fordham International Law Journal 1397 (2012), and K. Lenaerts, *Exploring the Limits of the EU Charter of Fundamental Rights*, 8 European Constitutional Law Review 375 (2012).

[4] Art. 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."

applying the Charter, the Court of Justice respects the principle of conferral as set out in Art. 5(2) TEU.

The scope of application of the Charter is therefore the keystone which guarantees that the principle of conferral is complied with. In this regard, Art. 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 Union law". Whilst in relation to the EU institutions, bodies, offices and agencies, Art. 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."[5]

But what does "implementing [EU] law" mean? According to the explanations relating to Art. 51(1) of the Charter,[6] 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 Court of Justice, 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 (the "agency situation") and (2) EU obligations that must be complied with when a Member State derogates from EU law (the "derogation situation"). Conversely, where EU law imposes no obligation on the Member States, the Charter simply does not apply.

In *Åkerberg Fransson*, the Court of Justice gave important guidance relating to the interpretation of Art. 51(1) of the Charter.[7] Let us look at this case more closely. The facts of the case may be summarised as follows. In 2009, the Swedish Public Prosecutor's Office brought criminal proceedings against Mr Åkerberg Fransson on charges of serious tax offences. He was accused of providing false information which brought about a loss of public revenue linked to the levying of income tax and VAT. Prior to that, i.e. in 2007, by reason of the same act of providing false information, the Swedish authorities had, in the course of administrative proceedings, imposed a financial penalty (tax surcharge) on Mr Åkerberg Fransson. With a view to seeing the criminal charges brought against him dismissed, Mr Åkerberg Fransson sought to rely on Art. 4 of Protocol No. 7 of the European Convention for the Protection of Human Rights and

[5] In German, "ausschließlich bei der Durchführung des Rechts der Union". In French, "aux États membres uniquement lorsqu'ils mettent en œuvre 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". In Polish, "do Państw Członkowskich wyłącznie w zakresie, w jakim stosują one prawo Unii".

[6] Explanations relating to the Charter of Fundamental Rights of the European Union [2007] OJ C 303/17, p. 32.

[7] See in this regard K. Lenaerts, *The Court of Justice of the European Union and the Protection of Fundamental Rights*, 31 Polish Yearbook of International Law 79 (2011), p. 81, and A. Ward, *Article 51*, [in:] S. Peers *et al., supra* note 3, p. 1413.

Fundamental Freedoms (ECHR) and Art. 50 of the Charter which enshrine the *ne bis in idem* principle. Accordingly, the referring court asked the Court of Justice whether EU law precluded criminal proceedings for tax evasion from being brought against a defendant where a tax penalty has already been imposed upon him for the same acts of providing false information.

In order to answer that difficult question, the Court of Justice had first to determine whether the Charter was applicable to a situation such as that of Mr Åkerberg Fransson. At the outset, it held that Art. 51(1) of the Charter "confirms [its] case-law relating to the extent to which actions of the Member States must comply with the requirements flowing from the fundamental rights guaranteed in the [EU] legal order".[8] That case-law is fully consistent with Art. 6(1) TEU and Art. 51(2) of the Charter, according to which the provisions of the Charter cannot be interpreted in breach of the principle of conferral. In this regard, the Court of Justice drew a distinction between the situations falling within the scope of EU law and those falling outside the scope of that law. Whilst in relation to the former the compatibility of the national legislation at issue with fundamental rights may be examined in light of the Charter, in relation to the latter the Court of Justice lacks jurisdiction to do so. Stated differently, "[t]he applicability of [EU] law entails [the] applicability of the fundamental rights guaranteed by the Charter."[9] On the contrary, where "a legal situation does not come within the scope of [EU] law, the [Court of Justice] does not have jurisdiction to rule on it and any provisions of the Charter relied upon cannot, of themselves, form the basis for such jurisdiction".[10] For the case at hand, this meant that in order for Art. 50 of the Charter to be applicable to the situation of Mr Åkerberg Fransson, the Court of Justice had to determine whether there was a connecting factor between the tax penalties and criminal proceedings to which he had been or was subject and EU law. The question thus became whether Sweden was fulfilling an obligation imposed by EU law.

To begin with, the Court of Justice found that those tax penalties and criminal proceedings were partially connected to the fact that Mr Åkerberg Fransson had breached his obligations to declare VAT. By imposing those tax penalties and by bringing those criminal proceedings, Sweden was thus complying with its obligation "to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on its territory and for preventing evasion"[11] as provided for by Arts. 2, 250(1) and 273 of Directive 2006/112[12] and by the principle of loyal cooperation.[13] Additionally,

[8] Judgment in C-617/10 *Åkerberg Fransson*, EU:C:2013:105, para. 18.

[9] *Ibidem*, para. 21.

[10] *Ibidem*, para. 22.

[11] *Ibidem*, para. 25.

[12] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [2006] OJ L 347/1. Previously, Arts. 2, 250(1) and 273 of Directive 2006/112 were set out in Arts. 2 and 22 of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment [1977] OJ L 145/1.

[13] Art. 4(3) TEU.

since the collection of VAT revenue contributes to the financing of the EU budget, national legislation which seeks to deter individuals from adversely affecting such collection protects the EU financial interests. It follows that by imposing tax penalties and by bringing criminal proceedings against Mr Åkerberg Fransson, Sweden was also fulfilling its obligations under Art. 325 TFEU, according to which Member States are "oblige[d] to counter illegal activities affecting the financial interests of the [EU] through effective deterrent measures and, in particular, (…) to take the same measures to counter fraud affecting the financial interests of the European Union as they take to counter fraud affecting their own interests."[14] Accordingly, the Court of Justice concluded that tax penalties and criminal proceedings such as those of the case at hand "constitute implementation of Articles 2, 250(1) and 273 of Directive 2006/112 (…) and of Article 325 TFEU and, therefore, of [EU] law, for the purposes of Article 51(1) of the Charter."[15] Moreover, that conclusion could not be called into question by the fact that the national legislation upon which those tax penalties and criminal proceedings were founded had not been specifically adopted to transpose Directive 2006/112.[16]

Åkerberg Fransson is a seminal judgment which clarifies the scope of application of the Charter. It reiterates the Court of Justice's firm commitment to upholding the rule of law of which fundamental rights are *always* part and parcel. In that case, the Court of Justice made clear that "[t]he applicability of [EU] law entails [the] applicability of the fundamental rights guaranteed by the Charter."[17] "Metaphorically speaking, this means that the Charter is the 'shadow' of EU law. Just as an object defines the contours of its shadow, the scope of EU law determines that of the Charter."[18]

To conclude this part of the article, it is worth looking at two examples where the Court of Justice ruled that it had no jurisdiction to answer the questions referred by the national court on the ground that the national law at issue did not "implement EU law".

In the *Siragusa* case,[19] Mr Siragusa, who owned property in a landscape conservation area, made alterations to that property without first obtaining landscape compatibility clearance. He applied for retrospective planning permission for those alterations, but was unsuccessful. Whilst such retrospective permission could, in principle, be granted subject to the payment of a fine, that solution was ruled out where works which had been carried out illegally resulted in an increase in volume. As this was the case for Mr Siragusa, the Italian authorities issued an order requiring him to dismantle the work carried out in breach of the Italian law protecting the cultural heritage and the landscape. Mr Siragusa challenged that order before the Regional Administrative Court of Sicily. The latter asked the Court of Justice whether that law constituted an unjustified and disproportionate infringement of Mr Siragusa's right to property as protected by Art. 17

[14] *Åkerberg Fransson*, para. 26.
[15] *Ibidem*, para. 27.
[16] *Ibidem*, para. 28.
[17] *Ibidem*, para. 21.
[18] Lenaerts & Gutiérrez-Fons, *supra* note 3, pp. 1567-68.
[19] Judgment in C-206/13 *Siragusa*, EU:C:2014:126.

of the Charter. As regards the potential link between the case at hand and EU law, the referring court took the view that the protection of the landscape could not be regarded as a stand-alone objective separate from the protection of the environment which was largely covered by EU law. In this regard, by referring to primary and secondary EU legislation on environmental matters,[20] the national court implicitly reasoned that the Italian law protecting the cultural heritage and the landscape "implemented EU law" for the purposes of Art. 51(1) of the Charter. However, the Court of Justice took a different view.

After stressing the fact that the concept of "implementing EU law" laid down in Art. 51(1) of the Charter requires "a certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other",[21] the Court of Justice found, in what is, in my view, the key passage of the judgment, that:

> fundamental EU rights could not be applied in relation to [the] national legislation [in question] because the provisions of EU law in the subject area concerned did not impose any obligation on Member States with regard to the situation at issue in the main proceedings.[22]

Since neither the provisions of the Treaties nor the EU Directives and Regulations mentioned in the order for reference were applicable to the case at hand, the Court of Justice ruled that it lacked jurisdiction to answer the question referred by the Regional Administrative Court of Sicily.

Before looking at the facts of the second case, let us first describe the background in which it took place. As we all know, in order to overcome the current economic crisis, some Member States have had no choice but to cut public spending.[23] Those measures have, on occasion, included a reduction in the salaries of civil servants. This has been

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[20] As to primary EU law, the national court referred to Arts. 3(3) TEU and 21(2)(f) TEU, as well as Arts. 4(2)(e) of the Treaty on the Functioning of the European Union (TFEU), 11 TFEU, 114 TFEU and 191 TFEU. As to secondary EU law, it cited the Aarhus Convention (approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005, [2005] OJ L 124/1); Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters to Community institutions and bodies [2006] OJ L 264/13; Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC [2003] OJ L 41/26; and Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment [2012] OJ 26/1.

[21] *Ibidem*, para. 24.

[22] *Ibidem*, para. 26.

[23] *See generally* U. Neergaard, C. Jacqueson & J. Hartig Danielsen (eds.), *The Economic and Monetary Union: Constitutional and Institutional Aspects of the Economic Governance within the EU*, The XXVI FIDE Congress in Copenhagen, 2014, Congress Publications, Vol. 1, DJØF Publishing, Copenhagen: 2014. *See also* K. Lenaerts, *EMU and the EU's Constitutional Framework*, 39 European Law Review 751 (2014).

the case in Portugal where the 2011 State Budget Act provided that civil servants' income would be reduced. In *Sindicato dos Bancários do Norte*,[24] the trade union of a nationalised bank claimed that such a reduction was discriminatory as it did not apply to persons working in the private sector. However, the Portuguese Constitutional Court took a different view and, by a judgment of 21 September 2011, ruled that the 2011 State Budget Act was compatible with the Portuguese Constitution. From a national perspective, employees of that bank had no choice but to accept that the reduction envisaged would take place. From an EU law perspective, the Labour Court of Porto reasoned that the compatibility of the 2011 State Budget Act with EU law could still be called into question in light of the EU principle of equality, which is enshrined in Art. 20 of the Charter. Accordingly, it asked the Court of Justice whether that principle allowed room for such a difference in treatment. However, just as in *Siragusa*, the Court of Justice ruled, by order of 7 March 2013, that it lacked jurisdiction to answer the questions referred, given that the order for reference contained no concrete evidence or reasoning capable of establishing that the 2011 State Budget Act "implemented EU law."[25]

2. EU VALUES AND CONSTITUTIONAL CONSENSUS

The existence of constitutional consensus leads to the adoption of norms which then become the "supreme law of the land". Those norms may contain values which are pan-European and are to be found in primary EU law.

Constitutional consensus may find expression in the Treaties and the Charter as well as in judge-made principles of law (known as general principles of EU law). Notably, the Charter is the result of a pan-European political consensus which embodies the EU's commitment to respect for fundamental rights. This is why, since the entry into force of the Treaty of Lisbon, the Charter has been placed on an equal footing with the founding Treaties. This is also why the Preamble to the Charter stresses the fact that the Charter

> *reaffirms* (…) the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the [Court of Justice] and of the [ECtHR].

As an expression of constitutional consensus, the Charter needs to fulfil three functions. First, it serves as a source of inspiration for the discovery of general principles.[26] Second, it serves as an aid to interpretation. Given that the provisions of the Charter

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[24] Order in C-128/12 *Sindicato dos Bancários do Norte and Others*, EU:C:2013:149.

[25] *See also* orders in C-264/12 *Sindicato Nacional dos Profissionais de Seguros e Afins*, EU:C:2014:2036, and C-665/13 *Sindicato Nacional dos Profissionais de Seguros e Afins*, EU:C:2014:2327.

[26] *See e.g.* judgment in C-555/07*Kücükdeveci*, EU:C:2010:21, para. 22.

are primary EU law, secondary EU law and national law implementing EU law must be interpreted in light of those provisions.[27] Finally, it has been relied upon as providing grounds for judicial review. EU legislation that breaches the Charter is to be held void[28] and national law implementing EU law that contravenes the fundamental rights enshrined therein must be set aside.

In this regard, three interrelated questions arise. First, does the EU legal order draw the distinction between "constitutional consensus" and "legislative consensus"? Second, how is compliance with constitutional consensus ensured in the realm of fundamental rights protection? Third, once that compliance is ensured, is the EU legislator entitled to set a uniform standard of fundamental rights protection?

2.1. Constitutional and legislative consensus

The first question should be answered in the affirmative. Whilst constitutional consensus leads to the adoption of EU norms of the highest rank (primary EU law), legislative consensus is an integral part of the daily functioning of the European political process.

By "legislative consensus" I refer not only to EU norms which are unanimously adopted by the Council, but to all secondary EU norms which are the result of political agreement at EU level. For the purposes of this article, legislative consensus must be broadly understood. It goes without saying that it is more difficult to obtain a "constitutional consensus" than a "legislative consensus". Indeed, in order to reform the basic rules which govern the EU, all Member States and, where appropriate, their citizens must agree to it.

It also goes without saying that "legislative consensus" must comply with "constitutional consensus".

2.2. Compliance with constitutional consensus

In the realm of fundamental rights protection, compliance with constitutional consensus means that any limitation on the exercise of those rights as a result of the EU legislative consensus, must comply with Art. 52(1) of the Charter. The same applies to national laws implementing the EU legislative or constitutional consensus.

However, it is worth noting that, just as under the ECHR and national Constitutions,[29] no limitation may be imposed on the rights under Title I of the Charter (Arts. 1 to 5), i.e. human dignity, the right to life, the right to the integrity of the person, the

[27] *See e.g.* judgments in C-402/07 and C-432/07 *Sturgeon and Others*, EU:C:2009:716; confirmed by the Grand Chamber in C‒581/10 and C‒629/10 *Nelson and Others*, EU:C:2012:657. *See also* C‒400/10 PPU *McB.*, EU:C:2010:582.

[28] *See e.g.* judgments in C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert*, EU:C:2010:662; C-236/09 *Association belge des Consommateurs Test-Achats and Others*, EU:C:2011:100, and C-584/10 P, C-593/10 P and C-595/10 P *Commission v. Kadi* ("*Kadi II*"), EU:C:2013:518.

[29] *See e.g.* Art. 30 of the Polish Constitution which provides that: "The inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens."

prohibition of torture and inhuman or degrading treatment or punishment, the prohibition of slavery and forced labour.[30]

Allow me to quote in full Art. 52(1) of the Charter:

> Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, 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.

It should be observed that the wording of Art. 52(1) of the Charter is, for example, similar to that of Art. 31(3) of the Polish Constitution.[31] Again, this shows that the Charter draws on the constitutional traditions common to the Member States, thereby giving concrete expression to constitutional consensus.

First, 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.[32] Second, in providing that any limitation must "respect the essence of [the rights and freedoms recognised by the Charter]", Art. 52(1) thereof guarantees that no limitation will deprive those rights and freedoms of their substance. Third, any limitation must pursue an "objective of general interest recognised by the Union' or aim 'to protect the rights and freedoms of others".

As to the former type of objectives, they are set out not only in Art. 3 TEU but also in specific Treaty provisions.[33] The case law of the Court of Justice clearly displays a rather broad approach to the question whether an objective is "of general interest recognised by the Union". For example, the principle of transparency,[34] and the requirements of international security[35] have been recognised as such objectives. Moreover, limitations on the fundamental rights conferred by the Charter may have both a vertical and a

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[30] See the Explanations relating to the Charter, *supra* note 6, 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 judgment in C-112/00 *Schmidberger*, EU:C:2003:333, para. 80 (holding that "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").

[31] Art. 31(3) of the Polish Constitution reads as follows: "Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights."

[32] Judgment in C-407/08 P *Knauf Gips v. Commission*, EU:C:2010:389.

[33] *See e.g.* Arts. 36, 45 (3), and 52 TFEU.

[34] *Volker und Markus Schecke and Eifert*, para. 71.

[35] *Kadi II*, para. 103.

horizontal dimension. This means that the assertion of a fundamental right must comply with "the need to protect the rights and freedoms of others".[36] The words "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, notably the rights that stem from the Treaty provisions on free movement and Union citizenship. In relation to conflicts between fundamental rights, or between fundamental rights and fundamental freedoms, it is worth noting that there is no hierarchy of qualified rights under the Charter. Given that all qualified rights stand on an equal footing, conflicts between them must be solved by striking the right balance. In the Court of Justice's own words:

> Where several rights and fundamental freedoms protected by the European Union legal order are at issue, the assessment of the possible disproportionate nature of a provision of European Union law must be carried out with a view to reconciling the requirements of the protection of those different rights and freedoms and a fair balance between them.[37]

Fourth and last, Art. 52(1) of the Charter requires that any limitation on the rights conferred by the Charter must comply with the principle of proportionality. It is thus for the EU institutions and, as the case may be, for national authorities implementing 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" (this is known as the "suitability test"); and that it does not go beyond what is necessary to achieve the legitimate aim pursued (this is known as the "necessity test").

Let us illustrate the foregoing considerations by looking at two recent judgments of the Court of Justice, namely those in the *Schwarz*[38] and *Digital Rights* cases.[39] Whilst in the former case, the Court of Justice held that EU legislative consensus complied with EU constitutional consensus, in the latter case it did not.

The factual and legal background of *Schwarz* is as follows. In accordance with Art. 1(2) of Council Regulation No. 2252/2004 – which harmonises the security features and biometrics in passports and travel documents issued by Member States – "[p]assports and travel documents shall include a highly secure storage medium which shall contain a facial image. Member States shall also include two fingerprints taken flat in interoperable formats. The data shall be secured and the storage medium shall have sufficient capacity and capability to guarantee the integrity, the authenticity and the confidentiality of the data".[40] Accordingly, when Mr Schwarz, a German citizen, applied for a German passport

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[36] Judgment in C-283/11 *Sky Österreich*, EU:C:2013:28.

[37] *Ibidem*, para. 60. *See also* judgments in C-275/06 *Promusicae*, EU:C:2008:54, paras. 65-66, and C-544/10 *Deutsches Weintor*, EU:C:2012:526, para. 47.

[38] Judgment in C-291/12 *Schwarz*, EU:C:2013:670.

[39] Judgment in C-293/12 and C-594/12 *Digital Rights Ireland*, EU:C:2014:238.

[40] However, Art. 1(2a) of Regulation No 2252/2004 states that children under the age of 12 years and persons whose fingerprints are physically impossible to take shall be exempt from the requirement to give fingerprints.

but refused to have his fingerprints taken, the German authorities rejected his application. Mr Schwarz challenged that decision before the Administrative Court of Gelsenkirchen on the ground that Art. 1(2) of Regulation No. 2252/2004 was incompatible with his rights to respect for his private life and the protection of his personal data as provided for in Arts. 7 and 8 of the Charter. In his view, the legislative consensus reflected in Art. 1(2) of Regulation No. 2252/2004 failed to comply with the constitutional consensus expressed by those two provisions of the Charter.

At the outset, the Court of Justice noted that the taking and storing of fingerprints in passports constituted a limitation on the exercise of the rights to respect for private life and the protection of personal data. Accordingly, that limitation had to comply with the constitutional consensus reflected in Art. 52 of the Charter. First, the Court of Justice ruled that the limitation arising from the taking and storing of fingerprints when issuing passports was "provided for by law", since those operations are provided for by Art. 1(2) of Regulation No 2252/2004, which is a legislative act. Second, it found that those two measures were justified by two objectives recognised as legitimate by the EU legal order, namely first, to prevent the falsification of passports and second, to prevent fraudulent use thereof (i.e. use by persons other than their genuine holders). Third, the Court of Justice noted that it was not apparent from the evidence available to it, nor had it been claimed, that the limitations placed on the exercise of the rights recognised by Arts. 7 and 8 of the Charter did not respect the essence of those rights. Fourth and last, the Court of Justice found that Art. 1(2) of Regulation No. 2252/2004 complied with the principle of proportionality.

As to the "suitability test", the Court of Justice found that the storage of fingerprints on a highly secure storage medium as provided for by Art. 1(2) of Regulation No. 2252/2004 required sophisticated technology which was not easily accessible to everyone. Therefore such storage was likely to reduce the risk of passports being falsified and to facilitate the work of the authorities responsible for checking the authenticity of passports at EU borders.[41] Regarding the aim of preventing fraudulent use of passports, the Court of Justice noted that, although the method of ascertaining identity using fingerprints is not 100% reliable, it does significantly reduce the likelihood of unauthorised persons from being admitted into the EU.

As to the "necessity test", the Court of Justice "[had] not been made aware of any measures which would be both sufficiently effective in helping to achieve the aim of protecting against the fraudulent use of passports and less of a threat to the rights recognised by Arts. 7 and 8 of the Charter than the measures deriving from the method based on the use of fingerprints."[42] Accordingly, it ruled out iris-recognition technology, because it was not as advanced as fingerprint-recognition technology and because it was significantly more expensive, thereby making it less suitable for general use.[43] In the

[41] *Schwarz*, para. 41.
[42] *Ibidem*, para. 53.
[43] *Ibidem*, para. 52.

same way, the Court of Justice also found that Art. 1(2) of Regulation No. 2252/2004 did not go beyond what was necessary to prevent the fraudulent use of passports, since the EU legislator had provided for specific and effective guarantees that sought to prevent the personal data stored in the passports from being misused and abused.[44] Taking the view that, in aiming to prevent unauthorised persons from using EU passports, Art. 1(2) of Regulation No. 2252/2004 complied with "the necessity test", the Court of Justice reasoned that there was no need to examine whether the taking and storage of fingerprints were necessary measures in order to prevent the falsification of passports. Consequently, the Court of Justice ruled that examination of the question referred had revealed nothing capable of affecting the validity of Art. 1(2) of Regulation No. 2252/2004.

The legislative consensus reflected in Art. 1(2) of Regulation No. 2252/2004, which provided for a uniform standard of fundamental rights protection when Member States issue passports and travel documents, complied with the constitutional consensus expressed by Arts. 7 and 8 of the Charter. This meant that, contrary to the wishes of Mr Schwarz, Member States were, in principle, precluded from issuing a passport without taking the fingerprints of its holder. Since Art. 1(2) of Regulation No. 2252/2004 complied with the Charter, the national legislator could not adopt a higher standard of fundamental rights protection, as such a standard would adversely affect the balance between fundamental rights and the legitimate aim of preventing illegal entry into the European Union set out in that Regulation.

In the *Digital Rights* case, the Court of Justice was asked, in essence, to examine whether Directive 2006/24[45] was valid in light of Arts. 7, 8 and 52(1) of the Charter. That Directive sought to "harmonise Member States' provisions concerning the retention, by providers of publicly available electronic communications services or of public communications networks, of certain data[[46]] which are generated or processed by them, in order to ensure that the data are available [to the competent national authorities] for the purpose of the prevention, investigation, detection and prosecution

[44] First, fingerprints may be used only for verifying the authenticity of a passport and the identity of its holder (*ibidem*, para. 56). Second, Regulation No. 2252/2004 ensures protection against the risk of data including fingerprints being read by unauthorised persons (*ibidem*, para. 57). Third, that Regulation does not provide for the storage of fingerprints except within the passport itself, which belongs to the holder alone (*ibidem*, para. 60). Accordingly, Regulation No. 2252/2004 could not in and of itself be interpreted as providing a legal basis for the centralised storage of data collected thereunder or for the use of such data for purposes other than that of preventing illegal entry into the EU (*ibidem*, para. 61).

[45] Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC [2006] OJ L 106/54.

[46] *Digital Rights*, para. 26. That data included: "data necessary to trace and identify the source of a communication and its destination, to identify the date, time, duration and type of a communication, to identify users' communication equipment, and to identify the location of mobile communication equipment, data which consist, inter alia, of the name and address of the subscriber or registered user, the calling telephone number, the number called and an IP address for Internet services".

of serious crime, such as organised crime and terrorism, in compliance with the rights laid down in Articles 7 and 8 of the Charter."[47]

Whilst it was true that Directive 2006/24 did not permit the retention of the content of communications or of any information consulted using an electronic communications network, the Court of Justice pointed out that it did make it possible to know the identity of the person with whom a subscriber or registered user had communicated and the means by which that communication was effected, as well as to identify the time and the place of the communication, and to know the frequency of the communications of the subscriber or registered user with certain persons during a given period.[48] Directive 2006/24 also allowed for the data to be retained and used without the subscriber or registered user being informed, thereby "generat[ing] in the minds of the persons concerned the feeling that their private lives are the subject of constant surveillance"[49] – in other words, to borrow the famous expression coined by George Orwell in his dystopian novel "Nineteen Eighty-Four",[50] the feeling that "Big Brother is watching you."

In the Court of Justice's view, this showed that the retention of data and the access of the competent national authorities to those data, as provided for by Directive 2006/24, "directly and specifically affect[ed] private life" which is protected by Art. 7 of the Charter.[51] It also constituted the processing of personal data within the meaning of Art. 8 of the Charter. Given that Directive 2006/24 limited the exercise of the rights laid down in Arts. 7 and 8 of the Charter, it had to comply with the requirements laid down in Art. 52(1) thereof. In that connection, the Court of Justice observed, first, that Directive 2006/24 did not adversely affect the essence of the rights set out in Art. 7 of the Charter, since it did "not permit the acquisition of knowledge of the content of the electronic communications as such'. In the same way, the rights set out in Article 8 of the Charter were not deprived of their essence since the Directive required Member States to adopt 'appropriate technical and organisational measures against accidental or unlawful destruction, accidental loss or alteration of the data."[52] Second, the Court of Justice noted that Directive 2006/24 pursued two objectives of general interest recognised by the EU, namely "the fight against international terrorism in order to maintain international peace and security"[53] and "the fight against serious crime in order to ensure public security."[54] Third, the Court of Justice examined whether Directive 2006/24 complied with the principle of proportionality. By drawing on the case law of the ECtHR,[55] it took the

[47] *Ibidem*, para. 24.
[48] *Ibidem*, para. 26.
[49] *Ibidem*, para. 37.
[50] Published in 1949.
[51] *Digital Rights*, para. 29.
[52] *Ibidem*, paras. 39 and 40.
[53] Judgment in C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v. Council and Commission*, EU:C:2008:461, para. 363.
[54] Judgment in C-145/09 *Tsakouridis*, EU:C:2010:708, paras. 46-47.
[55] ECtHR, *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, para. 102, ECHR 2008-V.

view that, in light of the extent and seriousness of the interference with the fundamental right to private life brought about by the provisions of that Directive, the EU's legislative discretion was reduced.[56] Next, the Court of Justice went on to find that the retention of data in connection with electronic communications was an appropriate means of attaining the objective pursued by Directive 2006/24, as such retention was indeed a valuable tool for criminal investigations.[57] Finally, the Court of Justice observed that "derogations and limitations in relation to the protection of personal data must apply only in so far as is strictly necessary."[58] This meant that, when adopting that Directive, the EU legislator was under the obligation to lay down clear and precise rules governing the extent of the interference with the fundamental rights enshrined in Arts. 7 and 8 of the Charter. However, the Court of Justice gave three reasons for its conclusion that this test was not satisfied in the case of Directive 2006/24.

The first reason was that "Directive 2006/24 cover[ed], in a generalised manner, all persons and all means of electronic communication as well as all traffic data without any differentiation, limitation or exception being made in the light of the objective of fighting against serious crime".[59] It thus entailed a wide-ranging and particularly serious interference with the fundamental rights of practically the entire European population. As to the second reason, that Directive failed to provide either substantive or procedural criteria "delimiting the access of the competent national authorities to the data and to their subsequent use for the purposes of prevention, detection or criminal prosecutions concerning offences that, in view of the extent and seriousness of the interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter, may be considered to be sufficiently serious to justify such an interference."[60] In particular, the Court of Justice observed that Directive 2006/24 did not lay down any criterion identifying the persons authorised to have access to the data. Nor did it limit the use of the data retained by those persons to what was strictly necessary in light of the objective pursued. Most importantly, access by the competent national authorities to the data was not subject to a prior review by any court or independent administrative body.[61] The third reason was that, in accordance with Directive 2006/24, data was to be retained for a minimum period of six months and a maximum of 24 months, regardless of its usefulness for the purposes of preventing serious crime. This meant that the period of retention was not determined according to objective criteria that were apt to ensure that this period was limited to what was strictly necessary.[62] Moreover, Directive 2006/24 also failed to provide for sufficient safeguards, as required by Art. 8 of the Charter, to ensure effective protection of the data retained against the risk of abuse and against any

[56] *Digital Rights,* para. 48.
[57] *Ibidem,* para. 49.
[58] *Ibidem*, para. 52.
[59] *Ibidem*, para. 57.
[60] *Ibidem*, paras. 60 and 61.
[61] *Ibidem*, para. 62.
[62] *Ibidem*, paras. 63 and 64.

unlawful access to and use of those data. In particular, this was so because providers of electronic communications services could, for reasons of economic feasibility, limit the level of security which they would apply. In addition, the irreversible destruction of the data at the end of the data retention period was not guaranteed and it was possible for the data to be retained outside the EU.[63]

Accordingly, the Court of Justice held that Directive 2006/24 was incompatible with Arts. 7, 8 and 52(1) of the Charter and, as a consequence, declared it to be invalid.

2.3. The existence of legislative consensus

Value diversity is ruled out where there is a European legislative consensus as to the precise level of protection that should be granted to a particular fundamental right. Of course, as the rulings of the Court of Justice in *Schwarz* and *Digital Rights* demonstrate, any such EU legislative consensus must also comply with the EU constitutional consensus. Concretely, this means that the policy choices made by the EU legislator must provide a level of protection which is at the very least equal to that provided for by the Charter.

The ruling of the Court of Justice in *Melloni*,[64] a case involving questions relating to the validity and interpretation of the EU Framework Decision on the European Arrest Warrant, also illustrates this point.[65] In that case, the EU legislator sought to harmonise the grounds for non-recognition of decisions rendered following a trial at which the person concerned did not appear in person (a person convicted *in absentia*). To that end, it laid down a list of the circumstances in which, in spite of the fact that the person concerned was convicted *in absentia*, the European arrest warrant must nevertheless be executed. For example, the Framework Decision states that refusal of execution of a decision rendered *in absentia* may not take place where the person concerned, who is aware of the scheduled trial, has appointed legal counsel, and he or she was in fact defended by that person at the trial. The Spanish Constitutional Court asked whether the Framework Decision allowed value diversity, given that, under the Spanish Constitution, the execution of a decision rendered *in absentia* was always made conditional upon retrial. The Court of Justice replied in the negative. By striking the balance between enhancing mutual recognition in criminal matters and the rights of the defence, the EU legislator had defined the precise level of fundamental

[63] *Ibidem*, paras. 67 and 68.

[64] Judgment in C-399/11 *Melloni*, EU:C:2013:107. See in this regard, Lenaerts & Gutiérrez-Fons, *supra* note 3, p. 1557. *See also* V. Skouris, *Développements récents de la protection des droits fondamentaux dans l'Union européenne: les arrêts Melloni et Åkerberg Fransson*, Il diritto dell'Unione Europea 229 (2013), p. 241. *See also* N. de Boer, *Case Note on Melloni*, 50 Common Market Law Review 1083 (2013), p. 1096; D. Ritleng, *De l'articulation des systèmes de protection des droits fondamentaux dans l'Union: les enseignements des arrêts Åkerberg Fransson et Melloni*, Revue trimestrielle de droit européen 267 (2013), p. 283, and D. Sarmiento, *Who's afraid of the Charter? The Court of Justice, national courts and the new framework of fundamental rights protection in Europe*, 50 Common Market Law Review 1267 (2013).

[65] Council Framework Decision 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States [2002] OJ L 190/1.

rights protection with which all Member States must comply. Thus, the EU legislative consensus prevailed over value diversity. Logically, the Spanish Constitutional Court also asked whether that legislative consensus complied with the Charter, to which the Court of Justice replied in the affirmative. Indeed, the balance struck by the EU legislator was held to comply with Arts. 47 and 48 of the Charter. In so ruling, the Court of Justice held that the fundamental right to effective judicial protection and the rights of the defence are not absolute but may be subject to limitations, provided that those limitations pursue a legitimate objective and are compatible with the principle of proportionality. This was the case. The strengthening of mutual recognition in criminal matters is an objective recognised by the Treaties. As to the principle of proportionality, the Framework Decision lays down the circumstances in which the person concerned must be deemed to have waived, voluntarily and unambiguously, his right to be present at his trial. Hence, the Court of Justice ruled that the legislative consensus set out in the Framework Decision complied with the constitutional consensus reflected in the Charter.

By judgment of 13 February 2014, the Spanish Constitutional Court decided to revisit its interpretation of Art. 24 of the Spanish Constitution.[66] However, in so doing, it followed a reasoning grounded in the methods of interpretation provided for by the Spanish Constitution, rather than in the EU principle of primacy. At the outset, the Spanish Constitutional Court held that, where Spanish authorities are called upon to execute a decision adopted by foreign authorities which is incompatible with fundamental rights, the former may indirectly commit a violation of those rights. However, it noted that in situations governed by international rules, the content of the right to a fair trial does not include all the guarantees established by Art. 24 of the Spanish Constitution, but only those that constitute the very essence of the notion of a "fair trial". Accordingly, it reasoned that, when the right to a fair trail produces "ad extra effects", its content is to be determined in the light of the international treaties to which Spain is a party. In this regard, the Spanish Constitutional Court decided to look at the case law of the ECtHR and to take due account of the ruling of the Court of Justice in *Melloni*. Contrary to what it had previously decided, it thus ruled that Art. 24 of the Spanish Constitution does not prevent the Spanish judicial authorities from consenting to extradite a person who has been convicted *in absentia*, provided that such a person has, voluntarily and unambiguously, waived his right to be present at his trial and has been effectively defended at the trial by legal counsel. Subject to that proviso, the question whether that person is given the opportunity to apply for a retrial in the requesting State was no longer relevant. For the purposes of the case at hand, this meant that the Spanish Constitution did not oppose the execution of the European arrest warrant issued against Mr Melloni.

[66] Spanish Constitutional Court, judgment of 13 February 2014, not yet reported.

3. NATIONAL DIVERSITY

It follows from the foregoing that there is room for value diversity in the absence of a European legislative consensus as to the level of protection that must be given to a common good. This means, for example, that where a matter falls within the scope of EU law and the EU legislator has not yet determined the precise level of protection that must be given to a fundamental right, it is for the society of each Member State to make that determination. Yet, since pluralism is not an absolute value, the level of protection granted to a fundamental right by a national legal order must comply with any constitutional consensus that exists at EU level.

In the realm of fundamental rights, this means that value diversity may be expressed, provided that "the level of protection provided for by the Charter, as interpreted by the Court [of Justice], and the primacy, unity and effectiveness of European Union law are not (…) compromised."[67] Needless to say, the absence of EU legislation means that there is no EU legislative consensus. Conversely, the existence of EU legislation does not necessarily imply the existence of EU legislative consensus as to the level of protection that must be accorded to a common good.

It is true that the EU legislator may adopt measures which seek to harmonise a policy field and, at the same time, lay down a uniform standard of fundamental rights protection. This was the case in *Melloni*, where the EU legislator decided to enhance the principle of mutual cooperation in criminal matters whilst providing for a uniform standard of protection of the rights of the defence of persons convicted *in absentia*. However, this does not always hold true: the EU legislator may decide to harmonise a policy field, whilst nevertheless allowing room for a cumulative application of fundamental rights.

This means that national diversity may emerge in both the presence and the absence of EU legislation.

3.1. Diversity in the presence of EU legislation

Let us illustrate the fact that national diversity may emerge where EU legislation is present by examining the ruling of the Court of Justice in *F.*,[68] a case also involving the EU Framework Decision on the European Arrest Warrant.

Before looking at the facts of that case, it is worth pointing out that the issuing of a European arrest warrant must comply with the principle of specialty. This means that a warrant may only be executed in respect of the offences listed therein. If the requesting authority wishes to prosecute the person surrendered for offences other than those for which that person has been surrendered, the executing authority must adopt a decision agreeing to it. The facts of the case, which were all over the UK media, are as follows. A high school teacher, Mr F., had run away with one of his female students of minor age,

[67] *Åkerberg Fransson*, para. 29.
[68] Judgment in C-168/13 PPU *F.*, EU:C:2013:358.

when UK authorities issued a European arrest warrant against him in connection with criminal proceedings brought against him for acts which could be classified in English law as child abduction. A few days later, he was detained by French authorities and consented to be handed over to the UK authorities. The European arrest warrant was executed by the Cour d'appel de Bordeaux, and Mr F. was sent to the UK.

Subsequently, the UK judicial authorities decided to prosecute him for the offence of sexual activity with a child under 16. Accordingly, they requested the Cour d'appel de Bordeaux to give its consent as that offence might constitute an offence other than that for which he had been handed over. The Cour d'appel de Bordeaux delivered a judgment in which it agreed to that request. Mr F. brought an appeal against that judgment before the Cour de cassation. After noting that Art. 695-46 of the French Code of Criminal Procedure did not allow for such an appeal, the Cour de cassation called into question the constitutionality of that provision and referred the case to the *Conseil constitutionnel* for consideration.

Having doubts as to the compatibility of that article of the French Code of Criminal Procedure with the French Constitution, the French *Conseil constitutionnel* asked the Court of Justice whether the Framework Decision had to be interpreted as precluding Member States from providing for a constitutional right which would enable the person concerned to bring an appeal having suspensive effect against a decision agreeing to the request in issue.

The Court of Justice reached the conclusion that it did not. The Framework Decision did not prohibit the person concerned from bringing such an appeal. Nor did it require Member States to make provision for it. The Charter leads to the same conclusion: its Art. 47 affords an individual a right of access to a court but not to a particular number of levels of jurisdiction. Regarding the possibility of making such an appeal, there was therefore no European consensus, be it legislative or constitutional. As a consequence, it was for each Member State to decide whether its constitutional law permitted the national legislator to rule out such an appeal or else to provide for it. Needless to say, in making provision for such an appeal the national legislator could not call into question the system of mutual recognition set out in the Framework Decision. This meant, in particular, that such an appeal could not prevent the executing authority from adopting a decision within the time-limits prescribed by the Framework Decision.

Three weeks after the Court of Justice delivered its judgment, the French *Conseil constitutionnel* ruled on the question of constitutionality referred by the Cour de cassation.[69] It found that, in light of the principles of non-discrimination and effective judicial protection as protected by the French Constitution, the expression "not subject to appeal" laid down in Art. 695-46 of the French Code of Criminal Procedure was unconstitutional. Whilst the French Constitution does not require a second level of jurisdiction, it does guarantee that limitations to any right of appeal, which amount to a limitation on the right to effective judicial protection, must be justified. However, the

[69] *See Conseil constitutionnel*, Decision No. 2013–314 QPC of 14 June 2013.

French *Conseil constitutionnel* found that neither EU law nor French law provided for such a justification.[70]

It follows from a joint reading of *Melloni* and *F*. that it is not for the Court of Justice to decide when and how national diversity is to be replaced by European unity. That is a decision to be made by the EU political institutions. Since the EU is governed by the principle of democracy, it is for the EU political process to draw the line between unity and diversity. As a court that upholds the rule of law, the Court of Justice may only ascertain that, when drawing that line, the EU political institutions have complied with the EU constitutional consensus.

3.2. Diversity in the absence of EU legislation

In the absence of EU legislation, and in so far as there are no national measures producing a protectionist effect (or having a protectionist intent), Member States enjoy a broad leeway to safeguard national interests which are deemed fundamental to their identity. Beyond a core nucleus of shared values where the Court of Justice must ensure uniformity, EU law cannot disregard the cultural, historical, and social heritage that is part and parcel of national constitutional traditions. In other words, outside the scope of constitutional consensus, the Court of Justice welcomes "value diversity". The rulings of the Court of Justice in *Omega*, *Sayn-Wittgenstein* and *Runevič-Vardyn and Wardyn* illustrate this approach.[71]

3.2.1. Human dignity

In *Omega*, the Bonn police authority prohibited Omega from offering games involving the simulated killing of human beings on the ground that they infringed human dignity. Given that Omega had entered into a franchise contract with a British company, it argued that the ban was contrary to the freedom to provide services embodied in ex Art. 49 EC (now Art. 56 TFEU). Thus, the Court of Justice was called upon to strike a balance between ex Art. 49 EC and the concept of human dignity, as understood by a national authority. After noting that the ban constituted a restriction on the freedom to provide services which, nevertheless, pursued a legitimate objective – the protection of human dignity – the Court of Justice ruled that, for the purposes of applying the principle of proportionality, "[i]t 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."[72] Thus, the fact that a Member State other than Germany had chosen a system of protection of human dignity that was less restrictive of the freedom to provide services did not mean that the German measure was contrary to the EC Treaty. Given that the ban satisfied the level of protection required by the

[70] *See* the Commentary on Decision No. 2013-314.

[71] Judgments in C-36/02 *Omega*, EU:C:2004:614; C-208/09 *Sayn-Wittgenstein*, EU:C:2010:806, and C-391/09 *Runevič-Vardyn and Wardyn*, EU:C:2011:291.

[72] *Omega*, para. 37.

German constitution and did not go beyond what was necessary to achieve that result, the Court of Justice considered that it was a justified restriction on the freedom to provide services. Thus, *Omega* demonstrates that the Court of Justice did not seek to impose a common conception of human dignity. Nor did it embrace the national conception prevailing outside Germany which was more protective of free movement. Instead, it endorsed a model based on "value diversity", where national constitutional traditions are not in competition with the economic objectives of the Union, but form an integral part of them.[73]

3.2.2. The abolition of titles of nobility

The Court of Justice followed the same approach in *Sayn-Wittgenstein*. The facts of the case were as follows. In 2003, the Austrian Constitutional Court delivered a judgment in which it interpreted the Law on the abolition of the nobility, which enjoys a constitutional status as it implements the principle of equal treatment in this field. It held that the Law on the abolition of the nobility prohibits Austrian citizens from bearing titles of nobility, including those of foreign origin. This meant for Ilonka Fürstin von Sayn-Wittgenstein – an Austrian national residing in Germany who took the name of her German stepfather – that all official documents delivered by Austrian authorities could no longer contain the noble elements "Fürstin von", i.e. her surname could only be registered as "Sayn-Wittgenstein". The latter, who had been using the prefix "Fürstin von" both personally and professionally in Germany for more than fifteen years, argued that the Law on the abolition of nobility hampered her rights to free movement. By contrast, the Austrian Government stressed the importance of the Law on the abolition of nobility which, as a matter of public policy, "went hand in hand with the creation of the Republic of Austria".[74] Hence, the referring court asked, in essence, whether Art. 21 TFEU may authorise a Member State to rely on reasons of a constitutional nature in order not to recognise all the elements of a name obtained by one of its nationals in another Member State. The Court of Justice began by finding that the refusal by Austrian authorities to recognise the noble elements of Ms Sayn-Wittgenstein's surname constituted a restriction on her rights to free movement. Such refusal may cause Ms Sayn-Wittgenstein '"serious inconvenience' within the meaning of *Grunkin and Paul*[[75]] result[ing] from having to alter all the traces of a formal nature of the name 'Fürstin von Sayn-Wittgenstein' left in both the public and the private spheres, given that her official identity documents currently refer to her by a different name."[76] Indeed, the discrepancy in names may cast doubts as to Ms Sayn-Wittgenstein's identity and the authenticity of the documents she submits, or the veracity of their content.[77] As to the justification for

[73] T. Tridimas, *The General Principles of EU Law*, 2nd ed., Oxford University Press, Oxford: 2006, p. 341.

[74] *Sayn-Wittgenstein*, para. 32.

[75] Judgment in C-353/06 *Grunkin and Paul*, EU:C:2008:559.

[76] *Sayn-Wittgenstein*, para. 67.

[77] *Ibidem*, para. 69.

the restriction, the Court of Justice held that, as a matter of public policy, a Member State may restrict the right to free movement in order to protect an element of its national identity.[78] Although public policy had to be interpreted strictly, the Court of Justice noted that, since "the concept of public policy may vary from one Member State to another and from one era to another [,] [t]he competent national authorities must therefore be allowed a margin of discretion within the limits imposed by the Treaty."[79] Next, the Court of Justice recognised as legitimate the objective pursued by the Law on the abolition of the nobility, which "seeks to ensure the observance of the principle of equal treatment as a general principle of law",[80] enshrined in Art. 21 of the Charter. As to the principle of proportionality, the Court of Justice recalled its findings in *Omega*:

> 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.[81]

Hence, the Court of Justice ruled that the refusal by the Austrian authorities to recognise the noble elements of the surname of a national of that State was compatible with Art. 21 TFEU.

Moreover, in order to strengthen its reasoning, the Court of Justice referred for the first time, albeit in passing, to Art. 4(2) TEU, recalling that under that provision "the [EU] is to respect the national identities of its Member States, which include the status of the State as a Republic."[82] This is an important development which suggests that Art. 4(2) TEU is to be interpreted as protecting "national identity", that concept being understood as the fundamental constitutional principles of the Member States. However, the fact that the Court of Justice mentioned Art. 4(2) TEU in the context of the principle of proportionality implies that "national identity" is not absolute, but must be weighed against the fundamental values of the EU itself.[83] This means that where

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[78] *Ibidem*, paras. 83 and 84.

[79] *Ibidem*, para. 87.

[80] *Ibidem*, para. 89.

[81] *Ibidem*, para. 91.

[82] *Ibidem*, para. 92.

[83] *See* A. von Bogdandy & S. Schill, *Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty*, 48 Common Market Law Review 1417 (2011), p. 1420 (arguing that "[n]ational identity (…) does not enjoy absolute protection under EU law, but has to be balanced against the principle of uniform application of EU law; implementing this duty is a task of both the [Court of Justice] and national constitutional courts as parts of a system of composite constitutional adjudication"). See also S. Rodin, *National Identity and Market Freedoms after the Treaty of Lisbon*, 7 Croatian Yearbook of European Law and Policy 12 (2011), p. 41 (who argues that "[t]he role of Article 4(2) TEU is twofold. As a competence rule, it imposes limits on EU regulation, even in cases where such regulation would otherwise be permissible. As an interpretative rule, it provides guidance for the [Court of Justice] and national courts on how to interpret the relationship between EU and national law").

fundamental constitutional values of the Member States are at stake but no core value of the Union is at issue, then "value diversity" will prevail over the uniform application of EU law. Conversely, where the national measure concerned threatens values of essential importance to the Union (such as the prohibition of discrimination on grounds of nationality), the Member State concerned will not be able to rely on Art. 4(2) TEU. The approach followed by the Court of Justice in *Omega* and *Sayn-Wittgenstein* is fully consistent with this reading of Art. 4(2) TEU. Where the contested national measure has nothing to do with protectionism,[84] i.e. where no core value of the Union is at stake, the Court of Justice seeks to respect "value diversity" by applying a "proportionality test" which leaves to the Member States the level at which constitutional principles of fundamental importance are to be protected.

3.2.3. The protection of the official national language

In *Runevič-Vardyn and Wardyn*, the Court of Justice was called upon to examine the compatibility of Lithuanian rules, which required a person's forenames and surnames to be entered in documents indicating civil status which that Member State issued using only the characters of the Lithuanian alphabet, with the Treaty provisions on EU citizenship. For example, this meant that the use of diacritical marks, such as "Ł", was not allowed and that names written with the letter "W" had to be rewritten using the letter "V".[85] In 2007, Malgožata Runevič-Vardyn, who was a Lithuanian national belonging to the Polish minority of that Member State (but not having Polish nationality), requested that the Vilnius Civil Registry Division change her forename and maiden name, as they appear on her birth certificate and marriage certificate, namely "Malgožata Runevič", to "Małgorzata Runiewicz", which corresponds to her name according to the Polish spelling rules (the "first request"). She also put forward a similar request asking for her second surname – i.e. her husband's surname –, as it appears on her marriage certificate, to be changed from "Vardyn" to "Wardyn" (the "second request"). Her husband, a Polish national, also requested that his forenames, as they appear on his marriage certificate, namely "Lukasz Pawel", be changed to "Łukasz Paweł" (the "third request"). It is worth noting that the competent Lithuanian authorities had written his surname using the Polish rules governing spelling, i.e. "Wardyn". However, in accordance with Arts. 3.281 and 3.282 of the Lithuanian Civil Code, the Vilnius Civil Registry Division rejected all three requests. That decision was subsequently challenged by Ms Runevič-Vardyn and her husband before the First District Court of the City of Vilnius, which sought guidance from the Court of Justice. Ms Runevič-Vardyn argued that the decision of the Vilnius Civil Registry Division adversely affected her rights of free movement under Art.

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[84] *Cf.* Judgment in C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union*, EU:C:2007:772. See in this regard, K. Lenaerts & J. A. Gutiérrez-Fons, *The constitutional allocation of powers and general principles of EU law*, 47 Common Market Law Review 1629 (2010).

[85] On the use of diacritical marks as a right of minorities under public international law, *see* R. Satkauskas, *Use of Diacritics: Towards a New Standard of Minority Protection?*, 21 Lithuanian Foreign Policy Review 112 (2008).

21 TFEU, as the civil status documents issued by the competent Lithuanian authorities on which neither her forename nor her surnames were written in accordance with rules governing Polish spelling, failed correctly to reflect the nature of her relationship with her husband or even her son.

As to the existence of a restriction, the Court of Justice proceeded to examine each of the three requests separately. In relation to the first request, it ruled out that the decision of the Vilnius Civil Registry Division refusing to change Ms Runevič-Vardyn's forename and maiden name, as they appear in her birth certificate, was liable to deter her from exercising her rights of free movement, since those names had always been entered in the civil registry in the same way. As to the second request, the Court of Justice held that it was for the referring court to decide whether the fact that her second surname was spelled with a "V" instead of with a "W" – i.e. it was written in a form that did not match her husband's surname as registered in Poland – could cast doubts as to her and her husband's identity and the authenticity of the documents which they submitted. Referring to *Garcia Avello* and *Sayn-Wittgenstein*,[86] the Court of Justice held that if the decision of the Vilnius Civil Registry Division "involve[d] the possibility that the truthfulness of the information contained in those documents [would] be called into question and the identity of that family and the relationship which exist[ed] between its members placed in doubt",[87] that might cause serious inconvenience to Ms Runevič-Vardyn and her husband amounting to a restriction on the rights conferred upon them by Art. 21 TFEU. Finally, as to the third request, the Court of Justice found that the only difference between the name of Ms Runevič-Vardyn's husband, as it appears on their marriage certificate, and the way in which it would have been written using rules governing Polish spelling was that the competent Lithuanian authorities had omitted diacritical marks. That omission, in view of the Court of Justice, was not sufficient to cause "serious inconvenience" to Ms Runevič-Vardyn's husband in the exercise of his rights of free movement. As the Opinion of AG Jääskinen points out, "diacritical marks are often omitted in many daily actions for practical reasons" (e.g. technological constraints inherent in some computer systems).[88] The Court of Justice also added that "for people who are unfamiliar with a foreign language the significance of diacritical marks is often misunderstood and they will not even notice them."[89]

In relation to the second request, the Court of Justice also examined whether, in the event of the referring court finding a restriction on the rights of Ms Runevič-Vardyn and her husband set out in Art. 21 TFEU, such a restriction could be justified. Several Member States intervening in support of Lithuania argued that it was legitimate for a Member State to ensure that the official national language was protected in order to safeguard national unity and preserve social cohesion. In addition, the Lithuanian

[86] Judgments in C-148/02 *Garcia Avello,* EU:C:2003:539, para. 36, and *Sayn-Wittgenstein*, paras. 55 and 66-70.

[87] *Runevič-Vardyn and Wardyn*, para. 77.

[88] *Ibidem*, para. 81.

[89] *Ibidem*.

Government stressed that "the Lithuanian language constitutes a constitutional asset which preserves the nation's identity, contributes to the integration of citizens, and ensures the expression of national sovereignty, the indivisibility of the State, and the proper functioning of the services of the State and the local authorities".[90] The Court of Justice held that it was legitimate for the Member State concerned to protect and promote its official language. Referring to Art. 3(3) TEU and Art. 22 of the Charter, the Court of Justice observed that the EU is committed to respecting its rich cultural and linguistic diversity. Most importantly, the Court of Justice stated that the protection of a State's official language is part and parcel of its national identity which, in light of Art. 4(2) TEU, the EU must protect. Regarding the principle of proportionality, the Court of Justice limited itself to providing general guidance. It held that it was for the referring court to balance, on the one hand, the right of Ms Runevič-Vardyn and her husband to respect for their private and family life and, on the other hand, the legitimate protection by the Member State concerned of its official language and traditions. However, the Court of Justice seemed to suggest that, if a restriction were to be found in relation to the second request, it would be very difficult for that restriction to comply with the principle of proportionality: the surname "Wardyn" had already been entered on the very same marriage certificate issued by the competent Lithuanian authorities. Moreover, in Lithuania, the name of nationals of other Member States may be written using characters of the Roman alphabet which do not exist in the Lithuanian alphabet.

CONCLUDING REMARKS

European values which are the result of a constitutional consensus are embedded in primary EU law. It is essentially for the political process to determine when, and indeed whether, those norms – which require the unanimous consent of the Member States and, where appropriate, of their citizens – should be adopted. Constitutional consensus can also lead to the adoption of general principles of EU law. These principles allow room for flexibility, yet in a context of conceptual continuity between the European Union and its Member States. When discovering a general principle, the Court of Justice serves as a bridge between the constitutional traditions common to the Member States and their shared European values.

It is the existence or absence of an EU legislative consensus that indicates whether the Member States are developing at the same pace and in the same manner or whether national societies are evolving in accordance with their own scales of values. That being said, national diversity and EU legislative consensus must both comply with values which are regarded as pan-European, i.e. those that are the object of a constitutional consensus at EU level.

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[90] *Ibidem*, para. 84.

It is this latter consensus that guarantees that the forces that bring Europeans together are stronger than those that pull them apart or, to put it more eloquently, paraphrasing the words of Maria Skłodowska-Curie, the European Union is based on the idea that we, Europeans must be “less curious about [differences in] people and more curious about [common] ideas.”

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MEMORY LAWS OR MEMORY LOSS? EUROPE IN SEARCH OF ITS HISTORICAL IDENTITY THROUGH THE NATIONAL AND INTERNATIONAL LAW

Abstract:
This article provides an overview of "memory laws" in Europe, reflecting upon what may be called the "asymmetry" of such laws. It then looks at the special case of Poland and its troubled experience with memory laws; it considers the question of whether, in the eyes of the law – genocide, and in particular the Holocaust – is so "special" that its public denials warrant legal intervention. It also looks at the case law of the European Court of Human Rights and its (not necessarily coherent) "doctrine" on memory laws and their consistency, or otherwise, with the European Convention for the Protection of Human Rights and Fundamental Freedoms (and in particular with freedom of expression as laid down in Art. 10). The article concludes by asserting that even if we take the law as an indicator of European public memory, there is no consensus on the past, except perhaps for the special case of the Holocaust. The main challenge lies in determining whether memory laws, defined by some as social engineering and the imposition of "imperative" versions of memory, are consistent with the principles inherent in open, democratic and free societies in Europe. This challenge remains unmet.

Keywords: ECHR, ECtHR, European Convention on Human Rights, European Court of Human Rights, genocide, Holocaust, memory law, Poland

> Memory is both a blessing and a curse for nations with history marked by tragedy. In a moment of catastrophe memory is the ultimate weapon for a nation, the very last bastion of national self-defence (...). Such memory creates beautiful national myths and elevates the past; it beautifies the ugly; the sins of its own community are thus doomed to be forgotten.[1]

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[1] A. Michnik, *Żydowski problem z pamięcią* (Jewish problem with the memory), Gazeta Wyborcza, 28 April 2013.

INTRODUCTION

Each nation and each state in the world has, in its history, moments of glory and pride, and also episodes which are shameful and barbaric. There is therefore a temptation, hard to resist by politicians, to design the officially endorsed educational programmes, political actions and legal rules in such a way as to establish a collective memory which presents the state in the most positive light. With these tools they emphasize the glory and minimize the shameful chapters of their nation's past. This phenomenon is not a modern invention and has served since ancient times as a tool of influencing the present through "regulating" the past.[2]

The concept of memory laws (French *lois mémorielles,* German *Erinnerungsgesetze*) first appeared prominently in the broad public discourse in France in 2001, when the statute known as Taubira's Law was enacted,[3] which defined both the Atlantic slave trade and slavery itself as a crime against humanity. Since then fierce debates have accompanied attempts to use the law to achieve justice through the recognition of past sufferings.

Legal regulations referred to as 'memory laws' assume basically two forms, taking the nature of their consequences into account as the main criterion for the distinction: (1) the legal establishment of public acts of memory and official orthodoxy with respect to certain historical facts, without however any sanctions attached to contrary assertions (e.g. recognition of some event as genocide, or regulations establishing official dates of commemoration of an important event, such as the Italian Act of 2000 setting 27 January as the Day of National Remembrance of the Holocaust);[4] and (2) laws prohibiting the denial of certain historical events or requiring their interpretation in a specified way, under the threat of the imposition of sanctions, usually of a criminal nature. As regards the latter form of "memory law", the sanctions relate mainly to negation of the fact that crimes of genocide were committed, or interpretation of these crimes in a manner contrary to the one defined by the legislator, usually prohibiting their denial, approval, or trivialization.[5] Basic legal problems emerge here, as prohibitions of this kind are inevitably related to fundamental rights and freedoms, and imposing limitations on them will not be acceptable for many persons.

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[2] Emanuela Fronza gives the example of a ban on public commemoration of crimes committed in Athens during the rule of thirty tyrants. *See* E. Fronza, *The Punishment of Negationism: The Difficult Dialogue between Law and Memory*, 30 Vermont Law Review 610 (2006).

[3] Law no. 2005-158 of 23 February 2005, J.O. 24 February 2005.

[4] This form of memory law is not usually controversial, unlike the second type, which applies criminal sanctions.

[5] *E.g.* in Lithuania, Art. 170 of the Criminal Code prohibits the public denial, belittling or support of international crimes, crimes of the USSR or Nazi Germany against the Republic of Lithuania and her inhabitants.. In Lichtenstein, Art. 283 of the Criminal Code contains a provision stating that "Whoever publicly denies, coarsely trivialises, or tries to justify genocide or other crimes against humanity via word, writing, pictures, electronically transmitted signs, gestures, violent acts or by other means shall be punished with imprisonment for up to two years." The provisions are quoted in the country reports of the European Commission against Racism and Intolerance, available at: http://www.coe.int/t/dghl/monitoring/ecri/activities/countrybycountry_en.asp (accessed 30 March 2015).

Advocates of memory laws argue that legal regulations concerning historical facts and events, and their interpretation, serve as guardians of the truth about the past and honour the victims of murky times.[6] Memory laws are also meant to arrest the process of obliteration of memory about the nature of totalitarian regimes and dictatorships, which frequently resort to massive crimes. In consequence, the democratic order of the state and the foundations of a democratic society are also deemed to be protected. Conversely, opponents treat memory laws as an inadmissible establishment of historical dogma by means of legal measures.[7] Members of the Liberty for History (*Liberté pour l'Histoire*) Association a few years ago issued the famous Appeal of Blois (*Appel de Blois*), in which they proclaimed: "History must not be a slave to contemporary politics nor can it be written on the command of competing memories. In a free state, no political authority has the right to define historical truth and to restrain the freedom of the historian with the threat of penal sanctions (…)."[8]

Indeed, the very fragile nature of truth concerning facts is, as Hannah Arendt described it, not only prone to forgetfulness but also to manipulation.[9] But this insight can in fact be invoked as an argument both for and against the establishment of memory laws, which can be used either as an instrument to manipulate the truth about the past, or to serve as its guardian (i.e. prevent others from engaging in manipulation).

This article contends that the complex relationship between memory, history, politics and law is a fact, and the challenges it poses must be faced by historians, politicians, sociologists and legal scholars. The importance of the legal component of this equation is described by Lawrence McNamara, who states that: "As law mediates and regulates claims to justice in the present, its grasp of how to deal with the past must be a central concern. There is too much at stake for things to be otherwise."[10]

Therefore, this article analyses first and foremost the legal, but also political and social, conflicts surrounding the contemporary European memory laws. It explores the special legal status with respect to the questioning, or challenging, of certain historical facts, as well as a certain asymmetry involved in recognizing certain past events as having a special, legally protected status for their preferred interpretation. This asymmetry will be discussed in particular with regard to the case law of the European Court of Human Rights. The Strasburg Court has had to consider on several occasions the scope of the margin of appreciation enjoyed by states in providing for legal enforcement of certain interpretations of their own past, but it has not applied this margin consistently to laws related to all the evils that plague European history.

I argue that although the memory of the horrors experienced by people in the past should be a shared endeavour for all, a dialogue about history carried out solely with

[6] R. Cohen-Almagor, *Holocaust Denial is a Form of Hate Speech*, 2(1) Amsterdam Law Forum 33 (2009).

[7] *See* R. Rémond, *History and the Law*, 4046 Études (2006).

[8] Liberté pour l'histoire, *Blois Appeal*, available at: http://www.lph-asso.fr/index.php?option=com_content&view=article&id=47&Itemid=14&lang=en (accessed 30 March 2015).

[9] H. Arendt, *Human Condition*, University of Chicago Press, Chicago: 1958, p. 232.

[10] L. McNamara, *History, Memory and Judgment: Holocaust Denial, The History Wars and Law's Problems with the Past*, 26 Sydney Law Review 353 (2004), p. 394.

the use of legal sanctions can significantly erode the space and opportunity for conflict resolution. A serious risk exists that the legal path of enforcement will exacerbate antagonisms and sometimes provoke outright hostility concerning inherently different perspectives of historical events. At the same time, I also try to demonstrate that in the case of some bans on genocide denial, the law serves as a necessary and justified tool for counteracting incitement to racial, ethnic and religious hatred.

1. FROM THE PROLIFERATION OF MONUMENTS TO WILFUL AMNESIA: EUROPE'S ASYMMETRIC MEMORY

As noted by Jim Hoagland, Europe is a continent colonized by its past and memory.[11] This statement seems particularly true with reference to the history of 20th century Europe, which is reflected in, *inter alia*, the continually growing number of monuments, museums, and symbols commemorating the past, and nowadays increasingly in memory laws. Memory laws are today characteristic mainly of the European states. In the United States, the First Amendment principles would almost certainly be used to strike down memory laws comparable to those existing in many European legal systems.[12] One of the primary reasons for such a discrepancy in legal attitudes is assessment of the risks and effects created by such limitations on free speech. As Wojciech Sadurski put it, in the context of penalizing negationism: "In the United States, groups which feed on literature such as 'historical revisionism' are part of the political folklore, just as are flat-Earthers and Montana separatists: probably irritating and deeply offensive to many, but very unlikely to reach a capacity to challenge the democratic system to its core."[13]

One of the most controversial memory laws in Europe is the 2007 Law of Historic Memory[14] introduced by the Spanish Congress of Deputies.[15] The provisions of the law, which include limitations on individual rights and freedoms, concern two aspects: the prohibition of political events at the Valley of the Fallen and Franco's burial place, and the removal of Francoist symbols from public buildings and spaces, with exceptions granted for artistic or architectural reasons and to religious sites. At first sight, these prohibitions do not seem oppressive and controversial, at least if one compares them to

[11] J. Hoagland, *Coming to Terms with the War: It's Now or Never*, International Herald Tribune, 9 April 1998.

[12] For more on the First Amendment principles, *e.g.* G. R. Stone et al., *The First Amendment*, Aspen Publishers, New York: 2012.

[13] W. Sadurski, *'It All Depends': The Universal and the Contingent in Human Rights*, EUI Working Paper, 2002/7, p. 28.

[14] Law to recognise and broaden rights and to establish measures in favour of those who suffered persecution or violence during the Civil War and the Dictatorship, B.O.E. 2007, 52/2007, English translation available at: http://www.derechos.org/nizkor/espana/doc/lmheng.html (accessed 30 March 2015).

[15] For a detailed analysis of the legal dimension of the transitional justice period in Spain, see *e.g.* J. M. Tamarit Sumalla, *Historical Memory and Criminal Justice in Spain. A Case of Late Transitional Justice*, Intersentia, Cambridge – Antwerp – Portland: 2013.

Austria's Prohibition Act, which provides the legal basis for the process of denazification in Austria and aims at suppressing any potential rebirth of Nazism by providing severe penalties (up to 10 years imprisonment) for a wide range of neo-Nazi activities.[16] But although the wording of the Spanish law declares that its aim is the "recognition of the victims of political, religious and ideological violence on both sides of the Spanish Civil War and of Franco's regime", its provisions seem to indicate that it was designed as a tool for praising and aiding Franco's victims and condemning his supporters. Thus the law is deemed by many to violate the Spanish "Pact of Forgetting", legally incorporated into the 1977 Amnesty Law.[17] It was therefore bound to arouse the split memory of society and face fierce criticism from the political right. As a result, some have criticized it as being "[a]ccusatory rather than reconciliatory."[18]

Another example of memory laws are the legal prohibitions which have been introduced in some post-communist countries against the public denial of the crimes of Communism and Stalinism and the display of their symbols (such as the hammer and sickle).[19] In the context of these regulations it is worth noting the bill on amendment of the Criminal Code in Russia. Work on the amendment was commenced in 2009 by the State Duma,[20] and provided that any form of total or partial rehabilitation of Nazism and Nazi criminals, as well as the denial of Nazi crimes, would be punishable by a fine and/or up to three years imprisonment. At the same time however, the proposed law was initially also aimed at punishing the characterization as criminal of any actions undertaken by the member states of the anti-Hitler coalition, including crimes committed by Stalin in Poland, thus upholding the Russian myth of the Great Patriotic War. From

[16] Verbotsgesetz [Prohibition Act] 1947, 8 May 1945, BGBl. 25/1947, amended in 1992: BGBl. 148/1992.

[17] The Spanish Amnesty Law has itself been subject to sharp controversies and criticism, (i.e. by the UN human rights bodies), which stress that under international human rights law there must be no statute of limitations for crimes against humanity, as are contained in the 1977 law. See the UN position: http://www.trust.org/alertnet/news/spain-must-lift-amnesty-for-franco-era-crimes-un (accessed 30 March 2015).

[18] D. E. Stofleth, *Memory Politics in Spain: The Law of Historical Memory and the Politics of the Dead* (International Association of Genocide Scholars database), available at: http://www.genocidescholars.org/sites/default/files/document%09%5Bcurrent-page%3A1%5D/documents/IAGS%202011%20Daniel%20Stofleth.pdf (accessed 30 March 2015).

[19] The constitutionality of legal provisions imposing sanctions against those who publicly display such symbols has already been challenged in national constitutional courts. On 4 June 2013 the Constitutional Court of Moldova ruled on the constitutionality of Law No. 192 of 12 July 2012 as regards the prohibition of symbols of the totalitarian communist regime and of promoting the totalitarian ideologies, finding it unconstitutional as it has failed to satisfy the requirements of clarity and predictability. A similar decision has been issued by the Polish Constitutional Tribunal, while in the case of the Czech Republic and Hungary, the constitutionality of bans against Communist symbols has been upheld. See the brief submitted on 11 March 2013 by the European Commission for Democracy through Law of the Council of Europe and the OSCE Office for Democratic Institutions and Human Rights Amicus Curiae upon the request of the Constitutional Court of Moldova, available at: http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)004-e (accessed 30 March 2015).

[20] Bill on the amendment of the Penal Code of Russian Federation, General Code of Russian Federation 1996, No. 25, item 2954.

a Polish perspective such a provision would legitimise an inadmissible historical lie, giving it the authority of law.[21] Fortunately, in the face of strong criticism the final scope of the provision was limited to criminalisation of the denial or approval of Nazi crimes.[22]

Interestingly, the most numerous legal regulations concerning different types of historical assertions have been established in France, where for years the truth about the nation's colonialist past and collaboration with the Nazis was pushed into official and social oblivion.[23] The laws established by the French Parliament include: *Loi Gayssot* of 13 July 1990,[24] which punishes, with a fine and/or imprisonment of one year, denial of the crimes against humanity mentioned in Art. 9 of the London Agreement of 8 August 1945; *Loi Arménie* of 29 January 2001,[25] a law recognizing the Armenian genocide in the Ottoman Empire in 1915; *Loi Taubira* of 21 May 2001,[26] which defines both the Atlantic slave trade and slavery itself, practiced from the 15th century, as a crime against humanity; *Loi Rapatriés* of 15 February 2005,[27] declaring that the French nation expresses its gratitude for activities carried out by France in the territories previously under French sovereignty, and further declaring in its Art. 4 that French educational programs should teach the "positive role" of France's presence there (which is a rather controversial description of the nature of colonial domination).[28] The latest controversies emerged in January 2012 when both houses of the French Parliament adopted a new law criminalizing denial of the genocide of Armenians committed by the Turks during the First World War, with the same penalties applicable as in the case of Holocaust denial.[29] Even though the provision was shortly thereafter struck down by the Constitutional Council,[30] which examined the law after receiving numerous appeals against it signed by dozens of lawmakers from across the political spectrum arguing that it unconstitutionally violated freedom of speech, the fact of its adoption by the French Parliament led to a serious conflict between Paris and Ankara.[31]

[21] For more on Stalinist crimes committed in, *inter alia*, Poland, *see e.g.* A. Applebaum, *Iron Curtain: The Crushing of Eastern Europe, 1944-1956*, Allen Lane, London: 2012.

[22] *See* N. Koposov, *Historical memory laws in Russia and Eastern Europe* (text of a speech delivered by Nikolay Koposov at the Liberté pour l'histoire General Assembly, Paris, France, 21 May 2011).

[23] For more on French memory laws, *see* D. Fraser, *Law's Holocaust Denial: State, Memory, Legality*, [in:] L. Hennebel, T. Hochmann (eds.), *Genocide Denials and the Law*, Oxford University Press, New York: 2011, pp. 28-48.

[24] Loi n° 90-615 du 13 juillet 1990 tendant à réprimer tout acte raciste, antisémite ou xenophobe, JORF n° 162 du 14 juillet 1990.

[25] Loi n° 2001-70 du 29 janvier 2001 sur le génocide arménien.

[26] Loi n° 2001-434 du 21 mai 2001 tendant à la reconnaissance, par la France, de la traite et de l'esclavage en tant que crime contre l'humanité.

[27] Loi n° 2005-158 du 23 février 2005 portant reconnaissance de la Nation et contribution nationale en faveur des Français rapatriés.

[28] This provision was ultimately repealed in 2006.

[29] Loi n° 3842 du 23 janvier 2012 portant transposition du droit communautaire sur la lutte contre le racisme et réprimant la contestation de l'existence du génocide arménien.

[30] Décision n° 2012-647 DC du 28 février 2012.

[31] As claimed by Robert Badinter, the decision of the Constitutional Council formally and ultimately dismissed historical memory laws as such. The Council stated that laws recognizing certain events as geno-

Turkey suspended military cooperation, bilateral political agreements, and economic contracts with France in reaction to the bill, which the Turkish Foreign Minister called a "black stain" on France.[32] Turkey had from the very beginning attacked the French initiative to penalize the denial of the genocide of Armenians. Yet at the same time Turkey has established and still applies provisions of its own Criminal Code prohibiting the "slandering of the Turkish nation" and "slandering of the state of the Republic of Turkey",[33] which in Turkey is used by the authorities as an instrument of repression against those who deal with the problems of the Armenian population in the Ottoman Empire, as well as against modern manifestations of these historical events.[34] In particular, the authorities punish persons for claiming that the events of 1915 constituted genocide against the Armenian people. Orhan Pamuk, a world-famous writer and Nobel Prize laureate, was among those accused of such an expression.[35]

Germany has not escaped serious controversy either. Although memory of the Nazi crimes committed during the Second World War is maintained there, including by means of legislation, in recent years a trend has been observed (monitored with particular intensity and concern in states such as Poland) to emphasize the war sufferings of the German people themselves, and to make attempts to equate some harms done to Germans with the harm done by them to others. The initiative to establish the Centre against Expulsions in Germany, mainly commemorating the German victims of expulsions carried out during and after the Second World War, opened with the support of the German government and parliament. This may be viewed as symptomatic of a change in political sensitivities, according to which all murders and oppressions are comparable.[36]

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cide does not possess the normative character essential to law. Furthermore, Parliament has no discretion to define such events as criminal acts, as it should be left to the independent judiciary, according with the separation of powers rule. R. Badinter, *Is this the end for the historical memory laws?*, paper presented to the General Assembly of Liberté pour l'histoire, Paris, France, 2 June 2012 (on file with the author).

[32] S. Sayare, S. Arsu, *Genocide Bill Angers Turks as It Passes in France*, New York Times, 23 January 2012.

[33] The law (Art. 301 of the Turkish Criminal Code) was significantly mitigated in May 2008, i.e. through limiting its material scope (earlier the insult concerned the broad term of "Turkishness") and reducing the severity of penalties. Moreover, the application of the said provision now depends on the formal consent of the Turkish Minister of Justice. See the Amnesty International comment on the provision: http://humanrightsturkey.org/2013/04/03/article-301-end-it-dont-amend-it/ (accessed 30 March 2015).

[34] *See e.g.* T. Akçam, V. Dadrian, *Judgment at Istanbul: The Armenian Genocide Trials*, Berghahn Books, New York: 2011.

[35] The charges against Pamuk were ultimately dropped following strong criticism by EU officials, questioning the readiness of Turkey for the EU accession negotiation process. The international outcry also led to a public reaction of the European Parliament: *Questions for written answer to the Commission, Subject: Turkish court judgment against Orhan Pamuk*, E-003754/2011 (19 April 2011), available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2011-003754+0+DOC+XML+V0//EN&language=EN (accessed 30 March 2015).

[36] The Berlin Centre against Expulsions, the project put forward by the Federal Republic of Germany (and strongly criticized by the Polish government), is dedicated to the commemoration of the history of the German expellees and their homelands. The whole project was initiated by the influential German Federation of Expellees, representing the diaspora of ethnic Germans and their families, with strong far-right and revisionist sympathies.

The initiative was fiercely opposed in 2003 by Marek Edelman, the leader of the 1943 Warsaw Ghetto uprising. In response to the argument that Germans simply wanted to exercise their right to their own remembrance of those events, Edelman responded "What sort of remembrance? Did they suffer that much? Of course it is sad when you are forced to leave your house and abandon your land. But the Jews lost their houses and all of their relatives. Expulsions are about suffering, but there is so much suffering in this world. Sick people suffer, and nobody builds monuments to honour them."[37]

Thus it has been argued that German commemoration of expulsions must take into account their historical context. Any attempt at leaving the context aside will give rise to justified fears about the intentions of those who ignore the underlying reasons for the expulsions. Hence the resolution of the German Parliament of 2002 calling for "A centre against displacement with a European alignment" which in none of its paragraphs mentions the word "Nazism", can be considered very problematic.[38]

This short overview of the memory laws enacted in Europe demonstrates how divided and asymmetric the memory of European states and nations is, making the chances for even partial agreement very limited. This asymmetry usually involves, to a large extent, one nation ignoring or minimising its own guilt against other nations or peoples, while concentrating on the suffering of its own people and seeking to have such suffering acknowledged by the 'perpetrators'. Such an asymmetric approach is also visible in the different measures taken by the states to deal with the legacies of past crimes.

2. A CASE STUDY: POLAND

Poland is an interesting example of a state which, while putting its history on a pedestal of national values, wrestles with its difficult and often traumatic past, every now and then mixing it up with present-day politics and public life. I wish to emphasise that I am not making any claim for a strong exceptionalism of Poland in this regard. To the contrary, the way Poland has dealt with the legal vestiges of its Communist (and its earlier occupation-period) past is fairly typical of the dilemmas that the Central and Eastern European (CEE) legal systems face, and the measures which they adopt. The selection of this particular case study is influenced by the author's expertise and direct experience, as well as the fact that the legal measures described below raise stark questions about attempts to legalize a particular historical orthodoxy. During its four decades of life under communist rule, the Poles did not have the opportunity to engage in an open, public debate on its own recent history. In

[37] Passage from Marek Edelman's article published in Tygodnik Powszechny on 17.08.2003, quoted [in:] T. Judt, *From the House of the Dead: An Essay on Modern European Memory*, [in:] T. Judt, *Postwar: A History of Europe since 1945*, Penguin, New York: 2006, p. 829.

[38] Resolution of the German Federal Parliament of 4 July 2002, available at: http://www.z-g-v.de/english/aktuelles/?id=61 (accessed 30 March 2015).

communist times one went to prison for many years, and during Stalinist times could even lose his or her life, for telling the truth about the massacre of Polish prisoners of war by the Soviet secret police in the Katyń forest.[39] During the same period, and to a large extent in response to past and present injustices, the often mythical vision of Polish heroism was cherished and passed on to subsequent generations. This memory solidified the identity of the nation which regained its freedom and independence in 1989. In such circumstances the nation's own guilt for acts committed in the past was easily overlooked or ignored.

In Poland it is forbidden by law to deny, "publicly and contrary to the facts", Nazi crimes, communist crimes, and other crimes constituting crimes against peace, crimes against humanity or war crimes perpetrated against persons of Polish nationality and Polish citizens of other ethnicity or nationality in the period between 1 September 1939 and 31 July 1990.[40] Such denial is subject to a fine and/or imprisonment of up to three years. In addition the judgment is to be made public.

In 2006 the Polish Parliament, with the votes of the right-nationalist coalition then in power, incorporated a new provision into the Criminal Code (Art. 132(a)) establishing as a crime the "public defamation of the Polish nation", deemed to consist specifically of accusing it of involvement in Nazi and communist crimes.[41] To a large extent this regulation constitutes proof that a part of Polish society is not capable of accepting certain truths, some of which were described by Jan Tomasz Gross in his books published around that time,[42] although in fact they had been unveiled much earlier by eminent Polish historians who studied the history of the Holocaust on Polish lands, including Barbara Engelking, Jan Grabowski and Jacek Leociak from the Polish Centre for Holocaust Research.[43] These truths concerned incidents of "blackmail, extortion, denunciation, betrayal, and plunder of the living and the dead" carried out

[39] In Spring 1940, in the forests of Katyń, the Soviets murdered almost 5,000 Polish prisoners of war – military officers, policemen, intellectuals. Under Communism, history was often a no-entry zone. Thus, for many years the official version, propagated and enforced by the Soviets, stipulated that the crime was committed by the Nazis. For more on the Katyń massacre, see in particular A. Paul, *Katyn: Stalin's Massacre and the Triumph of Truth*, Northern Illinois University Press, DeKalb, IL: 2010.

[40] Act of 18 December 1998 on the Institute of National Remembrance—Commission for the Prosecution of Crimes against the Polish Nation, Polish Official Journal (Dz. U.), No.155, item 1016.

[41] For a detailed analysis of the provision, *see* I. C. Kamiński, *Kontrowersje prawne wokół przestępstwa polegającego na pomawianiu narodu o popełnienie zbrodni* (Legal controversies around the crime of public defamation of the Polish nation by accusing it of crimes), 8 Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego 5 (2010).

[42] The revelation of the truth about Poles who burnt their Jewish neighbours in a barn in the town of Jedwabne in July 1941, recounted by Jan Tomasz Gross in his book *Neighbors*, redefined the consciousness of a large part of Polish society. At the same time, it sparked off extremely negative, frequently anti-Semitic reactions. J. T. Gross, *Neighbors: The Destruction of the Jewish Community in Jedwabne, Poland*, Princeton University Press, Princeton: 2001.

[43] *See e.g.* J. Grabowski, *Rescue for Money: 'Paid Helpers' in Poland, 1939-1945*, 13 Search and Research Series (2008); B. Engelking, J. Leociak, *Warsaw Ghetto: The Guide through the Perished City*, Yale University Press, New Haven: 2009.

by Poles against Jews in many places in Poland during the Second World War and in its aftermath.[44]

The 2006 defamation provision was declared unconstitutional by the Polish Constitutional Tribunal in its judgment of 19 September 2008, based on the faulty legislative process employed in its passage.[45] The grounds for the decision were fundamentally different from those cited by the Ombudsman, who lodged the motion of unconstitutionality to the Tribunal. The Ombudsman claimed that the honour of, and respect for, the Polish nation were already sufficiently protected by the Criminal Code, which penalized public defamation of Polish nation or the Republic of Poland (Art. 133 of the Code) – and that this general defamation provision was not objectionable because it rested upon the impossibility of distinguishing between the truth or falsity of a statement, and instead rested on evaluations only. However, the new, more specific provision concerned an imputation of certain facts which *may* be analyzed in terms of their truth/falsity, and this, in the view of the Ombudsman, clashes both with constitutional freedom of expression, including freedom of acquiring and spreading information (Art. 54 of the Constitution) and constitutional freedom of academic research (Art. 73). According to the Ombudsman, the new provision failed the test of proportionality by producing a real risk that people will abstain from public utterances and from scholarly research concerning Nazi and Communist crimes, and so may restrict public discourse concerning recent Polish history.

In particular, the Ombudsman raised an obvious question: at what point may we establish that an allegation is false? If, on one hand, it is an obvious fact that at least some Poles participated in committing these crimes, and on the other hand the law mandates penalization of such an attribution of these crimes to the Polish Nation – how can we establish a clear framework of the truth about historical events, while respecting freedom of speech regarding those matters?[46]

This last point seems quite troublesome: the establishment of what constitutes the imputation of a crime to a Nation as a whole is totally arbitrary, and hence would greatly restrict freedom of speech and of scholarly historical research. In its judgment, the Tribunal did not, however, take into account any of the substantive allegations which were listed by the Polish Ombudsman in the motion to find the law unconstitutional. Instead, the Tribunal found unconstitutionality in the legislative *process* only, not in the substance of the provision. The procedure was indeed rather peculiar: the Criminal Code was amended by way of an amendment to another statute (the so-called Lustration Act). In itself this would not have been legally objectionable, even if somewhat awkward. What the Tribunal found questionable, however, was that the new provision was included into the amendment at a late stage of the legislative process by the Senate rather than the lower chamber (the Sejm), which only subsequently adopted (passively, i.e. by not rejecting) the contro-

[44] M. Krygier, *Lifting the Burden of the Past* (keynote address for symposium *Why Poland? Facing the Demons of Polish-Jewish History*, Melbourne, Australia, 28 November 2012).

[45] Judgment of the Polish Constitutional Tribunal, case no. K 5/07, OTK 7A/2008, item 124.

[46] Judgment of the Polish Constitutional Tribunal, case no. K 5/07, Part I (summarizing the arguments by the Ombudsman).

versial provision. The Tribunal, on the basis of the constitutional regulation of the Senate's legislative role (Art. 121 (2) of the Constitution) found that the Senate had unconstitutionally exceeded the scope of the subject-matter of the law submitted to it by the Sejm, thus exercising in fact its own legislative initiative through a defective procedure.[47]

In basing its decision on procedural grounds only, the Constitutional Tribunal avoided taking a stand on the socially, politically and historically sensitive issue of the permissibility of that type of "memory law", which penalizes persons for departing from a particular orthodoxy about recent history. By asserting, in a very cursory manner (one sentence only), that the unconstitutionality of a provision based on a defective procedure renders any discussion of its substance "pointless", and any further consideration of the provision, redundant,[48] the top judicial body squandered an opportunity to pronounce on the merits (and demerits) of a dangerous "memory law". In fact the Tribunal was not prevented from entering into a discussion on the merits by its finding of a procedural defect, as was plausibly (in the view of this author) asserted in a dissenting opinion by Judge Wojciech Hemerliński. The Judge pointed out that there has not been any coherent doctrine in the Tribunal case law to date about inappropriateness (or otherwise) of considering substantive objections once procedural defects have been found, and cited judgments giving both positive and negative answers to this question.[49] According to Judge Hemerliński, what should be decisive is the nature of the objections raised by the challenger. This, according to the dissenting Judge, is based on the principle that the Tribunal is bound by the scope of the challenge, and in this case the objections made by the Ombudsman were primarily substantive.

More ominously, Judge Hemerliński noted at the end of this dissent that since the provision had been struck down on the procedural grounds only, there are no obstacles towards re-adopting the same law, this time through a correct procedure. Fortunately this has not happened - not yet, in any event, and one hopes that it will not happen because the provision was undoubtedly an example of a dangerous and harmful memory law which, instead of defending the truth, would contribute to its denial in accordance with the legislator's will.

3. IS GENOCIDE DENIAL DIFFERENT? IS HOLOCAUST DENIAL UNIQUE?

Are regulations which penalize the denial, praise, or belittlement of the crime of genocide more justified than other memory laws, and is the penalization of Holocaust denial justified in a more convincing way? These questions are among the most difficult and controversial issues connected with memory laws. Many legal scholars trying to formulate the answers thereto find themselves in the position described by William

[47] *Ibidem*, Part III.3.
[48] *Ibidem*, Part III.6.
[49] *Ibidem*, Dissenting Opinion by Judge Wojciech Hemerliński, Part III.

Schabas, as being "[t]orn between the militant anti-racism of punishing denial and a latent libertarianism that bristles at any attempt to muzzle expression."[50]

3.1. Genocide denial

It can be argued that denial of the crime of genocide is not only harmful in the individual dimension, but also negatively influences society as a whole. Furthermore, the motivations behind a denial or trivialization of these crimes almost always arises from a hostile attitude toward the national, ethnic, racial or religious groups to which the victims belonged. Another argument in support of genocide denial laws is based on the view that the denial serves as a form of disguised hate speech.[51]

In a broader context, the denial of a genocide committed by former or present generations of a given society is often considered to be proof that this society is not ready to accept responsibility for its crime(s).[52] It can also be politically motivated, aimed at building unity and a shared identity of the nation (e.g. the French post-war policy of silence concerning the Vichy regime). A general negation of an established crime of genocide can be aimed at inciting hatred to a "hostile" state and society (consider e.g. the official policy of the Iranian administration against Israel and the Jews, of which denial of the Holocaust forms a central element).[53] Negationism can also be a mechanism used to incite the exclusion of minorities and socially weaker groups by stigmatizing them as liars who invented their sufferings, a tactic which facilitates further oppression. Many scholars studying the phenomenon of genocide, and its conditions and mechanisms, believe that denial of such a crime is a factor which increases the risk of its recurrence, which is one of the elements of the entire "process" of genocide. As observed by Henry Theriault: "Permitting genocide denial despite the damage it does not only reinforces deniers in their destructive activities but also opens an ethical loophole that will potentially allow a range of harassment, including violence, under various circumstances. At the extreme, successful genocide denial begets genocide."[54]

Laws which prohibit negationism are deemed to serve as preventive mechanisms to exclude the risk of such crimes reoccurring in the future. Thus, those who justify the intervention of the law into the area of history and memory argue that, in the case of the crime of genocide, it is not the penalization of negationism, but rather negationism itself which is in contradiction with democratic principles and values, and thus a violation of human rights.

[50] W. Schabas, *Preface*, [in:] Hennebel and Hochmann, *supra* note 23, p. 13 (xiii).

[51] *See in particular* A. Tsesis, *Destructive Messages: How Hate Speech Paves the Way for Harmful Social Movements*, New York University Press, New York: 2002; R. A. Kahn, *Holocaust Denial and Hate Speech*, [in:] Hennebel, and Hochmann, *supra* note 23; R. Cohen-Almagor, *Holocaust Denial is a Form of Hate Speech*, 2(1) Amsterdam Law Forum (2009), Cohen-Almagor, *supra* note 6.

[52] *See* B. Cooper, *Denying Genocide: Law, Identity and Historical Memory in the Face of Mass Atrocity Conference*, 9 Cardozo Journal of Conflict Resolution 448 (2008).

[53] Y. Carmon, *The Role of Holocaust Denial in the Ideology and Strategy of the Iranian Regime*, 307 Middle East Media Research Institute (MEMRI), Inquiry and Analysis Series (2006).

[54] Henry Theriault, quoted by Sévane Garibian in S. Garibian, *Taking Denial Seriously: Genocide Denial and Freedom of Speech in the French Law*, 9(2) Cardozo Journal of Conflict Resolution 479 (2008), p. 488.

The controversies surrounding the penalization of different forms of genocide denial have reached the supranational level in Europe. In November 2008, after a long and tumultuous legislative process,[55] the EU Council adopted its Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law.[56] The material scope of the Framework Decision is stipulated in Art. 1, which describes intentional conduct to be made punishable by Member States. The prohibition of negationism expressed in the Framework Decision is not restricted to the obligation to punish the "negation" of specific crimes, but also defines their "condoning" and "gross trivialization" as punishable conduct. It also provides that EU Member States are allowed to take necessary measures to punish such conduct only if it is carried out in a manner likely to incite violence or hatred against groups or members of groups enumerated in the Decision.[57] The final draft chosen for adoption was connected with the considerable discrepancies in the position of individual states with respect to the penalization of different forms of negationism, including particularly Holocaust denial. The decision to leave it to the discretion of Member States whether to punish negationism even when there is no call for violence or incitement to hatred was emphasized by the Rapporteur Martine Roure during the consultations over the document in the European Parliament: "Trivialisation of the crime of genocide is a form of racism, and Member States should be able to punish it even where incitement to hatred or violence is not involved."[58] However, the Decision has been harshly criticized by authors generally opposed to penalizing negationism. As Uladzislau Belavusau observes "In the absence of a Luxembourg (Court of Justice of the European Union) specification of what constitutes 'the conduct carried out in a manner likely to incite to violence or hatred against such a group', it remains difficult to assess the potential of the severe and unequivocal criminalisation of historical revisionism in the EU. What is striking on the surface is the extremely broad scope of the criminalised offence. That makes the Decision a potential watchdog for a free historical discussion with regard to the contradictory aspects of the Second World War."[59]

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[55] *See* M. Bell, *Racism and Equality in the European Union*, Oxford University Press, Oxford: 2008, p. 164.

[56] Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law, Official Journal L 328, 06/12/2008 pp. 0055–0058.

[57] Furthermore, any Member State can make a statement that it will make punishable the act of public condoning, denying or grossly trivialising the crimes of genocide, crimes against humanity and war crimes, only if the crimes have been established by a final decision of a national court of the Member State and/or an international court, or by a final decision of an international court only.

[58] Report of 14 November 2007 on the proposal for a Council Framework Decision on combating certain forms and expressions of racism and xenophobia by means of criminal law (11522/2007–C6-0246/2007–2001/0270(CNS) (second consultations).

[59] U. Belavusau, *Freedom of Speech. Importing European and US Constitutional Models in Transitional Democracies,* Routledge, London and New York: 2013, p. 189. Belavusau convincingly criticizes the Decision in many aspects, including the exclusion of gender and sexuality as the grounds for hate speech.

Analysis of the "changes: that the EU states have introduced into their national legislation to date in order to fulfil their obligations derived from the Framework Decision in the area of penalizing negationism indicates that the instrument is virtually meaningless, as all EU states claim that their regulations adopted prior to the Decision are sufficient.[60] It would seem therefore that the Decision is mainly of expressive or symbolic significance. This however only exacerbates the dilemmas raised by attempts to translate a historical discourse into the language of criminal prohibitions.

3.2. Holocaust denial

In a moving essay on European historical memory Tony Judt aptly explains that "Hitler's final solution to the Jewish problem" in Europe is not only the source of crucial areas of post-war international jurisprudence – "genocide" or "crimes against humanity". It also adjudicates the moral (and in certain European countries the legal) standing of those who pronounce upon it. To deny or belittle the Shoah – the Holocaust – is to place yourself beyond the pale of civilized public discourse."[61] The legal situation that Judt describes has been shaped in Europe by regulations which penalize the public dissemination of Holocaust denial. The question thus arises whether laws directed against Holocaust denial are more justified and convincing than those applying to other genocide denials. There are several arguments in favour of this point of view.[62]

It was nearly thirty years ago that Yisrael Gutman, at a seminar in the Hebrew University in Jerusalem, wondered aloud whether, with respect to Holocaust denial, the world was dealing with a negative but passing phenomenon, or whether it was yet another manifestation of traditional anti-Semitism. Today the answer is painfully explicit.[63] The 'arguments' of the Holocaust deniers are gaining support all over the world,[64] with the former President of Iran making Holocaust denial an official state doctrine,[65] while the

[60] Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law, COM(2014) 27 final, 27 January 2014.

[61] Judt, *supra* note 37, p. 804.

[62] There are a few authors who do not agree that legal bans on Holocaust denial should be included in the catalogue of "memory laws". Robert Badinter argues that the goals of the French *Loi Gayssot* is to fight racism and xenophobia, not to "relate" history, which is what other memory laws do. Additionally, he claims that the legal ban on Holocaust denial simply "[p]rohibits the rejection of the authority of res judicata, as determined by an international court whose authority stems from a treaty to which France is a signatory." The argumentation of Badinter confirms the thesis of a different and more legitimate position with respect to the ban of the Holocaust denial. But the motivation to pass these kinds of regulations and the consequences of following them are closely connected to memory and identity of certain states and nations, which also allows them to be included in the broader category of memory laws. Badinter, *supra* note 31.

[63] Y. Gutman, *Denying the Holocaust*, Shazar Library, Jerusalem: 1985, pp. 20-25.

[64] *See e.g.* D. E. Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and Memory*, Plume, New York: 1994; M. Shermer, A. Grobman, *Denying History: Who Says the Holocaust Never Happened and Why Do They Say It?,* University of California Press, Berkeley: 2000.

[65] A. Applebaum, *Teheran's Holocaust Lesson*, Washington Post online edition 12.12.2006, available at: http://www.washingtonpost.com/wp-dyn/content/article/2006/12/11/AR2006121101163.htm (accessed 30 March 2015).

survivors of German concentration camps are passing away. As a result, Holocaust denial today is, as observed by Wojciech Sadurski, "[a] part of a larger package of an ideology which maintains that Jews cannot be trusted on anything, even on their own past."[66]

In addition, the threat stemming from the dissemination of Holocaust denials becomes even more apparent when one considers the level of general knowledge in Europe about the Second World War and the Holocaust. As indicated in a poll commissioned in 2012 by the Forsa Research Institute on 25 January (just two days before the International Holocaust Memorial Day) 21 percent of Germans between 18 and 30 years of age, when asked about the most notorious Nazi extermination camp, had never heard of it.[67] Another survey revealed that in 2009 23 percent of British secondary school students did not know what happened in the concentration camp in Auschwitz. Answers to questions about this extermination camp included associations with a beer brand name, a state bordering on Germany, and a type of bread.[68] If education about the Holocaust has failed so dramatically in states such as Germany, the question which arises is how memory of it should be defended.

It is also worth emphasizing that a specific form of negationism is spreading rapidly in some Arab states, one which, in the context of the conflict in the Middle East may be seen as yet another factor which exacerbates it. The denials disseminated there differ from European negationism, but in no way should they be treated as less harmful.[69] What is distinctive is the assertion that the Holocaust was groundlessly used by the Jews to establish the state of Israel, an assertion often accompanied by an attempt to deprive the Holocaust of its exceptional character by equating the sufferings of the Palestinians with the sufferings of the Jews during the Extermination. Although these assertions do not involve a direct denial of the Holocaust, the consequences of disseminating such statements are similar to those which arise when the fact of the Holocaust is denied, and contribute to increased anti-Semitic attitudes and moods.

Finally, it must be emphasized that in the IT era, involving the use of modern communication techniques - predominantly the Internet - the scale of dissemination of negationist theories is almost unlimited. At present there are thousands of websites with information about the "great Jewish fraud", often published in a format designed to create an impression of reliable, scientifically proven facts.[70] Holocaust denial has

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[66] Sadurski, s*upra* note 13, p. 27. Although the present President of Iran, Hassan Rouhani, recognized Holocaust as a "reprehensible" crime in an interview given to CNN in September 2013, many remain sceptical about the sincerity of this shift in the official narrative. *See* Ch. Shalev, *Iran's Holocaust-denial trickery may point to nuclear duplicity as well*, Haaretz, 30 September 2013.

[67] For more on the results of the poll of 2012, see http://www.zeit.de/gesellschaft/2012-01/umfrage-auschwitz (accessed 30 March 2015).

[68] J. Pawlicki, *Auschwitz to takie piwo. Kraj. Albo chleb* (Auschwitz is a brand of beer. A country. Or bread), Gazeta Wyborcza, 11 March 2009.

[69] *See* R. Kahn, *Strange Bedfellows? Western Deniers and the Arab World*, [in:] M. Berenbaum (ed.), *Not Your Father's Antisemitism*, Paragon House, St. Paul: 2008, pp. 183-87.

[70] The importance of this problem has been noted in, for example, the Council of Europe's Additional Protocol to the Convention on Cybercrime, which provides that parties to the Convention will punish

never before reached such a degree of international institutionalisation, with its own structures, publications and Facebook profiles.

However, the main argument, in the context of the penalisation of Holocaust denial, is that it is one of the modern forms of anti-Semitism, a type of hate speech directed against Jews. Although in most instances statements denying the Holocaust do not contain overtly hostile or hateful anti-Semitic slogans, to anyone reading them in the broader context the anti-Semitic motives are obvious. It is difficult to see any motivation other than anti-Semitism in the assertions that the "myth of the Holocaust" was born out of a Jewish conspiracy.[71] The presentation of Jews as liars who try to extort compensation and sympathy for crimes which were not committed, eventually gaining control over the world, constitutes an integral part of most traditional forms of anti-Semitic rhetoric.[72] According to Holocaust deniers, devious Jews, greedy for power and wealth, should arouse mistrust, contempt and consequently, hatred. Therefore, if we assume that Holocaust denial is a form of spreading hatred against Jews, and hence a manifestation of anti-Semitism, then legal regulations banning its dissemination must be acknowledged as an element of a broader state strategy to fight against all forms of racial, national or religious hatred and intolerance.[73]

While Holocaust denial does not automatically translate into sudden, intense explosions of anti-Semitic feelings, nor does it directly lead to acts of violence directed against Jews, a strong correlation is indisputable, however difficult it may be to determine the critical moment when words become actions.[74] It should be kept in mind that various forms of hostility may be submerged for long periods of time, only to suddenly erupt, even reaching the proportions of mass psychosis. The history of the Third Reich hate propaganda leaves no doubt about the influence that words can have on deeds. With surprising ease, hateful speech can transgress the barriers of

all distribution to the public through a computer system of materials which deny, grossly minimize, approve or justify genocide or crimes against humanity. See the Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems, CETS No.: 189.

[71] These arguments are advanced by Richard Williamson, a Lefebvrist catholic priest. *See also* W. Laqueur, *The Changing Face of Anti-Semitism: From Ancient Times to the Present Day*, Oxford University Press, Oxford: 2006, p. 137.

[72] Cohen-Almagor, *supra* note 6, pp. 35-36.

[73] Such a position is taken, among others, by the European Commission against Racism and Intolerance of the Council of Europe. See ECRI General Policy Recommendation No. 9: The fight against antisemitism, available at: http://www.coe.int/t/dghl/monitoring/ecri/activities/GPR/EN/Recommendation_N9/default_en.asp (accessed 30 March 2015).

[74] One of the most dramatic examples of this correlation can be found in the radio broadcasts aired on Rwandan radio stations at the time of the genocide in 1994. Due to high rates of illiteracy in Rwanda, radio served as the most powerful and effective way of incitement to hatred and violence against the *inyenzi* (cockroaches), as the Tutsis were called. *See The Media and the Rwanda Genocide*, Report by the International Development Research Centre, available at: http://www.internews.org/sites/default/files/resources/TheMedia&TheRwandaGenocide.pdf (accessed 30 March 2015).

time and place and, like a dormant plague virus, come to life after a long period of inactivity.[75]

Martin Krygier, referring to the Holocaust, rightly points out that: "Human history is not an overwhelmingly happy story, and atrocities are available in virtually any time and any place. But an enterprise on this scale, with its demonic malevolence, and such overwhelming consequences, is extremely rare; perhaps, as many believe, uniquely so."[76] However, when articulating the reasons for which the penalisation of the Holocaust denial is more justified than in the case of other memory laws, it is important to emphasise the role of these bans as instruments to counteract anti-Semitism, i.e. anti-Jewish hatred. Grounding one's argumentation in the thesis on the unique nature of the Holocaust rather than on the special character of Holocaust denial as a vehicle for anti-Semitism can be a 'slippery slope'. In this way the scale or hierarchy of the suffering of victims of the different genocides becomes constantly ranked, prescribing by law which of these sufferings deserves legal acknowledgement and which one does not.

4. THE EUROPEAN COURT OF HUMAN RIGHTS AND THE DILEMMAS OVER MEMORY LAWS

Various memory laws established by European legislators have also been the subject of judgments by the European Court of Human Rights (ECHR) in Strasbourg.[77] The Court was asked in several cases to decide whether the rights and freedoms of individuals (in particular freedom of speech), guaranteed in the European Convention on Human Rights (ECHR), were violated by memory laws in particular instances. The case law of the ECHR does not provide an unambiguous answer to the general question whether such laws are compliant with the standards of human rights protection provided by the European Convention.[78] The only exception is with respect to penalization of the public assertion that the Holocaust did not take place or a gross trivialization of the Holocaust

[75] In Albert Camus' novel, "the plague bug" is a universal symbol of evil existing in every man, which is brought to life at times of hazard, such as epidemics, war, and totalitarianism. A. Camus, *The Plague*, Penguin Books, London: 1998.

[76] Krygier, *supra* note 44.

[77] For a detailed and comprehensive analysis of the jurisprudence of the ECHR in memory law cases, *see* I. C. Kamiński, *Historical Situations in the Jurisprudence of the European Court of Human Rights in Strasbourg*, 30 Polish Yearbook of International Law 9 (2010).

[78] By contrast, a clear position on this issue was taken by the UN Human Rights Committee with respect to the compatibility of such laws with the International Covenant on Civil and Political Rights. In its General Comment No. 34 concerning interpretation of Article 19 of the International Covenant on Civil and Political Rights, the Committee states that: "Laws that penalize the expression of opinions about historical facts are incompatible with the obligations that the Covenant imposes on States parties in relation to the respect for freedom of opinion and expression. The Covenant does not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events" (para. 49, CCPR/C/GC/34, 12 September 2011).

– in this case ECHR permits far-reaching restrictions to be placed on the freedom of speech of Holocaust deniers, or persons referring in their theories or actions to the ideology and heritage of National Socialism (Nazism).[79] The exceptional treatment of the Holocaust was recently thrown into sharp relief when the Court ruled in the highly controversial case of *PETA v. Germany.*[80] The applicant association was forbidden by the German courts to launch an advertising campaign under the slogan "The Holocaust on your plate", consisting of posters, each of which bore a photograph of concentration camp victims along with a picture of animals kept in mass stocks. The ECHR shared the arguments of the German domestic courts, which limited PETA's freedom of speech, holding that the association had trivialised the fate of the Holocaust victims.

An even more significant example of the distinctive approach taken with respect to the Holocaust is provided by a recent judgment by the ECHR in *Perinçek v. Switzerland*, which concerned Armenian genocide denial.[81] Some commentators have even derided this decision as a symptom of "[a] sort of legal hypocrisy embedded in the Court's distinction between the Holocaust and other mass atrocities of the 20th century."[82] The ECHR, in a judgment which has been recently referred to Grand Chamber,[83] found that Switzerland breached the European Convention's right to freedom of expression by punishing a Turkish politician for publicly denying, during a series of events in Switzerland, that there had been any genocide of the Armenian people by the Ottoman Empire, and by describing the idea of an Armenian genocide as an "international lie". One of the arguments the Court used was the passage of time; that it is inappropriate to deal with the events in a more remote past as severely as with more recent ones.[84] Most importantly, however, the Court found the alleged absence of a general consensus in Europe, and in the world, about the scope and nature of the atrocities against Armenians in the Ottoman Empire, and whether they amounted to "genocide".[85] In this context, the Court drew a clear distinction between denial of the Holocaust and denial of the (alleged) Armenian genocide: in the former case (but not in the latter), the

[79] Holocaust deniers' complaints have been found inadmissible in numerous cases, including: *T. v. Belgium* (9777/82) Decision on inadmissibility, ECHR 14 July 1983; *F.P. v. Germany* (19459/92) Decision on inadmissibility, ECHR 29 March 1993; *Honsik v. Austria* (25062/94) Decision on inadmissibility, ECHR 18 October 1995; *Remer v. Germany* (25096/94) Decision on inadmissibility, ECHR 6 September 1995; *Nachtmann v. Austria* (36773/97) Decision on inadmissibility, ECHR 9 September 1998; *Witzsch v. Germany* (41448/98) Decision on inadmissibility, ECHR 20 April 1999, all available at http://www.echr.coe.int.

[80] *PETA Deutschland v. Germany* (43481/09) Chamber Judgment, ECHR 8 November 2012.

[81] *Perinçek v. Switzerland,* Judgment of 17 December 2013 (Second Section), Application No. 27510/08.

[82] *See e.g.* the comments of Uladzislau Belavusau: http://www.verfassungsblog.de/en/armenian-genocide-v-holocaust-in-strasbourg-trivialisation-in-comparison/#.VKWlXbHciW8 and Dirk Voorhoof: http://strasbourgobservers.com/2014/01/08/criminal-conviction-for-denying-the-existence-of-the-armenian-genocide-violates-freedom-of-expression/ (both accessed 30 March 2015).

[83] Referral of 2 June 2014.

[84] *Perinçek v. Switzerland,* para. 103.

[85] *Ibidem*, para. 115.

denial concerned crimes that had resulted in convictions "with a clear legal basis", and "the historical facts challenged by the applicants in those cases had been found by an international court to be clearly established."[86] Most importantly, however, the Court found that there was no "pressing social need" for the restriction on speech imposed by Switzerland, in contrast to the Holocaust denial, which "is nowadays the main vehicle of anti-Semitism (...) [i]t cannot be maintained that the rejection of the legal characterisation of the tragic events of 1915 and subsequent years as 'genocide' could have a similar repercussion."[87] Hence, the comments made by Mr Perinçek during his speeches in Switzerland "were not likely to stir up hatred or violence."[88]

The European Court of Human Rights issued a consistent ruling in a related case, but from the opposite side. In *Dink v. Turkey* it considered the case of a journalist and editor-in-chief of a Turkish-Armenian newspaper who was found guilty, by a Turkish court, of denigrating "Turkishness".[89] The European Court found that the journalist, Firat Dink, had expressed his resentment at attitudes which in his view amounted to "denial of the incidents of 1915", and in doing so he had been merely conveying his ideas and opinions on an issue of indisputable public concern. The European Court considered it crucial that the debate about historical events should be able to take place freely. It also noted that "it is an integral part of freedom of expression to seek historical truth" and that "it is not the Court's role to arbitrate" on a historical matter forming part of an ongoing public debate. In addition, the ECHR found that the articles by Mr Dink had not been "gratuitously offensive" or insulting, and had not fostered disrespect or hatred.[90]

The ECHR has frequently taken a stance on various matters related to memory triggered by attempts to deal with the past in Central and Eastern Europe (CEE). While these judgments do not concern "memory laws" *sensu stricto*, but rather belong to what is usually described as "militant democracy", the boundaries between these two categories are not precise, and in any event the Court's treatment of Communist symbols or the designation of a political party as "Communist" is indicative to the Court's approach to the legal treatment of the oppressive past in CEE. Hence these cases can be usefully evoked in our context. One of the most significant judgments in this regard was issued in July 2008 in the case of *Vajnai v. Hungary*.[91] Mr Attila Vajnai, Vice-President of the Workers' Party, complained that his freedom of speech had been violated when, in 2004, he was convicted of the offence of using a totalitarian symbol for wearing a five-pointed red star on his jacket during a public assembly. The Hungarian authorities claimed that they had to counteract the dangers associated with a totalitarian communist regime.

[86] *Ibidem*, para. 117.
[87] *Ibidem*, para. 119.
[88] *Ibidem*, para. 119.
[89] Judgment of 14 September 2010, Application Nos. 2668/07, 6102/08, 30079/08, 7072/09 and 7124/09.
[90] *Ibidem*, para. 135.
[91] *Vajnai v. Hungary* (33629/06) Chamber Judgment, ECHR 8 July 2008.

The ECHR found that the applicant's right to free speech was breached, controversially claiming that, twenty years after the fall of Communism in Hungary, the authorities' actions were neither necessary nor permissible in a democratic society, as there was no real danger of the communist regime being restored. The Court emphasized that the well-known mass violations of human rights committed under Communism had discredited the symbolic value of the red star. In addition, in the Court's view it could not be understood as representing exclusively Communist totalitarian rule. It determined that the red star also symbolised the international workers' movement, as well as certain lawful political parties. In the opinion of ECHR, the ban on displaying symbols such as the red star in public, when such displays are unaccompanied by a dissemination of propaganda in support of a totalitarian system and are used by a member of a party with no "totalitarian ambitions", is too severe a ban and for that reason unacceptable.[92]

Another relevant example of the ECHR's rulings on memory laws originating from CEE countries is the judgment issued in the case of *Partidul Comunistilor (Nepeceristi) and Ungureanu v. Romania*.[93] The applicants alleged that the State's refusal to register the Party of Communists as a political party had infringed their right to freedom of association, as guaranteed by Article 11 of the Convention.[94] In finding a violation of Art. 11 of the European Convention, the Court emphasized that the documents used by the national courts as the basis to refuse the registration "[d]id not contain any passages that might be considered a call for the use of violence, an uprising or any other form of rejection of democratic principles – which was an essential factor to be taken into consideration – or for the 'dictatorship of the proletariat'."

Thus the Court has ruled that the mere reference, either via the name or programme of an organization, to the Communist heritage did not amount to a rejection of the principles of democracy. Although the Strasbourg judges declared that they were ready to take into account the historical background of Romania's experience with a totalitarian regime prior to 1989, they nevertheless concluded that this historical context could not by itself justify the need for the interference. When, however, the cases originating in CEE involved the issue of anti-Semitism rather than (what we may call, for want of a better term "post-Communist nostalgia"), the Court has been much less lenient to the applicants and much more willing to accord the states a broad margin of appreciation in dealing with reprehensible expressions or propositions. For instance, in *W.P. and Others v. Poland*, applicants complained of an alleged breach by Poland of their right to freedom of association (Art. 11) because of, among other things, the

[92] *Ibidem*, para. 25.

[93] *Partidul Comunistilor (Nepeceristi) and Ungureanu v. Romania* (46626/99) Chamber Judgment, ECHR 3 February 2005.

[94] In addition the applicants, relying on Art. 14 of the European Convention (prohibition of discrimination), submitted that they had been discriminated against on the basis of their political views. However, in its ruling the Court decided, that "[s]ince the applicants' complaint under Article 14 had the same factual basis as the complaint under Article 11, the Court considered that no separate examination of it was necessary."

prohibition against forming "The National and Patriotic Association of Polish Victims of Bolshevism and Zionism."[95] Some of the objectives of the association included "[t]aking action aimed at equality between ethnic Poles and citizens of Jewish origin by striving to abolish the privileges of ethnic Jews and by striving to end the persecution of ethnic Poles", as well as "[t]aking action aimed at improving the living conditions of Polish victims of Bolshevism/Bolsheviks and Zionism/Zionists." The European Court did not need to spend much time deliberating (and rightly so in my view) to agree with the Polish Government's submission that the objectives of the association had been insulting and discriminating against members of an ethnic minority. Relying on the doctrine of margin of appreciation it declared the application inadmissible. In particular the Court found the applicants' ideas as "reviving anti-Semitism", and that these ideas therefore justified the need of bringing Art. 17 into play because the general purpose of the provision is, as the Court observed in the context of the applicants' anti-Semitism, "to prevent totalitarian groups from exploiting in their own interests the principles enunciated in the Convention." While this case did not concern a "memory law" *sensu stricto*, it is helpful in illustrating the proposition that the Court has adopted a differentiated attitude towards different types of Europe's pathologies, stemming from (or associated with) different dimensions of Europe's past.[96]

Another case originating from Poland deserves mention. While it also is not directly connected with "memory laws", it starkly illustrates the ECHR's relatively 'lenient' attitude to the Stalinist past at its worst, and thus should be alluded to here as part of the background for discussing the bifurcated approach by the Court to Europe's murderous, totalitarian regimes.[97] In fact, while it is correct to say that *Janowiec and Others v. Russia* does not directly involve a memory *law*, but it would certainly be incorrect to say that it does not involve *memory.* It does so to such a great extent that one thoughtful commentator writing about the case added a subtitle to her comment - "Polish Collective Memory Deceived in Strasbourg".[98] And it was. The applicants were the relatives of Polish nationals murdered by Stalin's NKVD secret police in Katyń in April/May 1940. They complained that Russia breached its obligations under Arts. 2 and 3 of the European Convention, respectively, by discontinuing the investigation into the massacre in 2004 (thus, breaching the procedural limb of Art. 2 by not conducting an adequate and effective investigation into the deaths of the applicants' relatives during a period after ratification of the European Convention by Russia), and by failing to account for

[95] *W.P. and Others v. Poland*, Third Section Decision as to the Admissibility, 2 September 2004, Application No. 42264/98.

[96] I am indebted to an anonymous reviewer of the first version of this paper for pointing out to me the relevance of this case to the themes under discussion here.

[97] *Janowiec and Others v. Russia*, Applications nos. 55508/07 and 29520/09; Fifth Section judgment of 16 April 2012 and Grand Chamber judgment of 21 October 2013.

[98] S. Sanz-Caballero, *How Could It Go So Wrong? Reformatio in Peius before the Grand Chamber of the ECtHR in the Case Janowiec and Others v. Russia (or Polish Collective Memory Deceived in Strasbourg)*, 33 Polish Yearbook of International Law 259 (2013).

the fate of Polish prisoners executed by NKVD (thus, breaching Art. 3 by continuously refuting historical facts and memory by withholding information about the fate of applicants' relatives and by denying the rehabilitation of Katyń victims, which amounted to inhuman and degrading treatment of the applicants). The Chamber judgment (of 16 April 2012) was a setback to the applicants' arguments: they won only partially on their Art. 3 claim (only with respect to those of the applicants who were already born when the massacre took place), while the Court refused to take cognizance of the merits of the complaints under Art. 2, relying on *rationae temporis* limitations on its competence. The Grand Chamber judgment (of 21 October 2013), however, was an even greater disappointment: not only did it uphold the refusal to examine complaint under Art. 2 but it added insult to injury by finding no breach of Art. 3 with respect to all applicants, regardless of their date of birth.

There are many things which are wrong in both decisions, and they have been subjected to broad criticism,[99] including in dissenting opinions attached to both of them, which proffered some stinging remarks about the majority's reasoning. This is not the place to review, nor even to summarize, these objections, but some points are directly relevant to the discussion in this paper. One concerns the cavalier approach by the Chamber to the Art. 3 claims, distinguishing between the anguish and suffering of those relatives born before and those born after the massacre.[100] The memory of a tragedy does not depend on the line drawn by the Court in this way, and family ties are no more "distant" depending on whether a similarly-placed relative was born before or after a crime took place. The Grand Chamber consolidated this insensitivity to the individual and collective memory by announcing that it could only take into account the anguish and distress suffered by the applicants from the date of ratification of the European Convention by Russia (1998), and concluding that there were no new elements contributing to any extension of their suffering after that date.[101] This ignores the fact that after 1998 the Russian authorities displayed a disdainful and dismissive attitude towards the actions taken by the relatives of the victims of the Katyń massacre, and as Judge Wojtyczek noted in his dissenting opinion to the Grand Chamber judgment: "On the date of Russia's ratification of the Convention, the situation was that those applicants who knew that their relatives had been victims of a war crime were still seeking to obtain more specific information about their fate and the location of their tombs."[102] The additional anguish suffered by those relatives after 1998 could well have constituted a special kind of suffering, distinct from the emotional distress inevitably suffered

[99] *See* in particular, several comments on the *Janowiec* case in vol. 33 of the Polish Yearbook of International Law (2013). Perhaps the most telling is the very title of a comment by G. Citroni, *Janowiec and Others v. Russia: A Long History of Justice Delayed Turned into a Permanent Case of Justice Denied*, *ibidem* at pp. 295-362.

[100] Chamber judgment, paras. 153-54.

[101] Grand Chamber judgment, para. 186.

[102] Grand Chamber judgment, Partly concurring and partly dissenting opinion of Judge Wojtyczek, part 10.

by any relative of victims of a war crime, thus fulfilling the criteria of a violation of Art. 3. The Court chose not to follow this path and adopted a very narrow interpretation, generous to the Russian Government and insensitive to the applicants' claims. As a result, as Susana Sanz-Caballero observed, the Strasbourg Court failed to "force Russia to acknowledge the mistaken Soviet practices of denial and disinformation", adding that "Russia seems to be still unable to confront its past, and the ECHR's capacity of action is limited by the ECHR provisions, and in the *Janowiec and Others* case it interpreted its own competence in a very restrictive way."[103]

The judgments discussed so far indicate that the European Court has faced difficult dilemmas triggered by various memory laws enacted by different European states. In such cases the Court has attempted to balance the rights and liberties of those whose freedom has been restricted against the values formed by the historical context, within which specific prohibitions should be considered. Undoubtedly, however, there is a striking asymmetry between the Court's treatment of cases tracing back to the legacy of Stalinism/Communism and those concerning the legacy of Nazism and fascism. In the latter cases (but not in the former) the Court has shown a willingness to accept far-reaching restraints upon rights and freedoms if the laws imposing such restraints are aimed at preserving historical truth, protecting the honour of victims, preventing the dissemination of racial, ethnic and religious hatred (e.g. in the form of anti-Semitism), as well as to prevent the resurrection of Nazi ideology.

One may ask what may be the likely motives for such an evident instance of double standards in the Court's approach to the European past? Second-guessing judicial motivations is always a risky exercise, and one should avoid speculating about the intentions of judges beyond those which have been made explicit by the judges themselves. In particular, one should refrain from imputing motives which are disingenuous, dishonest or otherwise improper. Perhaps the most obvious (and at the same time, charitable) explanation is that judges, in their differentiated approach to the Nazi and Communist past, reflect a broader political aspect of European public culture where there is a strong consensus about the horrors of Nazism and much weaker condemnation of Communist crimes, even in their most extreme, Stalinist version. With all certainty, the crimes of Nazism are a fixed element of historical narration and identity of Europe, and this identity largely contributed to the setting up of the CoE and the ECHR as a central legal tool for responding to the atrocities of the Second World War.[104] As such, today's judges replicate this fundamental *raison d'etre* of the European system of protection of human rights in the first place. It was targeted primarily against any possible resurgence of the horrors inflicted upon Europeans by Hitler and Mussolini, and only secondarily and tangentially, by Stalin.

But there is more to the "double standards" issue than just the circumstances of the birth of the ECHR system. There is an ongoing debate – among historians, political

[103] Sanz-Caballero, *supra* note 98, p. 278.

[104] L. Pratchett, V. Lowndes, *Developing Democracy in Europe: An analytical summary of the Council of Europe's acquis*, Council of Europe, Strasbourg: 2004.

scientists, and public intellectuals – about comparing the two murderous regimes in the European past, and there are many people who offer a 'hierarchy' of horror, whereby the Stalinist version of Communism is somehow less reprehensible than Nazism. This "gradation" was nicely exemplified by a debate in the European Parliament (EP) in April 2009 on a proposed resolution establishing "The European Day of Remembrance for the Victims of All Totalitarian and Authoritarian Regimes."[105] While many speakers, including the then President of the EP Hans-Gert Pöttering, asserted the moral and political equivalence of the horrors of Nazism and Communism, there were also strong voices denying such equivalence. Characteristically, the representative of the Party of European Socialists, Glyn Ford, analogized such a claim of equivalence to "historical revisionism" and "political relativism", claiming that "the crimes of the Nazis, the Holocaust and the [Nazi] genocide" cannot be equated "with those of Stalinist Russia."[106] Judges of the European Court are not immune to such debates and such viewpoints, and even if they do not spell them out explicitly, they may genuinely share them. Furthermore, the double standards may hinge upon the temporal factor: the shorter passage of time since the post-Communist transformations may convince some judges that any strong measures addressed at extirpating "Communist nostalgia" may be dangerously divisive in the new democracies of CEE.

I should emphasize that these are only speculations. The Strasbourg judges do not make them explicit and even seem to be by-and-large unaware of these factors, but they all seem to be reasonable and plausible, and each of them – or any combination of the three – may explain the relative lenience of the ECtHR judges towards Communist past compared to the Nazi past, and the different scope of margin of appreciation accorded to those countries wishing to enact legally protected memories about these two chapters in Europe's recent history.

CONCLUSIONS

Can memory laws help Europeans cope with their past and retain their historical memory and identity? It seems that this question can be answered affirmatively only with respect to a limited set of such laws.

The memory of the CEE societies, trapped in the domination of the Soviet regime after the Second World War, is neither shared nor well understood by the societies of Western Europe. At the same time countries like Poland, which never engaged in colonialism, do not identify with the dilemmas generated by the French laws that regulate this problem. Furthermore, some memory laws consolidate a deliberately false identity of a nation, based on the belief that it was only a victim of crimes, never a perpetrator. Such laws must be criticized and the legislators who pass them must take

[105] European Parliament resolution of 2 April 2009 on European conscience and totalitarianism, P6_TA(2009)0213.

[106] Explanations of vote, Texts tabled: RC-B6-0165/2009, Debates, Thursday, 2 April 2009 – Brussels.

upon themselves the burden of responsibility for the harm they inflict upon their own society and future generations.

The experience and history of the entire post-war Europe has shown that although some convergence of narratives and historical memories is possible, there remain differences between various states which can probably never be overcome.[107] The consensus concerning recognition of the crime of the Holocaust must be seen as an exception. The Holocaust is a tragic heritage of all Europe and, in the face of the enormous social and cultural changes taking place in Europe today, it is crucially important to ensure that the truth about it, which constituted one of the cornerstones of the new, reborn continent, is neither forgotten nor trivialized.[108] This, however, could become a significant challenge if we take into account seemingly unimaginable scenarios such as, for example, if teaching about the Holocaust were to be abandoned by schools in European states owing to the protests of Muslim students and their parents.[109]

It is thus possible to postulate that, in Europe today, memory laws should fulfil two fundamental roles in order to be justified and legitimised. First, such laws should constitute a proof that a given state has assumed responsibility for crimes and serious violation of human rights in the past, either by the state or its citizens. The memory of Poles about the crimes committed against them by the Nazi and Stalinist regimes is well-shaped and deeply rooted, but the Poles often do not remember the crimes which they themselves have committed, and in addition this truth continues to be driven away from social consciousness.[110] However, these types of memory

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[107] *E.g.* M. Pakier, B. Stråth (eds.), *A European Memory? Contested Histories and Politics of Remembrance*, Berghahn, Oxford, New York: 2012.

[108] For dramatic examples of the shift in narratives about the Holocaust and of how the truth about the Holocaust is being abused or neglected today, *see* in particular A. H. Rosenfeld, *The End of the Holocaust*, Indiana University Press, Bloomington: 2011.

[109] A study conducted in the Netherlands and in the UK revealed that some teachers are dropping the Holocaust from history lessons to avoid offending Muslim pupils, since for many of them the Holocaust is a "Jewish lie". See *Addressing Anti-Semitism: Why and How? A Guide for Educators*, OSCE/ODIHR, 2007 and L. Clark, *Teachers drop the Holocaust to avoid offending Muslims*, Daily Mail Online, available at: http://www.dailymail.co.uk/news/article-445979/Teachers-drop-Holocaust-avoid-offending-Muslims.html (accessed 30 March 2015). *See also* G. Jikieli, J. Allouche-Benayoun (eds.), *Perceptions of the Holocaust in Europe and Muslim Communities*, Springer, Dordrecht: 2013.

[110] The study of Antoni Sułek concerning the memory of the Poles about the Jedwabne pogrom, published in 2011, revealed that Jedwabne, considered as a historical event and a symbol of Polish guilt towards their Jewish neighbours, has not yet become a part of the national memory of the majority of Poles, and that there is still a great deal of confusion when it comes to defining the perpetrators of the massacre. Sułek considers the lack of official commemorations of other pogroms of Jews that occurred during the war together with the lack of information in high school history textbooks to be the main reasons for this situation. A. Sułek, *Pamięć Polaków o Zbrodni w Jedwabnem* (Polish memory of the crime in Jedwabne), 3 Nauka 39 (2011). *See also* J. B. Michlic, *"Remembering to Remember", "Remembering to Benefit", "Remembering to Forget": The Variety of Memories of Jews and the Holocaust in Postcommunist Poland*, Jerusalem Center for Public Affairs, available at: http://jcpa.org/article/remembering-to-remember-remembering-to-benefit-remembering-to-forget-the-variety-of-memories-of-jews-and-the-holocaust-in-postcommunist-poland/ (accessed 30 March 2015).

laws should be limited to political declarations without any coercive implications whatsoever.

Secondly, memory laws should constitute a barrier to the abuse of freedom of speech and academic research when it is used as a shield to spread hatred against specific groups, as is done through the public dissemination of Holocaust denials. By penalising such forms of negationism, states fulfil their obligation under international human rights law to prohibit incitement to hatred and hate-motivated violence.[111]

There is no other path to emerge from, or reconcile, the conflicts between different groups, including different nations, than to respect the coexistence of many memories. Any attempt at containing or reframing memory for the common good nearly always proves ineffective and it seems almost impossible to make a reality of the expression "Your past is our past".[112] However, in some cases the multitude of memories can become a convenient way for driving out what is disgraceful in the history of one's own nation. The gassing of the Jews in Auschwitz, the crimes committed by the pro-Nazi Hungarian "Arrow Cross" during the Second World War, or the massacre in Katyń cannot be "remembered differently". If a state adopts legal regulations that promote or sanction such a "reversed memory", such memory laws should be vehemently opposed. However, if individuals or groups "[c]over up the truth with lies"[113] injecting them into the heart of public discourse with hateful motives, the state must have the right to respond, including with the use of instruments of penal law.

The phenomenon of memory laws is one of the most controversial issues in the complex discussions about the relationship between memory, history, and law. Enacting memory laws which cover up or revise the most sensitive, often painful, parts of a nation's history may constitute an expression of societal expectations to have the nation's positive self-perception legally supported, and the basis of national pride legally enforced. And yet, in the light of mutually competing narratives within and among the nations about the past, the effectiveness of such guarantees is illusory and even dangerous. In contrast however, memory laws which are designed to protect against hatred or even future genocide should be considered as an appropriate response to the powerful call of Elie Wiesel: "Remembering is a noble and necessary act. The call of memory, the call to memory, reaches us from the very dawn of history."[114]

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[111] Such an obligation arises from Art. 20.2 of the International Covenant on Civil and Political Rights, which stipulates that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

[112] D. Warszawski, *Ku pamięci, przeciw pamięci* (For memory, against memory), Gazeta Wyborcza, 23 January 2013.

[113] B. Dylan, *Idiot Wind*, *Blood on the Tracks*, Columbia Records 1975, quoted after: L. Barnett Lidsky, *Where's the Harm? Free Speech and the Regulation of Lies*, 65 Washington & Lee Law Review 1091 (2008), p. 1094.

[114] E. Wiesel, *Hope, Despair and Memory* (Nobel Lecture, Oslo, Norway, 11 December 1986), available at: http://www.nobelprize.org/nobel_prizes/peace/laureates/1986/wiesel-lecture.html (accessed 30 March 2015).

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SELECTION OF DEFENDANTS BEFORE THE ICC: BETWEEN THE PRINCIPLE OF OPPORTUNISM AND LEGALISM

Abstract:
International criminal tribunals had to make a choice between the principles of opportunism and legalism or decide to use a mixture of these both. They had to decide whether a prosecutor should become "the minister of justice" (as in the principle of legalism) or "the first judge" (evaluating in the frames of principle of opportunism the reasonable basis for prosecuting). This article addresses prosecutorial discretion before the ICC with respect to selecting defendants. Firstly, it analyzes the main differences between opportunism and legalism of prosecution. It also presents models of accusation functioning before the historical and existing international criminal tribunals – which usually opted for opportunism of prosecution. Before the ICC the conditions on which the Prosecutor may initiate an investigation are set in Art. 53(1) of the Statute: "The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute." It is interesting to observe that this phrase may be interpreted in many various ways, depending on the model of accusation the author belongs to: those coming from the Anglo-Saxon tradition have tendency to search for elements of opportunism; those from civil law states assume that the model of accusation operates according to the principle of legalism. There is also a number of mixed options presented, according to which the ICC operates according to a mixture of these two principles. Finally, the article presents different rules adopted by the ICC Prosecutor (or proposed), which govern the choice of the defendants.

Keywords: ICC, International Criminal Court, principle of legalism, principle of opportunism, Prosecutor

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1. PROSECUTORIAL DISCRETION V. MANDATORY PROSECUTION

The power to decide whether to prosecute or not is one of the basic powers of every prosecutor.[1] This power is often referred to as "prosecutorial discretion". This notion means that it is up to a prosecutor to decide whether a specific case and certain defendant (defendants) will be brought to criminal trial. Most authors refer to a dictionary definition of discretion that is broadly described in the common law states' and international criminal law books. Prosecutorial discretion can be defined as "the power of a prosecutor to make autonomous (independent or impartial) choices as to whom to incriminate, on which charges, on the basis of which evidence and at which moment in time, within a given legal framework". It also implies that "a prosecutor is entitled to take relevant decisions autonomously and without any imposition."[2] In such a model of prosecution the mere commission of an offence and probable guilt of a named offender do not necessarily trigger the formal legal procedure of prosecution and trial.[3] In consequence a prosecutor is not obliged to prosecute any case simply because it can be prosecuted. Therefore we can see that prosecutors have powers to set the boundaries of a coherent criminal justice policy. This power allows them to decide about intensification of criminal reaction they choose to apply in a given case. In the literature it is stated that discretionary non-prosecution arises out of practical policies – "if the rule of compulsory prosecution were strictly applied, the growth of new categories of minor crime in the statutes and the increase of reported crimes of all types would submerge the prosecution of serious crime in a sea of less important cases."[4] In the Anglo-Saxon doctrine it used to be believed, that it is simply not possible to prosecute all the criminal acts: "as the volume of crime increases and offense categories proliferate, even serious crimes are not fully prosecuted because it might be unduly time consuming to conduct a full investigation." Discretion was seen as a positive achievement of the systems of common law states as it "can individualize the implementation of the law, softening the harshness or injustices that sometimes arise from rules dispassionately applied."[5]

The prosecutor's discretion may include many factors. Firstly, he has to decide if there was a crime: if a certain human act or omission fulfills all the elements of a crime. It relates also to a decision as to whom to prosecute: the prosecutor has the power to select defendants from all the people possibly involved in a criminal conduct. Moreover,

[1] Such notions are used by M. Rogacka-Rzewnicka, *Oportunizm i legalizm ścigania przestępstw w świetle współczesnych przeobrażeń procesu karnego* (The principles of mandatory prosecution and prosecutorial discretion in the perspective of ongoing transformations of the criminal proceedings), Zakamycze, Kraków: 2007, p. 46.

[2] A. Cassese (ed.), *The Oxford Companion to International Criminal Law*, Oxford University Press, Oxford: 2009, p. 471.

[3] J. Fionda, *Public Prosecutors and Discretion*, Oxford University Press, Oxford: 1995, p. 9.

[4] J. H. Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 University of Chicago Law Review 439 (1973-74), p. 459.

[5] P. Cane, J. Conaghan (eds.), *The New Oxford Companion to Law*, Oxford University Press, Oxford: 2008, p. 330.

he also chooses what criminal behavior to accuse the defendant of (both referring to factual and legal borders of the behavior expressed in a form of the legal characterization of facts). He also decides about the timing of an indictment – when to initiate an investigation. Last but not least, he decides whether to engage in the plea bargaining process: whether to apply his discretion in order to stop criminal reaction in exchange for a guilty plea and quick termination of the proceedings. This leads to the problem of prosecutor's powers to intensify criminal prosecution in general; whether to initiate criminal proceedings against a certain behavior or to restrain from bringing the social conflict to the court and limit the judicial influence on a situation to negotiating a plea bargain between the suspect and the prosecutor. Therefore, the result of using discretionary powers by the prosecutor may be selectivity of prosecution: meaning not only selective choice of persons that are brought to justice but also the law to be enforced. It may lead also to obvious disadvantageous results: the same crimes are not treated alike. As it allows an individual to act as that individual chooses, the choice of that method must accept the consequences: the individual may act on basis of improper considerations, substituting personal standards for public, legal standards.

In the continental legal doctrine the principle of prosecutorial discretion is often identified with the principle of opportunism (*opportunité des poursuites*) associated with the common law states (mostly Anglo-Saxon).[6] Both principles are based on a presumption that it is only for the prosecutor to decide which offences and offenders should be prosecuted and on which counts. As opposed to that principle, *Legalitätsprinzip* or the principle of *legalité de poursuites* prevails in the civil (continental) legal systems, where all those who infringe the law must be prosecuted (the so-called principle of mandatory prosecution). In such a model there is no prosecutorial discretion – all offenders must be equally prosecuted. The model of prosecution based on this principle requires prosecution of all offences where sufficient evidence exists of the guilt of the defendant. Discretion is minimized and limited by the frames of the law and the prosecutor is precluded from taking a pro-active diversionary role. However, at the same time, it cannot be denied that discretion can also function as well within the system of legalism of prosecution – although in certain limits provided by the law and in smaller quantities.[7] "Claims that prosecutorial discretion has been eliminated, or is supervised closely, are exaggerated", as discretion is exercised in each of the systems for reasons similar to those supporting it in the United States. Although through different means – e.g. manipulating the legal

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[6] Cassese, *supra* note 2, p. 471. In more detail these models are described in H. Kuczyńska, *Model oskarżenia przed Międzynarodowym Trybunałem Karnym* (The model of accusation before the International Criminal Court), C.H. Beck, Warszawa: 2014, pp. 66 ff., and the revised and updated version of this book entitled *The Model of Accusation before the International Criminal Court*, Springer, Cham: 2015.

[7] *See generally* Langbein, *supra* note 4, p. 443; J. Herrmannt, *The Rule of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany*, 41 University of Chicago Law Review 468 (1973-4); M. Cieślak, *Polska procedura karna* (Polish criminal procedure), PWN, Warszawa: 1984, p. 291; Rogacka-Rzewnicka, *supra* note 1, p. 46; T. Weigend, *Anklagepflicht und Ermessen. Die Stellung des Staatsanwalts zwischen Legalitäts- und Opportunitätsprinzip nach deutschem und amerikanischem Recht*, Nomos Verlagsgesellschaft, Baden-Baden: 1976, pp. 17 ff.

qualification (through so-called correctionalisation) or extending the notion of minor guilt or lack of social interest or changing the definition of a socially dangerous act – the result also leads to excluding certain acts from the category of crimes.[8]

It seems that currently none of the legal systems remains faithful to these ideal concepts. It can hardly be said that a certain system of criminal procedure is "opportunist" or "legalist" anymore. Although the two models can still be isolated: states where the principle of opportunism is the legal rule and in which the principle of legalism is the main rule.[9] States that traditionally adopt one legal principle, introduce several exceptions to this principle, which leads to the creation of mixed systems. On the one hand, common law states introduce numerous legal tests that should be followed by the prosecutor when making a decision to initiate proceedings. Sometimes, even the representatives of the common law doctrine also question the very idea of giving to the prosecutor discretion to decide whom to prosecute: "if caseloads can be managed in Western European countries without prosecutorial discretion or with discretion carefully controlled, if full judicial inquiry can be made into every offense formally charged – then perhaps we have conceded too much power to the prosecutor."[10] On the other hand, we observe the proliferation of exemptions that favour the principle of opportunism in continental systems. This tendency is related to the gradually growing emphasis on the pragmatism of prosecution and the desired cost-effectiveness of the administration of justice.[11] Another argument for giving more discretion to the prosecutor is that social life is too complex and fluid to insist on absolute fidelity to norm under any circumstances. Legal standards have to be confronted with a case – a life situation. In consequence, even within the principle of legalism prosecutors should be left some discretion which would enable them to make subtle distinctions.[12]

2. INTERNATIONAL MILITARY TRIBUNALS IN NUREMBERG AND TOKYO AND VICTORS' JUSTICE

Before the International Military Tribunals (IMT) in Nuremberg and Tokyo there was no doubt that selection of defendants from all the potentially involved in crimi-

[8] *E.g.* A. S. Goldstein, M. M. Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy and Germany*, 87 Yale Law Journal 240 (1977), p. 280.

[9] *See* K. Ambos, K. Status, *Role, Accountability of the Prosecutor of the International Criminal Court: A Comparative Overview on the Basis of 33 National Reports*, 8 European Journal of Crime Criminal Law and Criminal Justice 89 (2000), pp. 98-101; J. Tylman, *Zasada legalizmu w procesie karnym* (The principle of legality in criminal procedure), Wydawnictwo Prawnicze, Warszawa: 1965, pp. 112, 42; Rogacka-Rzewnicka, *supra* note 1, pp. 19, 129; M. Andrzejewska, *Adaptacja koncepcji Thomasa Kuhna dla postępowania karnego* (Adaptation of the Thomas Kuhn conception to criminal procedure), 3 Prokuratura i Prawo 141 (2013).

[10] Goldstein, Marcus, *supra* note 8, p. 244. *See also* Herrmannt, *supra* note 7, p. 481.

[11] *See* Rogacka-Rzewnicka, *supra* note 1, pp. 96 and 127; K. Volk, *Grundkurs. StPO*, 5th ed., C.H. Beck, München: 2006, p. 113; C. Safferling, *Towards an International Criminal Procedure*, Oxford University Press, Oxford: 2001, p. 174.

[12] M. Damaška, *The Faces of Justice and State Authority*, Yale University Press, New Haven: 1986, p. 22.

nal regimes was indispensable. In Nuremberg, each Signatory of the London Treaty appointed a Chief Prosecutor for the investigation of the charges against and the prosecution of major war criminals. The Chief Prosecutors acted as a committee. The Statute gave to the Committee of Chief Prosecutors a wide discretion as to the choice of defendants. According to Art. 15 of the Nuremberg Charter, the Chief Prosecutors were to, acting individually and in collaboration with one another, undertake the preparation of the indictment for approval by the Committee. Art. 14(b) indicated only that the Committee would "settle the final designation of major war criminals to be tried by the Tribunal." However, the notion of "major war criminals" was understood differently: "at the 1943 Teheran Conference, Stalin proposed the execution of between 50.000 and 100.000 Germans, while Churchill envisioned the execution (without trial) of between 50 and 100 German war criminals."[13] Finally, 24 officials of the Nazi regime were sent to trial in Nuremberg (and seven so called "organizational defendants") and 28 in Tokyo. However, two observations come to mind when analyzing the method of selection of defendants.

First, if we assume that the IMT in Nuremberg acted on the basis of the principle of opportunism it was collective opportunism: the decision to approve the indictment and the documents to be submitted therewith had to be agreed by all four prosecutors. The Committee of Prosecutors was to act by a majority vote and appoint a Chairman "as may be convenient" and in accordance with the principle of rotation. In a case where there was equal division of vote concerning the designation of a defendant to be tried by the Tribunal, or the crimes with which he shall be charged, the proposal which was made by the party which proposed that the particular defendant be tried, or the particular charges be preferred against him, was to be adopted.

Second, in practice, although the Chief Prosecutors were responsible for "designation of the defendants", the decisions were taken by the governments of the victorious states. They were directly involved in the selection of defendants. The procedure before the IMT did not offer prosecutors any guarantees of independence.[14] The list of German war criminals to be prosecuted was prepared by a special commission (so-called UNWCC – United Nations War Crimes Commission), which was established in 1943 and designed to engage in investigating war crimes that were to be tried in Nuremberg.

[13] F. de Vlaming, *Selection of Defendants*, [in:] L. Reydams, J. Wouters, C. Ryngaert (eds.), *International Prosecutors*, Oxford University Press, Oxford: 2012, p. 544.

[14] As to this fact agree: L. Coté, *Independence and Impartiality*, [in:] L. Reydams, J. Wouters, C. Ryngaert (eds.), *International Prosecutors*, Oxford University Press, Oxford: 2012, pp. 372-73; W. Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, 6 Journal of International Criminal Justice 731 (2008); M. Brubacher, *Prosecutorial discretion within the ICC*, 2 Journal of International Criminal Justice 71 (2004); K. Ambos, S. Bock, *Procedural Regimes*, [in:] L. Reydams, J. Wouters, C. Ryngaert (eds.), *International Prosecutors*, Oxford University Press, Oxford: 2012, p. 492; J. D. Ohlin, *Peace, Security, and Prosecutorial Discretion*, [in:] C. Stahn, G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Martinus Nijhoff Publishers, Leiden/Boston: 2009, p. 185; N. Boister, R. Cryer, *The Tokyo International Military Tribunal: A Reappraisal*, Oxford University Press, Oxford: 2008, pp. 51-52.

On the basis of the evidence gathered it was supposed to establish if a prima facie case existed that a certain person had committed war crimes. In such a case the defendant was added to the list of the accused. The Committee acted according to the belief that only the prominent suspects should face the trial, who rather ordered, than executed personally, war crimes. As a general rule the Committee agreed that the suspects should also be representative of the Nazi regime as a whole.[15] However, no official guidelines were prepared for the Commission. As a result of the work of the Commission, a list of 712 suspects was prepared. Later, the list was condensed, according to some new principles introduced by the governments. In the process of selection of the defendants, each state fulfilled its own interests and goals. Even if they agreed as to the main rule – that the victims of the war crimes committed by the defendants were supposed to be citizens of an Allied state – each government also acted according to a certain agenda. For instance, the United States assumed that one of the main crimes considered during the trial was to be crime of aggression – waging an aggressive war. Moreover, it wanted to ensure that high-ranking Nazis who had collaborated with the United States in the final months of the war were not prosecuted.[16] At the same time the American team was criticized (and not groundlessly) of a total lack of knowledge about the political structure of the Third Reich, which led them to inaccurate decisions as to whom to accuse. Furthermore, the United Kingdom stated that the defendants should be well known to the European society in order to achieve a more "dramatic impact".[17] In the end the selection of defendants was rather chaotic and led by unclear political reasons than made according to some established criteria.

The choice of defendants in Tokyo was not so chaotic solely thanks to one reason: only one government was responsible for creating the list of suspects. Nonetheless, the choice was also mostly political. The selection of defendants was many times criticized as "arbitrary"[18] and evaluated as "a process plagued by poor organization and consultation, and little information, knowledge and time."[19] The Supreme Commander of the Allied Forces, General MacArthur, not only drafted the Charter of this Tribunal, but also had a final say as to whom to prosecute. His decision not to prosecute the Emperor of Japan – despite the Emperor's central responsibility for waging an aggressive war – went against the wishes of the US Prosecutor, Chief Counsel J. Keenan. General MacArthur even instructed the investigators not to summon the Emperor as a witness during the proceedings.[20] As a result of this omission, prosecutors were tasked with almost an impossible task to prove the elements of conspiracy based on organizational structure,

[15] Ambos, Bock, *supra* note 14, p. 492.

[16] Schabas, *supra* note 14, p. 732.

[17] M. M. deGuzman, W. Schabas, *Initiation of Investigation and Selection of Cases*, [in:] G. Sluiter, H. Friman, S. Linton, S. Vasiliev, S. Zappala (eds.) *International Criminal Procedure: Principles and Rules*, Oxford University Press, Oxford: 2013, p. 134.

[18] Ambos, Bock, *supra* note 14, p. 497.

[19] Boister, Cryer, *supra* note 14, p. 73.

[20] de Vlaming, *supra* note 13, p. 546.

but without its main leader.[21] The final list of the defendants was prepared during negotiations that took ten weeks and "took place behind closed doors".[22] Just like in the case of the Nuremberg IMT, also before the Chief Counsel set to work, a special commission had been established. The Far Eastern Commission (FEC) – accompanied by the US State, War and Navy Department Coordinating Committee (SWNDCC), was chosen to be the forum for the decisions.[23] The selection was supposed to be based on a "representative cross-section of those whom the Allied powers collectively regarded as responsible for Japanese policy before and during the Pacific War."[24] However, neither the Commission, nor the Prosecutor had developed a theory as to the level of engagement in the crimes and the guilt of potential suspects and no clear criteria for selection. Art. 1 of the Proclamation of 19 January 1946 establishing the Tokyo IMTFE stated that "criminals" that should be held responsible before the Tribunal are to be "persons charged with offences which include crimes against the peace." This way it narrowed the scope of the persons eventually held responsible. Therefore, "once it was decided a war of aggression had occurred, there was 'a prima facie' case against any person who as the holder of any office, however humble, in the civil or military organization of Japan took part in the planning, preparing, initiating or waging." In the final selection it was decided however, that only the "principal leaders" with primary responsibility for the acts committed"[25] should be accused. The most significant factor was the membership of key Japanese organs, such as the Cabinet or the Supreme Command. Consequently the choice was criticized as being based mostly on the official position of the defendant and not on real contributions in crimes against peace. This "preconception" led to the result that prosecutors attributed the whole responsibility for all harm to those who conspired to start illegal war. Moreover, based on that assumption, the indictment did not target those responsible for crimes other than crimes against peace – crimes against humanity, crimes based on the bacteriological and chemical warfare program, nor crimes committed against the people of Japan.[26]

We can pose a question, if we can still speak of the principle of opportunism if the prosecutor has no power to base his decision on personal conviction. As we have seen the full discretion was not enjoyed by the prosecutors, but by other governmental institutions, who made the final choice of the defendants. According to the citation Chief Prosecutor R. Jackson made a comment: "The people at Potsdam (…) made this commitment to publish the list [of defendants] without consulting us."[27] Not only politics but a certain policy – to give priority to certain types of crimes over others –

[21] This opinion expressed by Boister and Cryer, *supra* note 14, p. 50.

[22] de Vlaming, *supra* note 13, p. 546.

[23] Boister, Cryer, *supra* note 14, p. 50.

[24] de Vlaming, *supra* note 13, p. 547.

[25] Cited after: Boister, Cryer, *supra* note 14, p. 53.

[26] *See generally* R. Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, Cambridge University Press, Cambridge: 2005, pp. 199, 206.

[27] de Vlaming, *supra* note 13, p. 545.

influenced the process of selection of defendants. In Tokyo, the Prosecutor encountered all criticism by saying that more defendants will be tried later. However, there were no more trials at the international level. Several more representatives of the defeated regimes were tried before national (or quasi-national) courts in Poland and Germany.[28] These tribunals cannot be yet analyzed according to the principles governing the procedural analysis of a system of law. They became a tool designed to ensure that the idea of revenge was "taken in a proper legal context"[29] and a fair trial was conducted, but still under the control of the interested governments. Although some may claim that the prosecutors in Nuremberg and Tokyo "tried hard to keep a balance between legal and non-legal considerations",[30] a more accurate statement could be that the procedural regime consisted only of a guide on how to proceed with the trial but that the decisions about the trial were purely political. This type of international trial is commonly labeled as "victor's justice". The law was enforced only against the losing nations. They were both established by the victorious states that (moreover) occupied the territories of the states whose representatives were supposed to be tried.[31] The opportunist choices were made on the basis of purely political factors.

Moreover, the military nature of the tribunals should not be overlooked. It certainly influenced the lack of decisional independence of the prosecutors. "In military courts, prosecutors are subordinates, trained to accept orders from their superiors following established military hierarchy."[32] Prosecutors of these tribunals were state officials, acting on behalf of certain states and under their control. Also, indictments were formulated on behalf of the states against defendants.[33] The prosecutors received directions from their home states. The government decided about the person of the defendant and the charges, as well as about the way of conducting the case. As an often cited example, we could invoke the Soviet Union government's instructions to indict Nazis of committing war crimes in Katyń.[34] In consequence, there could be no doubt that the prosecutors of the military tribunals were not independent in their work and their decisions depended entirely from the will of the states.

However, even if the decision whether to prosecute did not belong to the prosecutors, it was taken on the basis of the principles of opportunism. Certainly it was not legalism

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[28] Such as the Supreme National Tribunal of Poland (Najwyższy Trybunał Narodowy), which operated for a brief two-year period 1946-48. *See* M. A. Drumbl, *Stepping Beyond Nuremberg's Halo: The Legacy of the Supreme National Tribunal of Poland*, Draft 2015, which appears as chapter 38 in vol. 2 of the published conference documents: Historical Origins of International Criminal Law Conference (Hong Kong: 1-2 March 2014), available at: http://www.fichl.org/fileadmin/fichl/FICHL_PS_20_web.pdf (accessed 30 March 2015).

[29] de Vlaming, *supra* note 13, p. 544.

[30] *Ibidem*, p. 546.

[31] Coté, *supra* note 14, p. 372.

[32] *Ibidem*.

[33] "Indictment International Military Tribunal, The United States of America, The French Republic, The United Kingdom of Great Britain and Northern Ireland, and The Union of Soviet Socialist Republics – Against (…)."

[34] *E.g.* Coté, *supra* note 14, pp. 372-73.

and it seems that there is no third method – except for a mixture of these two. It is commonly assumed that the procedural system of initiating criminal proceedings in Nuremberg and Tokyo reflected the strong influence of adversarial procedural models known from common law systems.[35] Accordingly, as in these systems it was designed on the basis of the model of opportunism – and in this model selection of defendants according to various considerations was possible. However, "the question of prosecutorial discretion was largely absent at Nuremberg."[36] We can conclude that in this case there was a separation between the opportunism and prosecutorial discretion. While the first one was present in Nuremberg trials, there could be no trace of the other.

3. EVOLUTION OF THE CONCEPT OF PROSECUTORIAL DISCRETION: ICTY AND ICTR

The operation of the ad hoc International Criminal Tribunals for former Yugoslavia (ICTY) and Rwanda (ICTR) led to the first discussion about the issue of existence of prosecutorial discretion in the international justice system. There was no doubt that these tribunals would not be able to try all persons suspected of having committed crimes in their jurisdictions, especially in light of the principle of primacy of jurisdiction over national courts.

Art. 18(1) of the ICTY Statute provides that "[t]he Prosecutor shall initiate investigations ex-officio or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and nongovernmental organisations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed."

According to the representatives of the prevailing theory, the content of this provision gives us grounds to assume that the Prosecutor acts on the principle of opportunism.[37] The assessment whether there is a "sufficient basis to proceed" belongs solely to the Prosecutor. His discretion as to the selection of cases that he prosecutes and persons he chooses to indict is limited only by the scope of jurisdiction of the tribunals.[38] The key

[35] Schabas, *supra* note 14, p. 731.

[36] C. Stahn, *Judicial Review of Prosecutorial Discretion: Five Years On*, [in:] C. Stahn, G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Martinus Nijhoff Publishers, Leiden/Boston: 2009, p. 185.

[37] *See generally* R. May, M. Wierda, *International Criminal Evidence*, Transnational Publishers, Ardsley, New York: 2002, pp. 328–29; A. Greenawalt, *Justice Without Politics? Prosecutorial Discretion and the International Criminal Court*, 39 NYU Journal of International Law and Politics 583 (2007), p. 636; Cryer, *supra* note 26, pp. 214-16; L. Coté, *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, 3 Journal of International Criminal Justice 162 (2005), p. 166; H. B. Jallow, *Prosecutorial Discretion and International Criminal Justice*, 3 Journal of International Criminal Justice 145 (2005), p. 150; Schabas, *supra* note 14, p. 733; de Vlaming, *supra* note 13, pp. 548-71.

[38] Although it is said that the first area were the selection of persons subdued to prosecution is done at the stage of establishment of an international tribunal; defining the tribunal's jurisdictional ambit gives

significance for the analysis of the discretionary powers of the Prosecutor is related to his independent powers to start an investigation. It is only at the stage of bringing the indictment before the Trial Chamber that a judicial organ can analyze the Prosecutor's decision to indict a particular perpetrator. However, the judges of the ICTY have powers only to assess a decision, whether a prima facie case exists and it is reasonable to lodge an indictment. The decision not to prosecute cannot be controlled. The judicial organ has no powers to decide whether the prosecutor should prosecute any particular case or person for certain acts if he refuses to proceed with the case.[39]

We could also utilize contextual interpretation – meaning interpreting a certain legal provision as a part of a wider legal system and thus interpreting it according to the rules governing this whole system. In this context, a strong influence of the common law system on the model of accusation adopted before the ad hoc tribunals cannot be ignored. The model of investigation was designed on the basis of the principles established in these systems.[40] As in the case of other procedural solutions, also the standardisation of the reaction to information concerning committed crimes falling within the jurisdiction of a tribunal was based on the common law model. This model assumed the applicability of procedural opportunism. On this basis, we can assume that the notion "sufficient basis to proceed" should be given the same meaning as in Anglo-Saxon systems. In consequence, the content of these provisions suggests that the Prosecutor has discretionary powers to evaluate whether there is a "sufficient basis" to start an investigation and indict a certain person and is under no obligation to do it when he considers that there is no sufficient basis.

However, what to some scholars is a clear-cut example of opportunism, to others appeared to be the principle of legalism (i.e. the model of accusation before the ICTY resembles the principle of legalism known from the continental law systems). According to this theory, the gravity of crimes that the Tribunal deals with should lead to acceptance of the Prosecutor's obligation to prosecute their perpetrators in every case when he receives information about committing such a crime – and confirms it. Secondly, the formulation of Art. 18(4) – "Upon a determination that a prima facie case exists, the Prosecutor shall prepare an indictment" – is of a strict character and leaves no place for prosecutorial discretion.[41] The use of the "shall" notion signifies that the Prosecutor should always prepare an indictment when he obtains evidence leading to a conclusion that there is a reasonable basis to believe that crimes within the jurisdiction

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ground for the further selection of accused – both in geography and in time. Despite many conflicts have been encountered, only two ad hoc tribunals have been created by the Security Council. *See* M. P. Scharf, *The Politics of Establishing an International Criminal Court,* 6 Duke Journal of Comparative and International Law 167 (1995).

[39] The same opinion expressed also on another occasion in Kuczyńska, *supra* note 6, p. 67.

[40] According to many authors, *e.g.* K. Ambos, *International criminal procedure: "adversarial", "inquisitorial" or mixed?*, 3(1) International Criminal Law Review 1 (2003), p. 6 or C. Schuon, *International Criminal Procedure: A Clash of Legal Cultures*, T.M.C. Asser Press, The Hague: 2010, p. 196.

[41] Arguments also presented in Kuczyńska, *supra* note 6, p. 68.

of the ICTY have been committed.[42] However, it seems that this approach is not widely represented. More often, we can encounter opinions accepting the operation of the principle of opportunism.

Moreover, the practice adopted the ICTY leaves no doubt that it operates on the basis of the principle of opportunism. The practice of the Office of the Prosecutor shows that it enjoys a wide discretion as to the decision whether to prosecute. Often the case of NATO's military intervention to stop ethnic cleansing in Kosovo in 1999 is mentioned as an example. In this case the Prosecutor refused to bring an indictment.[43] During the NATO operation airplanes launched a missile attack on state buildings in Belgrade killing sixteen civilians inside and damaging the building. Although in the beginning, the ICTY Prosecutor created a special committee to look into the allegations of NATO war crimes, the following year she declined investigating further, based on a NATO report , which stated that the buildings were used as military premises and the bombing was therefore justified. Although the decision was widely criticized, it was final. Even the explanation of this decision gave rise to suspicions that her decisions were based not purely on legal reasoning: "NATO bombing targets were authorized on the basis of consensus decisions following careful review by the highest-level military and government officials of each of the individual NATO states;" therefore, "this example presents a concrete scenario in which the heads of state of every NATO country might be charged with war crimes in the event that a Prosecutor disagreed with them about the legitimacy of the objective underlying a particular tactical decision."[44] In this case, apparently, she agreed with the tactical choice they had made. Another infamous case is the bombing of the Chinese Embassy in Belgrade. The ICTY did not initiate an investigation, observing in the report that the United States paid compensation and that the aircrew could not be held responsible.[45] In consequence, questions of criminal responsibility were dealt with by the way of a report and not in an investigation. There can be no doubt that the Prosecutor of the ICTY often found himself in a difficult situation: between the political agendas of powerful actors and on the other side – the interests of justice and an independence of the Office of the Prosecutor.[46]

Nonetheless, it is widely agreed that the prosecutorial discretion is not unlimited. Firstly, the discretionary powers of the ICTY Prosecutor are limited by Security Council resolutions. In the beginning of its operation, the ICTY Chief Prosecutor Richard Goldstone adopted a "pyramidal strategy" of indicting and prosecuting low-level per-

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[42] D. D. Ntanda Nsereko, *Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia*, 5 Criminal Law Forum 507 (1994), pp. 518-19; Safferling, *supra* note 11, p. 176. *See also* Coté, *supra* note 37, p. 165, and deGuzman, Schabas, *supra* note 17, p. 137.

[43] *Cf.* Final report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, at: http://www.icty.org/sid/10052 (accessed 30 March 2015). *See also* Greenawalt, *supra* note 37, p. 636; Cryer, *supra* note 26, pp. 214-16; Ambos, Bock, *supra* note 14, p. 502; Coté, *supra* note 14, pp. 376-79.

[44] Greenawalt, *supra* note 37, p. 639.

[45] *Cf.* final report to the Prosecutor, *supra* note 48; para. 84, *see also* Cryer, *supra* note 26, p. 218.

[46] Coté, *supra* note 14, p. 376.

petrators as a means of laying the foundation for the prosecution of those thought to be most responsible for the crimes in question. However, this approach was criticized and the actions of the Prosecutor condemned. It was observed that such an attitude is resource-consuming and clogs the system, leading in consequence to a situation where many accused persons in custody have waited several years for trial, undermining perceptions of fairness: "the perception that the OTP had focused too much on the 'small fry' accused at the expense of neglecting the 'big fish' led directly to the ICTY's 2002 recommendation to the UN Security Council that the Tribunal adopt a formal 'completion strategy'."[47] In consequence, the Security Council Resolution no. 1534 called "on each Tribunal, in reviewing and confirming any new indictments, to ensure that any such indictments concentrate on the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the relevant Tribunal."[48] This appeal was combined with a demand from the Security Council to complete all cases; first by the end of 2008, and then by the end of 2014.[49] In practice, the ICTY's Rules of Procedure and Evidence enable the judges to refer cases that do not involve the most senior leaders responsible for very serious crimes to national authorities.

Secondly, in 2004, basing on the content of the above mentioned Resolution, Rule 28(A) of the ICTY Rules of Procedure and Evidence was adopted which requires that the Bureau shall determine whether an indictment, prima facie, concentrates on one or more of the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the Tribunal. Only, if the Bureau determines that the indictment meets this standard, the President can designate one of the Trial Chamber judges for judicial review of the indictment. If the Bureau determines that the indictment does not meet this standard, the President shall return the indictment to the Registrar to communicate this finding to the Prosecutor. The Rules do not mention what happens after such a communication but on the basis of the practice adopted by the ICTY we can conclude that the Prosecutor may introduce a necessary amendment to the indictment based on the indications of the Bureau. These provisions constitute indices for the Prosecutor how to proceed with the selection of the defendants. At the same time, it is becomes a powerful tool of exercising judicial control over the actions of the Prosecutor.[50]

Thirdly, it is the Chambers of the ICTY that have introduced judicial guidelines for the Prosecutor as to a choice of cases and defendants (and charges) that he could use. In *Prosecutor v. Delalić and Others* case, one of the accused (E. Landžo) stated that

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[47] S. E. Smith, *Inventing the Laws of Gravity: The ICC's Initial Lubanga Decision and its Regressive Consequences*, 8 International Criminal Law Review 331 (2008), pp. 338-39.

[48] Resolution of the Security Council No. S/RES/1503 (2003), paras. 5-6, No. 1534 S/RES/1534 (2004), para. 5, and then No. 1966, S/RES/1966(2010), para. 3.

[49] *See* Schabas, *supra* note 14, p. 733; Ambos, Bock, *supra* note 14, p. 503; de Vlaming, *supra* note 13, pp. 548-71; K. J. Heller, *Completion*, [in:] L. Reydams, J. Wouters, C. Ryngaert (eds.), *International Prosecutors*, Oxford University Press, Oxford: 2012, pp. 901–902; M. M. deGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 Michigan Journal of International Law 265 (2011-12), p. 286.

[50] Schabas, *supra* note 14, p. 733; Ambos, Bock, *supra* note 14, p. 503; de Vlaming, *supra* note 13, pp. 548-71; Heller, *supra* note 49, pp. 901-902.

he was the subject of a selective prosecution policy conducted by the Prosecution, by which he understood that "the criteria for selecting persons for prosecution are based, not on considerations of apparent criminal responsibility alone, but on extraneous policy reasons, such as ethnicity, gender, or administrative convenience." Specifically, he alleged that he was selected for prosecution on the grounds of being a Muslim camp guard, while indictments "against all other Defendants without military rank", who were all "non-Muslims of Serbian ethnicity", were withdrawn by the Prosecution on the ground of changed prosecutorial strategies. Therefore, this selective prosecution contravened his right to a fair trial as guaranteed by Art. 21 of the Statute, which should be understood to incorporate the principle of equality and that prohibition of selective prosecution is a general principle of customary international criminal law.

The Appeals Chamber rejected this accusation. First of all it stated that the Prosecutor enjoys a wide discretion as to the choice of the defendants:

> In the present context, indeed in many criminal justice systems, the entity responsible for prosecutions has finite financial and human resources and cannot realistically be expected to prosecute every offender which may fall within the strict terms of its jurisdiction. It must of necessity make decisions as to the nature of the crimes and the offenders to be prosecuted. It is beyond question that the Prosecutor has a broad discretion in relation to the initiation of investigations and in the preparation of indictments.[51]

Moreover, according to the Chamber the withdrawal of those indictments was based on the quite different consideration, viz., on insufficiency of evidence. At the same time, the Appeals Chamber stressed that the discretion of the Prosecutor at all times is circumscribed in a more general way by "the nature of her position as an official vested with specific duties imposed by the Statute of the Tribunal" and her obligation to discharge those duties with full respect of the law. She must abide by the recognized principles of human rights such as the principle of equality before the law and the principle of non-discrimination.[52] At the same time the ICTR Appeals Chamber went even further, by stating that in order to show that the Prosecutor is proceeding on a selective basis, the defendant must prove it, providing the evidence of discriminatory intent:[53] "as such, the burden on an accused alleging selective prosecution is a high one."[54]

In consequence of the practice adopted by the Prosecutor and approved by the Chambers there can be no doubt that the ICTY Prosecutor acts according to the principle of opportunism and has wide discretionary powers to select cases for investigation; he can indict only some of the alleged perpetrators. He acts according to the "prioritization" method based on indicting only "persons of authority and leadership".[55] This approach was necessary in view of the completion-of-cases strategy. We can observe that there is a

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[51] *Prosecutor v. Delalić*, IT-96-21, judgment of the Trial Chamber, 20 February 2001, para. 601.

[52] *Ibidem*, paras. 603-605.

[53] *Prosecutor v. Akayesu*, ICTR-96-4-A, judgment of the Appeals Chamber, 1 June 2001, para. 96.

[54] Jallow *supra* note 37, p. 155.

[55] Cited after: R. Cryer, H. Friman, D. Robinson, E. Wilmshurst, *Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge: 2011, p. 443.

relation between the imposed obligation to end all the proceedings before a certain date and the necessity of a careful selection of cases leading to a growing "impunity gap". The same needs appeared before the ICTR where more than 100.000 suspects were held in Rwandan prisons.[56] However, prosecutors of the ad hoc tribunals have been frequently criticized for surrendering the selection of the defendants to their personal policy and unclear criteria.[57] On many occasions, it has been observed that indictments were not equally issued amongst the most responsible persons. On the other hand, we can encounter opinions, according to which the practice of the ad hoc tribunals has demonstrated that "the efficiency of the international Prosecutor – his capacity to investigate and prosecute in order to fulfill his mandate with limited resources and time – resides in the discretionary exercise of his powers"[58], or that "discretion is essential to the operation of any system of criminal justice for, without it, the system would grind to a halt – it would be paralyzed and would lack any flexibility or ability to adapt to particular circumstances."[59]

4. ICC – BETWEEN THE PRINCIPLE OF OPPORTUNISM AND LEGALISM

4.1. Powers to initiate an investigation

While designing the powers of the ICC Prosecutor during the negotiations stage his independent power to start an investigation became one of the most disputed and controversial problems.[60] Many states supported a solution where the Prosecutor could start an investigation only on demand of one of the State Parties to the Statute or the Security Council. Prosecutorial discretion has been seen as a danger in the ICC system. In particular, during negotiations many states strongly opposed granting the Prosecutor the power to initiate investigations *proprio motu*. The United States delegation in-

[56] de Vlaming, *supra* note 13, p. 570. *See also* G.-J. Knoops, *Theory and Practice of International and Internationalized Criminal Proceedings*, Kluwer Law International, The Hague/London/Boston: 2005, p. 116.

[57] *See* de Vlaming, *supra* note 13, p. 570 and the detailed analysis of all subsequent prosecutors of the *ad hoc* tribunals.

[58] *See* Coté, *supra* note 14, p. 165.

[59] Jallow, *supra* note 37, p. 145.

[60] Knoops, *supra* note 56, p. 112; W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, Oxford: 2010, p. 317; M. Bergsmo, J. Pejić, Article 15, [in:] O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article*, 2nd ed., Hart Publishing and Verlag C.H. Beck, München/Oxford: 2008, p. 582; M. Płachta, *Międzynarodowy Trybunał Karny* (The International Criminal Court), Zakamycze, Kraków: 2004, pp. 283-86; R. Goldstone, N. Fritz, *In the interest of justice and the independent referral: The ICC prosecutor unprecedented power*, 13 Leiden Journal of International Law 655 (2000), p. 657; E. La Haye, *The Jurisdiction of the International Criminal Court: Controversies over the preconditions for exercising its jurisdiction*, 46(1) Netherlands International Law Review 1 (1999), p. 15; Brubacher, *supra* note 14, p. 73; Greenawalt, *supra* note 37, p. 585; Coté, *supra* note 14, p. 404.

dicated that his discretion to start an investigation will not allow him to proceed in an unbiased way, engaging his attention on political questions and problems and making him a political player. The delegation expressed the anxiety against "frivolous" or even "malicious" accusations made by the "unpredictable" prosecutor.[61] The final adoption of the *proprio motu* Prosecutor's powers to initiate an investigation supposedly became the main reason of the US refusal to ratify the Statute. However, both supporters and opponents of this solution agreed as to one thing: this power was to have a key significance for the powers of the ICC. It was to become a test of its independence.[62]

Finally the version promoted by the European states prevailed and on the basis of Art. 15(1) of the Rome Statute: "[t]he Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court." Art. 15(3) explains when and how an investigation may be initiated: "[i]f the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected."

He is the sole organ of the Court which decides who will be prosecuted and who will not be. It leads to the power of the Prosecutor to decide about the factual scope of jurisdiction of the ICC. This power was however surrendered to the control of the Pre-Trial Chamber, which – in order for the case to go to the investigation stage of the proceedings – must authorize initiation of an investigation. Upon examination of the request of the Prosecutor to start an investigation and the supporting material, the Pre-Trial Chamber considers whether there is a reasonable basis to proceed with an investigation, and only when the case appears to fall within the jurisdiction of the Court, it authorizes the commencement of the investigation. The wording of the Statute stresses that the Prosecutor has only the power to "initiate" investigations and not to "start" them. It is only the decision of the Pre-Trial Chamber that may become a basis to the "commencement" of the investigation.[63]

Moreover, the judicial control on this stage of the proceedings extends on cases where the Prosecutor refused to initiate or proceed with the investigation. The Pre-Trial Chamber may choose to force the Prosecutor to proceed with investigation in

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[61] M. Płachta, *Prokurator Międzynarodowego Trybunału Karnego: między legalizmem a oportunizmem ścigania* (The Prosecutor of the International Criminal Court: Between legality and opportunity of prosecution), [in:] J. Menkes (ed.), *Prawo międzynarodowe. Księga pamiątkowa Profesor Renaty Szafarz* (International law. The book for the jubilee of Professor Renata Szafarz), WSHiP, Warszawa: 2007, pp. 479-80.

[62] Coté, *supra* note 14, p. 353; M. Bergsmo, F. Harhoff, Article 42, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article* (2nd ed.), Hart Publishing and Verlag C.H. Beck, München/Oxford: 2008, p. 972; P. Milik, *Komplementarność jurysdykcji Międzynarodowego Trybunału Karnego i trybunałów hybrydowych* (Complementarity of the International Criminal Court and hybrid tribunals), Dom Wydawniczy Elipsa, Warszawa: 2012, p. 105.

[63] This decision is not subject to appeal: J. Izydorczyk, P. Wiliński, *Pozycja i zakres uprawnień Prokuratora Międzynarodowego Trybunału Karnego* (The position and the scope of powers of the Prosecutor of the International Criminal Court), 6 Prokuratura i Prawo 35 (2005), p. 38; Bergsmo, Harhoff, *supra* note 62, pp. 585, 590.

two situations described in Art. 53(3) of the ICC Statute. Depending on what subject initiates the control, the powers of the Pre-Trial Chamber may look differently. The first possibility to review the decision of the Prosecutor appears when the State making a referral or the Security Council makes such a request. In this situation the Pre-Trial Chamber may review a decision of the Prosecutor not to proceed and may request the Prosecutor to reconsider that decision. The second option of review triggers the Pre-Trial Chamber on its own initiative, which may review a decision of the Prosecutor not to proceed if it is based solely on the Prosecutor's assessment that a prosecution is not in the interests of justice. In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.

4.2. The decision to prosecute

The conditions on which the Prosecutor may initiate an investigation are set in Art. 53(1) of the Statute. It states that:

> The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:
> a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
> b) The case is or would be admissible under article 17; and
> c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

If the Prosecutor determines that there is no reasonable basis to proceed and his determination is based solely on subparagraph (c), he shall inform the Pre-Trial Chamber, which may then review a decision of the Prosecutor not to proceed and may request the Prosecutor to reconsider that decision.

At this point three problems are relevant. First, the decision to prosecute a case consists of these two decisions: first whether to investigate a situation and then, whether to prosecute a particular case. The differentiation between a situation and a case seems to resemble continental structure of an investigation which is divided into two phases: *in rem* and *in personam*. There is no doubt that the selection of a defendant separates two stages of investigation. After the stage of conducing the proceedings *in rem* (investigation into a case), the proceedings is transferred to the *in personam* (investigation against a certain person) stage. Whereas during the first stage the prosecutor (also the ICC Prosecutor) analyses the whole factual situation and allegation as to the crime, the second stage refers to a specific person and specific charges, which are presented in the charging document. While a "situation", which justifies the initiation of the proceedings before the Court, includes a whole range of behaviours restricted to time, venue and potential perpetrators, a "case" refers to the specific event constituting one of the crimes falling within the Court's jurisdiction. The notion of a "case" "is used herein to denote one or more defendants and one or more charges stemming from one or more related incidents".[64] The Registrar even keeps a separate record for each "situation" and each "case". When a "case" is commenced, its record is completed with copies of the relevant documents from the "situation" record.[65] From the point of view of prosecutorial discretion, we can say that this discretion comes into play in two stages of initiating an investigation: the first stage being the selection of a situation for investigation; the second, selecting a case and a defendant for prosecution.

Second, in relation to the decision to prosecute the key question is when the specific defendant is selected – that is – when precisely a case is selected within a situation. There is no specific provision in the Statute that would suggest when cases are separated from a situation. It seems that the prosecution is directed against a certain person in the moment of issuance of the arrest warrant (or a summons to appear). It is the first moment in which the defendant is mentioned. Decision to prosecute is therefore taken in the moment of issuing an arrest warrant (or summoning the person to appear). This statement may – however – lead to another question: whether the decision to prosecute is taken when the ICC Prosecutor drafts such a warrant , when he applies to the Pre-Trial Chamber to issue it, or when the Pre-Trial Chamber, on the application of the Prosecutor, issues a warrant of arrest of a person according to Art. 58 of the Statute. It is also important to define the precise moment of directing the prosecution against a certain person as of this moment onward all the procedural guarantees apply to the suspect. Two reasons should speak for the second conception. First, we could not adopt the third solution, as we are looking for the precise moment when the Prosecutor takes the decision to prosecute; confirmation of this decision (which manifests itself in the issuance of the warrant) by the Pre-Trial Chamber cannot be equaled to the decision to prosecute, as it has no powers to take such a decision – only to confirm it. Moreover, it has been stated by the ICC that the "use of the word 'shall' indicates that the Pre-Trial Chamber is under an obligation to issue a warrant of arrest, provided that the prerequisites of article 58(1) of the Statute are met."[66] Second, we cannot acquiesce to the first solution, as up until this moment the draft warrant can be changed by the Prosecutor: it is only the lodging of this document to the Chamber that makes it final.

This approach finds confirmation in the first opinions expressed on the matter of the decision to prosecute. G. Turone stated that the application of the Prosecutor to issue the warrant of arrest

> is the very document through which the Prosecutor manifests his/her decision to prosecute, and since it shall contain the name of the person, a specific reference to the alleged crime committed, a concise statement of the facts and a summary of the evidence, it may be regarded as a document substantially equivalent to the indictment prepared by the

[64] deGuzman, Schabas, *supra* note 17, p. 132.

[65] *See* H. Olásolo, *Essays on International Criminal Justice*, Hart Publishing, Oxford/Portland: 2012, p. 26.

[66] *Situation in the Democratic Republic of the Congo*, ICC-01/04, Judgment on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I Entitled "Decision in the Prosecutor's Application for Warrants of Arrest, Article 58", 13 July 2006, para. 44.

> Prosecutor of the ad hoc Tribunals (...). In other words, the application under Article 58(2) constitutes a sort of provisional indictment, and the issuance by the Chamber of the warrant or summons somehow constitutes the equivalent of provisional confirmation of an indictment.[67]

According to this view this provisional indictment becomes formal when the Prosecutor presents the charges to the Pre-Trial Chamber for the confirmation procedure. This indictment, in turn, becomes valid and complete when the Chamber confirms the charges. Similarly, also later, W. Schabas observed, that Art. 58 "is really about the 'indictment'. But this term, which was 'strange to many delegations' is replaced in the Rome Statute by 'arrest warrant' and 'summons to appear'. These terms describe the accusatory instruments by which an individual 'suspect' becomes jeopardized by formal prosecution proceedings."[68] Also, the history of drafting of this provision leads to the conclusion that Art. 58 constitutes the basis for selection of the defendant. According to the 1993 draft of the International Law Commission on the ICC, Art. 31 treated upon the commencement of prosecution. It stated that "Upon a determination that there is a sufficient basis to proceed, the Prosecutor shall prepare an indictment containing a statement giving particulars of the facts and indicating the crime or crimes with which the accused is charged under the Statute." Then, even prior to a formal indictment by the Court, a person may be arrested or detained if the Court determines that such arrest or detention is necessary because there is "sufficient ground to believe that such person might have committed a crime within the jurisdiction of the Court; and, unless so arrested the person's presence at trial cannot be assured."[69] On the other hand, it cannot be forgotten that this provision may be applied not only to the "pre-indictment" arrests, but also to "post-indictment" arrests.[70]

In the Polish criminal procedure, the moment of pointing to the selected defendant who will be held responsible for the examined criminal behavior takes place when the charging document is presented to the suspected person (or such a document is made public in case when the suspected person cannot be found). In the German criminal trial, however, there is no need to present such a document and a defendant is selected only when the investigating authorities manifest their suspicion against a certain person by taking up a certain activity against such a person (being the consequence of such

[67] G. Turone, *Powers and Duties of the Prosecutor*, [in:] A. Cassese, P. Gaeta, W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, Oxford: 2002, p. 1178.

[68] Schabas, *supra* note 60, p. 704 citing F. Guariglia, *Investigation and Prosecution*, [in:] R. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, Kluwer Law International, The Hague/Boston: 1999, p. 235.

[69] *Report of the Commission to the General Assembly on the work of its forty-fifth session, Annex: Report of the Working Group on a Draft Statute for an International Criminal Court*, Yearbook of the International Law Commission 1993, Volume II, Part Two, p. 114.

[70] Which was noticed by: C. K. Hall, *Article 58*, [in:] O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd ed., Hart Publishing and Verlag C.H. Beck, München/Oxford: 2008, p. 1137.

a suspicion), e.g., issuing an arrest warrant. Such an activity decides about treating such a person from this moment onward as a factual suspect – if it constitutes an externalization of this suspicion. This method gives rise to the theory of the substantially (not formally) suspected person or – in other words – to a substantive (material) definition of a suspect.[71] It means that there is no need for a formal decision to consider a person to become a suspect: it is enough to direct against this person factual actions. We can see that this concept, after necessary adjustments, was adopted by the ICC. It can be claimed that this solution is more favorable to the suspect as it does not leave any space for the investigative authorities to start activities directed against a certain person "informally" – even before treating this person as a formal suspect enjoying certain rights (and among them the right to information about the charges) during an investigation.

The second important question regarding the moment of selecting a defendant is whether the parameters from Art. 53(1) of the Statute should be applied at this stage of proceedings. Art. 58 of the Statute states that the Prosecutor applies for an issuance of the warrant of arrest only if he is satisfied (*per analogiam* to the threshold that needs to be established by the Pre-Trial Chamber in order to issue the warrant) that "there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court" (what in the continental doctrine is known as the "general parameter") and "The arrest of the person appears necessary: (i) To ensure the person's appearance at trial; (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; or (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances" (the "specific parameter"). The first solution would be to consider that these parameters that should be fulfilled are of an evidentiary nature and that this is an evidentiary threshold as the "reasonable grounds" parameter has already been checked by the Prosecutor while initiating an investigation. However, it seems more appropriate to consider that the Prosecutor should for the second time demonstrate that there are "reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court." This conviction results from the word "reasonable grounds to believe", that should be comparable to the threshold from Art. 53(1) of the Statute. There is, however, one important difference – this test should be fulfilled towards the certain defendant. We cannot also forget that – as applied at a different stage of the proceedings – this notion should be differentiated from the standard from Art. 53(1)

[71] This theory presented by: S. Steinborn, *Status osoby podejrzanej w procesie karnym z perspektywy Konstytucji RP (uwagi de lege lata i de lege ferenda)* (The status of the suspected person in criminal trial from the perspective of the Constitution of the Republic of Poland), [in:] P. Kardas, T. Sroka, W. Wróbel (eds.), *Państwo prawa i prawo karne. Księga jubileuszowa Profesora Andrzeja Zolla* (The book for the jubilee of Professor Andrzej Zoll), vol. 2, Warszawa: 2012, pp. 1781-1801, *see also* A. Murzynowski, *Faktycznie podejrzany w postępowaniu przygotowawczym* (The factual suspect in an investigation), 10 Palestra 36 (1971), pp. 37-39.

of the Statute. The interpretation of each of them "depends on the different stages of the proceedings."[72] This concept is supported by the analysis of the Pre-Trial Chamber jurisprudence regarding the admissibility of issuance of a warrant of arrest. In each case it analyses whether all the conditions from Arts. 17 (especially the parameter of "gravity of the case") and 53(1) are fulfilled – in case of the certain person selected by the Prosecutor. In consequence, the decision of the Pre-Trial Chamber whether to issue the warrant of arrest (or a summons to appear) is the moment when the admissibility of the case against a certain person is decided.[73]

Third, legal criteria for the selection process are provided in Art. 53(1) should be differentiated from factual parameters from (2). The criteria from Art. 53(1) should be applied in the process of selection of a situation. A positive decision of the Prosecutor that these criteria are fulfilled allow the Prosecutor to follow from the pre-investigation stage to the stage of investigation. Criteria constituted in Art. 53(2) are applied at the later stage, when the Prosecutor decides whether there is a sufficient basis for a lodging an indictment (here known as charges). This parameter is assessed by the Prosecutor upon completion of the investigation. According to Art. 53(2) of the Statute,

> if, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:
> (a) There is not a sufficient legal or factual basis to seek a warrant or summons under Article 58;
> (b) The case is inadmissible under Article 17; or
> (c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime – he should inform the Pre-Trial Chamber and the State making a referral or the Security Council, of his or her conclusion and the reasons for the conclusion.

This paragraph is known as the "factual parameter" as it applies to the evaluation of the evidence gathered during the investigation. On the basis of such evidence, the Prosecutor examines whether he is going to be able to prove that the accused has committed the alleged crime and that all criteria of the crime have been met and that the accused assumed a particular role. The Prosecutor refuses to proceed with a case if he decides that there is no sufficient basis for prosecution due to the lack of sufficient – legal or factual – basis for formulating charges. Using this provision as a basis, the Prosecutor

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[72] *The Prosecutor v. Bemba*, ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, para. 27.

[73] As can be concluded from the wording of Situation in the Democratic Republic of the Congo, ICC-01/04, Judgment on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I Entitled "Decision in the Prosecutor's Application for Warrants of Arrest, Article 58", 13 July 2006, para. 4. Of course, such a person may challenge the admissibility of the case at any stage of the subsequent proceedings.

may, therefore, refuse to proceed in the event of lack of evidence.[74] This can happen before or after selecting a defendant – both in a situation where the Prosecutor has failed to find the perpetrators of crimes or proof of the perpetrator's guilt.

4.2. Discretion to initiate an investigation and the principle of opportunism

Based on the same wording of the provisions of Arts. 15 and 53(1) of the Statute, both arguments supporting the principle of opportunism and the principle of legalism have been presented. It is interesting to observe that in most cases the attitude towards this issue depends on the model of accusation functioning in the country the author belongs to: these coming from the Anglo-Saxon tradition have tendency to search for the elements of the principle of opportunism; those from civil law states assume that the model of accusation operates according to the principle of legalism.

According to some authors, the elements mentioned in Art. 53(1) are of an opportunist nature. The term "interests of justice" is generally used to "acknowledge the need for discretion and the inability of legal texts to codify answers for difficult issues."[75] According to this theory, "the structure of prosecutorial authority set forth in the Rome Statute closely resembles that typical of traditional common law systems, in which prosecutors, subject to varying degrees of judicial supervision, enjoy the primary authority to select and pursue criminal cases."[76] Therefore, the Prosecutor is at liberty to evaluate both "reasonable basis to proceed", "gravity of the crime" and the lack of "interests of justice" parameters.[77] The evaluation of these three parameters belongs solely to the Prosecutor. He enjoys the full independence to select both situations and cases (that is defendants) which to investigate on the basis of these conditions. He independently assesses whether the conditions justifying initiation of an investigations have been fulfilled. This power is related to as "prosecutorial discretion" or even "absolute discretion".[78] With this notion all the decisions during investigation are described: both decision to initiate an investigation, decision whom to prosecute and decision for what crimes.

However, even if we accept application of the principle of opportunism, it should be remembered that the discretion of the Prosecutor is limited by the control powers of Pre-Trial Chamber. The Chamber enjoys two powers: to authorize the initiation of an investigation (Art. 15) and to confirm charges before trial (Art. 61). Therefore sometimes a notion of a "controlled opportunism" is being used.[79] The discretion of the

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[74] *See* Schabas, *supra* note 60, p. 666; M. Bergsmo, P. Kruger, *Article 54*, [in:] Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2nd ed.), Hart Publishing and Verlag C.H. Beck, München/Oxford: 2008, p. 1073.

[75] Schabas, *supra* note 60, p. 663. *Similarly*, Płachta, *supra* note 61, p. 492.

[76] Greenawalt, *supra* note 37, p. 599.

[77] P. Vasiliev, *Trial*, [in:] L. Reydams, J. Wouters, C. Ryngaert (eds.), *International Prosecutors*, Oxford University Press, Oxford: 2012, p. 702; Ohlin, *supra* note 14, p. 187; H. Olásolo, *The Triggering Procedure of the International Criminal Court*, Martinus Nijhoff Publishers, Leiden/Boston: 2003, p. 136.

[78] *See* Vasiliev, *supra* note 77, p. 702; Ohlin, *supra* note 14, p. 187; Greenawalt, *supra* note 37, p. 583. *See also*, Kuczyńska, *supra* note 6, p. 69.

[79] Płachta, *supra* note 61, p. 494.

Prosecutor may therefore be understood only as a power to investigate a case and not as a power to formally start an investigation (only to "initiate" it).

4.3. Obligation to act and the principle of legalism

According to the theory supporting the principle of legalism it is clear that the Prosecutor shall, having evaluated the information made available to him, initiate an investigation unless he determines that there is no reasonable basis to proceed. The representatives of this theory claim that "one cannot help an impression that it is drafted in mandatory terms",[80] as the notion "shall initiate" in connection with the exception of "the interests of justice" is typically used when it induces the operation of the principle of legalism. Therefore, on the first view it does not leave any space for prosecutorial discretion. According to this theory, Art. 53(1) suggests that when the conditions set out in this provision are met, the Prosecutor is obliged to initiate proceedings. If he disposes of evidentiary material in support of the fact of committing one of the crimes under the Court's jurisdiction, he should initiate an investigation if the case is admissible and it is not against the interests of justice.[81] A duty to investigate occurs only when the three criteria introduced by Art. 53(1) of the Statute occur: there is sufficient evidence that a grave crime within the jurisdiction of the Court occurred, the case would be admissible and when it is not against the interest of justice.

This conclusion is supported by the language used in the Preamble which "[a]ffirm[s] that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation, [and d]etermine[s] to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes." From the language of the Preamble the supporters of this theory conclude that there is no possibility not to investigate when such crimes take place.[82] Therefore, the second argument – as in the case of the ICTY – is connected to the seriousness of crimes the ICC deals with. The Preamble seems to assume that the investigation of all the crimes it mentions is obligatory. The principle of legalism would be in compliance with the obligation to treat all the crimes in the same way and therefore with the principle of equality. Moreover, it would send a clear signal to all the states that all the situations and cases in jurisdiction of the ICC will be treated in the same way – independently of the personal opinions of the present Prosecutor of the ICC.[83]

Even if we assume the application of the principle of legalism, it should be evaluated in the light of the complementarity principle.[84] As the ICC does not possess factual

[80] I. Stegmiller, *The Pre-Investigation Stage of the ICC: Criteria for Situation Selection*, Duncker & Humblot, Berlin: 2011, p. 251.

[81] *See* Bergsmo, Pejić, *supra* note 60, p. 589; I. Stegmiller, *The Pre-Investigation Stage of the ICTY and ICC Compared*, [in:] T. Kruessmann (ed.), *ICTY: Towards a Fair Trial?*, Wien: 2008, p. 330.

[82] Stegmiller, *supra* note 80, p. 251; Bergsmo, Pejić, *supra* note 60, p. 586.

[83] *See also* Kuczyńska, *supra* note 6, p. 70.

[84] D. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 Yale Law Journal 2537 (1991), p. 2598; *see also* Turone, *supra* note 67, p. 1154.

means to ensure the legal standards consistent with the principle of legalism, this principle has to undergo a certain adaptation to the task of the ICC. It will only find application in cases when the jurisdiction of the ICC would come into force in cases of the unwillingness of a state or inability to investigate the crimes in jurisdiction of the Court. This attitude highlights the primary responsibility of the states to punish the perpetrators of crimes of international law.

4.4. "Concurrent validity" of both principles and mixed solutions

Moreover, a number of mixed theories have been presented. Their representatives usually agree that "it cannot be argued that that a strict principle of legalism was adopted given the selective prosecution strategy of the ICTY and ICTR and, moreover, the ICC's statutory implementation of discretion through the 'interests of justice' clause in article 53(1)(c) and 53(2)(c)." On the basis of this conclusion, they assume that the solution adopted in Art. 53(1) of the Rome Statute "appears to be a compromise between the choice of strict legalism and prosecutorial discretion", in consequence it expresses "a sort of hybridization between various national traditions."[85]

It is said that the most useful application of the models is to operate elements from both principles into one system.[86] Systems based purely on the principle of legalism are expensive, and cause long delays in the court system, which in the end may lead to jeopardizing the overall aim of protection of rights and interests of the accused. On the other hand, application of the principle of opportunism in the pure form is often criticized. Systems based on the principle of opportunism offer to a prosecutor too much freedom to choose cases to prosecute, which is not subordinated to any kind of judicial control. Whereas, a mixed form is a result of the search for the right balance between the necessity to prevent impunity and effectiveness of criminal reaction, as well as providing the right guarantees of the accused's and victims' rights. As a matter of fact – most systems are mixed nowadays, with the characteristic combinations of various elements of these two principles being determined by practical necessity, constitutional rules, historical and sociological background or political demands.[87]

The most frequently supported attitude divides conditions from Art. 53(1) to non-discretionary parameters and discretionary parameters. G. Turone states that the decision based on the first parameter – reasonable basis – is non-discretionary "since such decision is anyway supposed to depend upon a rational and objective assessment of the *notitia criminis*, i.e. of the original information provided, plus the additional information collected through preliminary examination."[88] Also, the scope of jurisdiction cannot be freely assessed. However, the conditions from Art. 53(1)(c) can be discretionally evaluated by the Prosecutor. Both the "gravity" of the crime and "lack of interests of

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[85] *See* M. Delmas-Marty, *Criminal Law in the Preliminary Phase of Trial at the ICC*, 4(2) Journal of International Criminal Justice 2 (2006), p. 9.

[86] *Similarly*, Fionda, *supra* note 3, p. 10.

[87] Cited after *ibidem*, p. 9.

[88] *E.g.* Turone, *supra* note 67, p. 1152.

justice" do not undergo easy limitations. The first of the discretionary parameters means that crimes of a "non-sufficient gravity" should be dealt with by national jurisdictions. As to the second discretionary parameter – it must be remembered that the evaluation of this condition is controlled by the Pre-Trial Chamber. Therefore it should be not viewed as to "open the door" for the Prosecutor to escape investigation by invoking arbitrary grounds under this provision – at least in theory. The same attitude is presented by M. Bergsmo, who states that the Prosecutor "is not at liberty to exercise discretion in applying to the Chamber to proceed when he or she considers that there is a sufficient basis. Art. 53, on the other hand, provides a further opening for prosecutorial discretion in this regard, by incorporating a consideration of interests of justice in the Prosecutor's final determination of whether to actually proceed with an investigation following authorization by the Pre-Trial Chamber."[89]

I. Stegmiller describes this system as "based on the legality maxim, tempered by substantial opportunity elements."[90] According to him, after introducing a general obligation to initiate an investigation by the use of the "shall" expression the provision introduces an exemption thereto "unless there is no reasonable basis". These "opportunity elements" are supposed to be the three criteria standing at the base of discretionary powers of the Prosecutor: reasonable basis to proceed, interests of justice and gravity of crimes. On the basis of this interpretation, I. Stegmiller concludes that "a general duty to start formal investigations is imposed upon the Prosecutor, but with the adjunct that a differentiated procedural system derogates this general obligation."[91] Furthermore he states that "the Prosecutor shall not proceed if he sees no reasonable basis in favor of investigations, and in order to reach a determination on the reasonable basis he 'shall consider' the criteria of article 53(1)(a) to (c)."[92] He calls it "the backdoor" and states that thanks to its use the principle of legalism is softened. As it can be seen from the other side – he is under an obligation to initiate an investigation if there is a reasonable basis to proceed.

It seems that the main difference between opportunism and legalism depends on a decision whether the assessment of the parameter "reasonable basis to proceed" and its elements – existence of interests of justice and gravity of the crime – lead to a mandatory reaction or whether the reaction is of a discretionary character. It seems that, notwithstanding the meaning of these notions, the main difference between opportunism and legalism lies in the assessment whether existence of a reasonable basis to proceed (or lack thereof) should be assessed subjectively (by the Prosecutor) or according to an objective test. While the first interpretation is characteristic for the common law tradition, the second is used by continental states. The latter interpretation assumes that in starting an investigation the prosecutor must take into consideration an objective evaluation of a situation, and act according to this idealistic assessment, rejecting at the same time the possibility to apply his personal judgment. This complicated method is

[89] Bergsmo, Pejić, *supra* note 60, pp. 589 and 1068.

[90] Stegmiller, *supra* note 80, p. 262.

[91] *Ibidem*, p. 250.

[92] *Ibidem*.

referred to as the "relative obligation" (as nonsensical as it may seem). It means that the initiation of an investigation is mandatory if the prosecutor comes to a conclusion that, objectively, there is a reasonable basis to proceed. At the same time, the common law tradition leaves the evaluation of existence of a reasonable basis to the discretion of the prosecutor, not subjecting him (as a rule) to an objective assessment of the tests provided for by the legal act. Based on this view we can observe that the same wording of a legal provision leads to completely different interpretations in two legal traditions. The whole cultural and legal heritage of a given state seems to weight upon this interpretation and the meaning given to a certain phrase.

5. THE SELECTION OF DEFENDANTS IN PRACTICE OF THE ICC

5.1. Selective prosecution

Taking into consideration two conditions influencing actions of the ICC Prosecutor – the almost unlimited scope of jurisdiction and limited (both personally and financially) means to execute it – it seems obvious that it is not possible to prosecute all the perpetrators of the crimes under the ICC's jurisdiction, even in a situation when the Prosecutor could consider the initiation of an investigation to be reasonable.[93] The scope of jurisdiction itself constitutes a strong argument for opportunism: it is too wide to assume that it is possible to apply the principle of legalism. The number of communications coming to the OTP causes that the Prosecutor is not practically capable of bringing to justice every person suspected of having committed a crime within the jurisdiction of the ICC. The scale of the problem is best shown by the numbers: between 1 November 2013 and 31 October 2014, the Office received 579 communications relating to Art. 15 of the Rome Statute (of which 462 were manifestly outside the Court's jurisdiction; 44 warranted further analysis; 49 were linked to a situation already under analysis; and 24 were linked to an investigation or prosecution). The Office has received a total of 10,797 communications since July 2002.[94] Crimes investigated by the Prosecutor of the ICC entail large numbers of perpetrators, sometimes even thousands of them, and it is virtually impossible to bring them all to face the ICC. The workload would lead to a total paralysis of the Court. Even in a situation when the Prosecutor acquires evidence in support of the information about committing a crime within the ICC's jurisdiction, he will always face the necessity to select the alleged perpetrators he indicts – on the basis of the criteria named in Art. 53(1): gravity of crimes, interests of justice, and reasonableness of initiating an investigation. In consequence, the general relations of crimes investigated (9 situations under investigation – Democratic Republic of the Congo, Uganda, Central African Republic, Darfur, Sudan, Kenya, Libya, Cote d'Ivoire, Mali, Central African

[93] *See also* Kuczyńska, *supra* note 6, pp. 72-73.

[94] *Report on Preliminary Examination Activities 2014*, paras. 17-18, available at: http://www.icc-cpi.int/iccdocs/otp/OTP-Pre-Exam-2014.pdf (accessed 30 March 2015).

Republic II – which include 21 cases, and 8 preliminary examinations) to crimes communicated must diverge to the detriment in comparison to state systems.

But most importantly, the limited resources provided by the Assembly of State Parties practically narrow down the number of simultaneous investigations.[95] So practically, these are the State Parties that define the number of cases and perpetrators that can be brought before the ICC. It is therefore often bitterly observed that "States created the ICC to adjudicate 'the most serious crimes of concern to the international community as a whole', but they gave it a budget that enables only a handful of prosecutions per year."[96] Such is the impact of financial possibilities of the Office that quite commonly we can encounter opinions indicating that the Prosecutor should have regard to available financial resources and treat this factor as one of the conditions evaluated in the process of the selection of cases.[97] As the Prosecutor is solely responsible for deciding how many cases will be brought before the ICC, in order to make this decision he has to compare the available finances with cost of a single case (and the number of potential defendants) and come up with a result being the number of cases that can be dealt with simultaneously (at the present moment that being 21 investigated cases, in the scope of 9 situations under investigation).

The prosecutorial discretion cannot be analysed in separation from the objectives and the reality of the international criminal tribunal, which are in their substance different from those of the state systems and do not allow easy comparisons. On what principle should the prosecution be based in such a reality then? Legalism rejects discretionary selection of defendants, as all perpetrators should be treated alike. This assumption clearly contradicts the reality of every international criminal tribunal. It seems that tempered legalism also does not allow for introducing any new criteria for selecting defendants, accepting that the parameters from Art. 53(1) should be applied equally in every case, based on an objective test. So, even legalism adapted by the use of complementarity principle does not solve the problem of multiplicity of perpetrators. In the reality of the ICC, the Prosecutor must set priorities. He "needs to balance interests and to prioritize the overall limited resources of time and personnel."[98] It is necessary to limit the number of persons accused by the Prosecutor – and as a result those judged by the Court – to an absolute minimum.[99] It cannot be done without

[95] W. W. White-Burke, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 Harvard International Law Journal 53 (2008), pp. 53-54.

[96] deGuzman, *supra* note 49, p. 267.

[97] Ntanda Nsereko, *supra* note 42, p. 125, A. M. Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 American Journal of International Law 510 (2003), p. 545.

[98] V. Röben, *The Procedure of the ICC: Status and Function of the Prosecutor*, 7 Max Planck Yearbook of United Nations Law 520 (2003), p. 524.

[99] Greenawalt, *supra* note 37, p. 620; Ambos, Bock, *supra* note 14, p. 541; Wu Wei, *Die Rolle des Anklägers eines internationalen Strafgerichtshofs*, Frankfurt am Main: 2007, p. 174. The so-called "screening and gatekeeping competence" as [in:] P. Bibas, W. W. Burke-White, *International Idealism Meets Domestic-Criminal-Procedure Realism*, 59 Duke Law Journal 637 (2009-10), p. 681.

the selection of defendants. As A. Cassese puts it "even from a merely theoretical point of view it would be absurd to assume that every single international crime and every single offender could be investigated and prosecuted by an international court."[100] Only within the principle of opportunism is it possible to accept that the Prosecutor may select defendants among the large number of alleged perpetrators. Only the principle of opportunism allows the Prosecutor to investigate only the most serious cases in which circumstances suggest – such as a high position in the hierarchy of the alleged perpetrator or the significance of the legal issues – that an international judicial organ should deal with them.

5.2. Basis for application of selective prosecution

It was during the first investigations that it turned out that the framework as set in the Rome Statute was not a sufficient basis for the selection of cases. As we have seen, a copious amount of literature was published on the topic of prosecutorial discretion of the ICC Prosecutor. Among various concepts as to the legal nature and sources of this discretion there were three aspects that all the publications had in common: firstly, they concluded that the present legal basis for the selection of cases is insufficient and secondly, they criticized the present politics of the Prosecutor, admitting that the choice of cases is directed by unclear goals and criteria. The third element that was in common was the conclusion that there is a need to introduce clear and coherent rules on which discretion in choosing defendants is based.

In the present moment, the selection of cases and defendants done by the Prosecutor is modeled by three sources The Statute itself provides the list of factors in Art. 53(1). This Article provides that in order to determine whether there is a reasonable basis to proceed with an investigation into the situation, the Prosecutor shall consider: jurisdiction (temporal, either territorial or personal, and material); admissibility (complementarity and gravity); and the interests of justice.

Second, the OTP have used several methods in order to render the process of selection of situations and cases more transparent. It develops a more precise prosecutorial strategy in its policy papers.[101] In its 2003 Policy Paper, the Office admits that the selection of cases and defendants is indispensable. However, as it is highlighted by the Office, the selection of cases does not lead to selective responsibility. According to the Office, this "impunity gap" should be "patched" if national authorities co-operate with the Court to ensure that all appropriate means for bringing other perpetrators to justice are used. In the Office's opinion, other offenders, who will not be prosecuted by the OTP, can wait for the strengthening or rebuilding of national justice systems, whereas the most guilty ones should not wait.[102] The Policy Paper explains that prosecuting the most responsible

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[100] Cassese, *supra* note 4, p. 472.

[101] The policy of the OTP derives from OTP Regulation 14(2), ICC-BD/05-01-09, 23 April 2009.

[102] *Paper on some policy issues before the Office of the Prosecutor*, September 2003, available at: http://www.icc-cpi.int/NO./rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf (accessed 30 March 2015), pp. 6–7.

perpetrators might encourage national authorities to deal with other cases. Also in its 2007 Policy Paper on the Interests of Justice, the OTP concluded that the Prosecutor's actions inevitably lead to the occurrence of the "impunity gap".[103] Again in this Paper, it was stressed that such a gap may be eliminated by designing comprehensive strategies to combat impunity, fully endorsing the complementary role that can be played by domestic prosecutions, truth seeking, reparations programs, institutional reform and traditional justice mechanisms in the pursuit of a broader justice.

It appears that this Paper creates an impression that the Prosecutor does not "select" situations, but rather is obliged to prosecute all situations that meet the criteria for jurisdiction and admissibility before the Court.[104] It seems that, in the two above mentioned papers, the OTP makes a promise that in the end all the perpetrators of the crimes in the jurisdiction of the ICC will be brought to justice – in national courts. However, it appears to be a promise made on behalf of the national authorities, over which the ICC has no power.

It is only in the 2009-12 Prosecutorial strategy that we can find a straight-forward statement that the OTP prosecutes in a selective way. Namely, it adopted "a policy of focused investigations and prosecutions". According to the OTP, "a policy of focused investigations" means that "cases inside a situation are selected according to gravity, taking into account factors such as the scale, nature, manner of commission, and impact of the alleged crimes." A limited number of incidents are selected. This allows the Office to "carry out short investigations; to limit the number of persons put at risk by reason of their interaction with the Office; and to propose expeditious trials while aiming to represent the entire range of victimization." While the Office's mandate does not include production of comprehensive historical records for a given conflict, incidents are selected to provide a sample that is reflective of the gravest incidents and the main types of victimization.[105] Moreover, against those chosen on this basis, the Office brings only representative charges. Which person and what charges the Prosecutor will choose to make an example of remains to his own personal discretion.

The Office has also used the Code of Conduct for the Office of the Prosecutor as the source explaining the criteria behind the selection of situations and cases. However, these criteria are still rather vague: Rule 51(a) and (c) dictates only that the Prosecutor should make impartial judgments based on the evidence and consider foremost the interests of justice in determining whether or not to proceed and to refrain from prosecuting any person whom they believe to be innocent of the charges.

Finally, every year it publishes Reports on Preliminary Examination activities; the first one was issued on 13 December 2011. In every one of these reports, the Office of the Prosecutor not only describes and presents the actual state of preliminary analysis

[103] *Policy Paper on the Interest of Justice*, September 2007, available at: http://icc-cpi.int/NO./rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf, p. 7 (accessed 30 March 2015).

[104] Similar observations made by deGuzman, *supra* note 49, p. 287.

[105] Prosecutorial strategy 2009-12, para. 20.

or investigation and conclusions about this state, but also establishes the criteria which it will follow to decide whether or not to initiate an investigation.

Publication of these guidelines provides information about factors that are taken into consideration by the Prosecutor.[106] This method aims at ensuring transparency of decisions – so much expected from the OTP – and helps to demonstrate that the Prosecutor's choice to prosecute (or not) has been made on the basis of legal, not political, criteria. Possibly, they could help to accept the choices made by the Prosecutor.[107] However, considering the legal validity of these documents we cannot forget they are documents reflecting internal policy of the OTP. In the OTP Policy Paper on Preliminary Examinations November 2013, even the Office itself admits that "[a]s such, [the paper] does not give rise to legal rights, and is subject to revision based on experience and in light of legal determinations by the Chambers of the Court. The Office has made this policy paper public in the interest of promoting clarity and predictability regarding the manner in which it applies the legal criteria set out in the Statute".

The third source of information about the basis for selection can be found in the practice of the OTP. Both the decisions of the OTP in specific cases and the applicable jurisprudence of the ICC Chambers will be described later.

Even with the list of factors standing at the base of the discretionary powers of the Prosecutor, still very often we can encounter the conclusion that the normative framework for the selection process is insufficient.[108] It leaves open the risk of arbitrariness and leads to the question whether the Prosecutor's policymaking functions bear sufficient legal accountability.[109] As a matter of fact, the ICC Prosecutor is often criticized for applying a non-coherent policy of prosecuting, which depends on the specific state where he intervenes and the position of the suspect.[110] Selectivity of the Prosecutor's actions is even presented as "a threat to the ICC's legitimacy."[111] It has to be admitted that this selectivity has so far led to instituting prosecutions mainly against citizens of states that are weak actors in the international arena or that fail to enjoy the support of powerful nations.[112] In the doctrine, it is widely agreed that there is a need to intro-

[106] Danner, *supra* note 97, p. 511.

[107] J. Stigen, *The Relationship between the International Criminal Court and National Jurisdictions*, Martinus Nijhoff Publishers, Leiden-Boston: 2008, p. 413.

[108] Stegmiller, *supra* note 80, p. 240.

[109] Greenawalt, *supra* note 37, p. 651, *but cf.* Brubacher, *supra* note 14, p. 72.

[110] Brubacher, *supra* note 14, p. 76; E. Muller-Rappard, *International Cooperation in Prosecution and Punishment*, [in:] M. C. Bassiouni (ed.), *Post-Conflict Justice*, Transnational Publishers, New York: 2002, p. 918; J. Locke, *Indictments*, [in:] L. Reydams, J. Wouters, C. Ryngaert (eds.), *International Prosecutors*, Oxford University Press, Oxford: 2012, pp. 610-12.

[111] deGuzman, *supra* note 49, p. 271.

[112] M. Damaška, *What is the Point of International Criminal Justice?* 83 Chicago-Kent Law Review 329 (2008), p. 361. This attitude leads to a "growing perception" that "Africans have become the sacrificial lambs in the ICC's struggle for global legitimation", cited after C. Jalloh, *Regionalizing International Criminal Law?,* 9 International Criminal Law Review 445 (2009), pp. 462-65.

duce more precise guidelines for prosecution which would provide a framework within which decision-making takes place.[113]

For a long time in the legal doctrine, it has been proposed that certain fundamental principles should govern the selection process: independence, impartiality, and non-discrimination[114] or independence, impartiality, objectivity and transparency.[115] Many authors, among others W. Schabas, have proposed that when selecting perpetrators, the Prosecutor should bear in mind such criteria as the "social alarm" criterion, meaning the concerns that such conduct may have caused in the international community and the broader interests of the international community, including the potential political ramifications of an investigation on the political environment of the state over which he is exercising jurisdiction. It means that he should weigh the risk that an investigation or prosecution may have on a political situation against the other interests that are likely to favour a prosecution, the broader impact of crimes on the community and on regional peace and security, including longer-term social, economic and environmental damage.[116]

There are also a number of other proposals. Some suggest introducing a special review procedure for the accused to allow him to challenge the decision of the Prosecutor on the grounds of allegation that political, and not legal considerations motivated this decision.[117] However, this solution simply shifts the decision-making from the Prosecutor to the judges.[118] We can also meet proposals to create a certain type of investigative chamber – e.g. equip the Pre-Trial Chamber with investigative powers.[119] It would not lead to creating a new organ, but should enable the existing organ to exercise control over pre-investigations. Another solution would be "outsourcing" the decision-making to an external actor. A. Greenawalt proposes that it could be the Security Council. Thus the political questions could remain with the political organs – "where they belong."[120] However, even he agrees that this solution should be rejected as it threatens the sole idea that stood behind the creation of an international criminal court; it threatens the independence not only of the Prosecutor but of the whole ICC.

There are also several supporters of a notion to introduce new legislation, which would provide the precise criteria for the selection of cases. A new Rule 104bis of the

[113] J. E. Hall Williams, *Introduction*, [in:] J. E. Hall Williams (ed.), *The Role of the Prosecutor: Report of the International Criminal Justice Seminar held at the London School of Economic and Political Science in January 1987*, Gower Publ., Avebury: 1988, p. 3.

[114] *See* F. Guariglia, *The selection of cases by the Office of the Prosecutor of the International Criminal Court*, [in:] C. Stahn, G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Martinus Nijhoff Publishers, Leiden/Boston: 2009, pp. 212–13.

[115] deGuzman, *supra* note 49, pp. 291 ff.

[116] *See* Brubacher, *supra* note 14, pp. 81-82; Schabas, *supra* note 14, p. 742.

[117] Knoops, *supra* note 56, p. 384.

[118] Greenawalt, *supra* note 37, p. 660.

[119] J. De Hemptinne, *The Creation of Investigating Chamber at the ICC: An option worth pursuing*?, 5 Journal of International Criminal Justice 402 (2007), p. 416; Stegmiller, *supra* note 80, p. 265.

[120] Greenawalt, *supra* note 37, p. 672.

RPE could mention a "short but exhaustive list of precise and binding criteria on gravity and interests of justice."[121] As the changes in the Rules are up to the State Parties, they should "act as legislators" and limit the scope of personal discretion of the Prosecutor, binding him with an obligation to prosecute, e.g., the military or political leaders and the highest state officials. However, this idea was rejected during negotiations on the Rome Statute. In the doctrine, it has been assumed then that the lack of any mention as to whether the Prosecutor should focus on a particular group of people (the most responsible; the highest state officials; most senior leaders) was purposeful.[122] The Prosecutor was not meant to concentrate only on a certain group of people, and was supposed to make his own choices. As a matter of fact, any efforts to concretize the notions of "interests of justice" and "gravity" would lead to limiting the scope of prosecutorial discretion. Moreover, in each case, each criterion – as much as these provided in Art. 53 – depends on the personal evaluation and subjective decision-making of the Prosecutor (and his Office). Even with guidelines written down and introduced, the criteria undergo a process of subjective evaluation by the Prosecutor. None of the rules limits the powers of the Prosecutor to evaluate the basis to initiate an investigation subjectively. There is a general consensus that they constitute "guidance" rather than a binding order.[123]

So far, the Prosecutor makes his own decision in every situation he decides to investigate. These decisions are awaited with impatience by the international community: "since the ICC is limited to prosecuting a handful of cases out of thousands of potential cases, each selection attracts substantial attention. Each decision expresses a statement about how the Court views its role in the world, with which relevant audiences may agree or disagree."[124] The reasons behind his choice are usually presented in the application for a warrant of arrest. These reasons, however, relate to the fact, that a particular defendant can be held responsible for the crimes under the ICC's jurisdiction. They do not present a clear opinion on the fact why this person, and not the other potential perpetrators, was chosen to be prosecuted.

5.3. The practice of the OTP: "the senior leaders" v. "the most responsible"

So far, the ICC Prosecutor has concentrated his actions on the most responsible perpetrators – as it was suggested from the beginning of the operation of the ICC, in the strategy presented by the OTP.[125] Both Art. 1 of the Rome Statute and the OTP papers refer to prosecuting "persons for the most serious crimes of international concern" and do not allow restricting prosecution only to the senior leaders. Therefore, pursuant to the 2003 Policy Paper, the concept of prosecuting "those who bear the greatest responsibility" was adopted as a basic rule: "the Office of the Prosecutor should focus

[121] Olásolo, *supra* note 77, p. 190, Stegmiller, *supra* note 84, p. 263.

[122] Stegmiller, *supra* note 80, p. 442.

[123] *See generally* Greenawalt, *supra* note 37, p. 630; Locke, *supra* note 110, p. 612.

[124] deGuzman, *supra* note 49, p. 269.

[125] *See* Greenawalt, *supra* note 37, p. 627; Schabas, *supra* note 14, pp. 745-46; Płachta, *supra* note 61, p. 487.

its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organisation allegedly responsible for those crimes." In some cases, the focus of an investigation by the Office of the Prosecutor may go beyond high-ranking officers.

We can see that there is no equation between the concept of "senior leaders" and "those most responsible".[126] Prosecuting senior leaders means prosecuting only the senior state officials, whereas prosecuting the most responsible leads to a conclusion that also mid-level perpetrators can be held responsible if an investigation of a certain type of crimes or those officers lower down the chain of command is necessary for the whole case. In this policy paper the OTP observed that there is a distinction between these two groups as the group of "those who bear the greatest responsibility" may include "the leaders of the State or organisation allegedly responsible for those crimes" but also other perpetrators.

However, this distinction not always seemed to be clear. In the beginning of its operation, the Pre-Trial Chamber's policy inclined towards prosecuting the most senior leaders. In the Situation in the Democratic Republic of the Congo, this Chamber recommended concentrating on "the highest ranking perpetrators" – as "only by concentrating on this type of individual can the deterrent effects of the Court be maximized."[127] In consequence, it refused to issue a warrant of arrest against Bosco Ntaganda, who was alleged to be the Deputy Chief of the Staff of operation of the FPLC in Congo, as requested by the Prosecutor.

However, the Appeals Chamber in the judgment on the Prosecutor's Appeal against the Decision of the Pre-Trial Chamber expressed a different view: that it is difficult to understand that the deterrent effect is higher if all other categories of perpetrators cannot be brought before the Court:

> It seems more logical to assume that the deterrent effect of the Court is highest if no category of perpetrators is per se excluded from potentially being brought before the Court. (…) The imposition of rigid standards primarily based on top seniority may result in neither retribution nor prevention being achieved. (…) The predictable exclusion of many perpetrators on the grounds proposed by the Pre-Trial Chamber could severely hamper the preventive, or deterrent, role of the Court which is a cornerstone of the creation of the International Criminal Court, by announcing that any perpetrators other than those at the very top are automatically excluded from the exercise of the jurisdiction of the Court.[128]

The Appeals Chamber considered the attitude expressed by the Pre-Trial Chamber to be not only detrimental to the operation of the Court, but also to conflict with the "contextual interpretation of the Statute". It observed that this interpretation does not allow for any limitation of perpetrators of the most serious crimes of international

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[126] Stegmiller, *supra* note 80, p. 444.

[127] *Situation in the Democratic Republic of the Congo*, ICC-01/04, Decision on the Prosecutor's Application for Warrants of Arrest, Article 58, 10 February 2006, paras. 54-55.

[128] *Situation in the Democratic Republic of the Congo*, ICC-01/04, Judgment on the Prosecutor's Appeal against the Decision of Pre-Trial Chamber I Entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58', 13 July 2006, paras. 73-78.

concern. The interpretation of the Statute may lead to only one conclusion: that its drafters did not intend it to apply only to the most senior leaders or top officials. First of all, the Preamble of the Statute mentions "most serious crimes" but not "most serious perpetrators". Second, attention should paid to Art. 27(1) which states that the Statute "shall apply equally to all persons without any distinction based on official capacity". Third, also in the light of specific provisions concerning the issues of responsibility there can be only one conclusion that all ranks of and perpetrators could be held responsible before the Court. Based on the example of the rules of responsibility of inferior soldiers established in Art. 33, which constitutes the principle of irrelevance of superior orders, we can conclude that "[r]ules regarding the irrelevance of superior orders for those who received such orders would be superfluous if only perpetrators who were in senior positions – and would thus be more likely to be giving than acting pursuant to those orders – could be brought before the International Criminal Court".

According to the Appeals Chamber, excluding a perpetrator from bearing criminal responsibility before the Court merely because his responsibility has been excluded based on the adopted policy of prosecuting only "the highest ranking perpetrators" would constitute refusal to prosecute on formalistic grounds. The Appeals Chamber compared adopting of formal criteria excluding certain groups from responsibility before the Court to "automatic" exclusion of responsibility. "Predetermination of inadmissibility on the above grounds could easily lead to the automatic exclusion of perpetrators of most serious crimes in the future."[129] Any formal obstacles in the form of assesing the responsibility on the basis of formal position in hierarchy could lead potential suspects to ensuring that they were not "a visible part of the high-level decision-making process." Meanwhile, the factual activities and possibilities of the perptrator should be assessed when taking a decision on prosecution as individuals who are not at the very top of an organization may still carry considerable influence and committ, or generate, the widespread commission of very serious crimes. The Chamber pointed to many various criteria that should be considered in the process of evaluating the factual position of a defendant:[130] "national or regional scope of activities of a group or organization, the exclusively military character of a group, the capacity to negitiate agreements, the absence of an official position, the capacity to change or prevent a policy." Only thanks to taking into consideration the above mentioned factors the Court will have the real picture of the person's responsibility.

The actual policy which takes into consideration the jurisprudence of the Appeals Chamber is expressed in the Prosecutorial Policy of 2009-12. The OTP adopted the policy of "focused investigations and prosecutions", meaning that "it will investigate

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[129] The OTP applied for the warrant of arrest in the case of *The Prosecutor v. Bosco Ntaganda* again and this time the warrant was issued on 12 of July 2012 (ICC-01/04-02/06, Decision on the Prosecutor's Application under Article 58).

[130] *Situation in the Democratic Republic of the Congo*, ICC-01/04, Judgment on the Prosecutor's Appeal against the Decision of Pre-Trial Chamber I Entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", 13 July 2006, para. 77.

and prosecute those who bear the greatest responsibility for the most serious crimes, based on the evidence that emerges in the course of an investigation. Thus, the Office will select for prosecution those situated at the highest echelons of responsibility, including those who ordered, financed, or otherwise organized the alleged crimes." [131] We can see that there is no equation between "the highest echelons of responsibility" and "the highest echelons of hierarchy". We can also notice that there is no better way to express the guidelines for selection of defendants. From their nature, guidelines must be generalized.

This Policy Paper still does not explain on what basis the Prosecutor should select lower-ranking officials. We can see in the actions of the Prosecutor a tendency which can be named as "exemplary prosecution". It means targeting some preselected individuals from a large number of possible suspects who all were involved in the case selected by the Prosecutor to investigate.[132] According to this concept, the Prosecutor should prosecute defendants according to the following key: they should be persons, whose prosecution would lead to indicating to the guilty ones and demonstrating the condemnation for given acts on behalf of the international community and satisfy the sense of justice for the victims. This method was also proposed as one of the guidelines for the selection of defendants: "As a matter of policy, international prosecutions should be limited to leaders, policy-makers and senior executors. This policy, however, does not and should not preclude prosecutions of other persons at the national level which can be necessary to achieve particular goals."[133]

This attitude gives to the Prosecutor the possibility to use a flexible approach. A strict inadmissibility of cases concerning lower level perpetrators would lead to an even greater impunity gap.[134] States could make an assumption that all low-level perpetrators are beyond the reach of the ICC jurisdiction and benefit from impunity.[135] It is worth to make a note, citing the words of I. Stegmiller,[136] that if the "ICTY and ICTR had not adopted a 'pyramidal strategy', they would not have been able to gain any convictions for gender crimes – such as the now-infamous names of 'nobodies' (Akayesu, Furundzija, Kunarac, Kovac and Vuković)." The ICC must safeguard its flexibility in order to secure the possibility to prosecute lower-level perpetrator and minor charges, which are also in the jurisdiction of the ICC.

Additionally, besides presenting the adopted strategy of prosecuting only the most responsible, on the basis of all the above mentioned jurisprudence and documents, we

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[131] Prosecutorial strategy 2009-2012, 1 February 2010, The Hague, available at: http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf (accessed 30 March 2015), paras. 19-20.

[132] *See* Greenawalt, *supra* note 37, p. 621.

[133] *See* M. C. Bassiouni, *Proposed Guiding Principles for Combating Impunity for International Crimes*, [in:] M. C. Bassiouni (ed.), *Post-Conflict Justice*, Transnational Publishers, New York: 2002, p. 27.

[134] Stegmiller, *supra* note 80, p. 443; Smith, *supra* note 47, p. 334.

[135] Stegmiller, *supra* note 80, p. 443.

[136] Smith, *supra* note 47, p. 343.

can assume that the policy of the ICC inclines towards the principle of opportunism. It is the policy to choose only a few cases from each situation. The Prosecutor must focus investigations and prosecutions on those who bear the greatest responsibility for the most serious crimes, and who are chosen on a discretionary basis, according to the above mentioned rules. From the existing legal framework, it results that not only the Prosecutor can do it, but that is what he is doing: prosecuting the most responsible, choosing them on an exemplary level.

As a matter of fact the OTP in the first cases heard before the ICC adopted a policy of prosecuting the highest ranking officials. The warrant of arrest against Germain Katanga was issued on the grounds that there were "reasonable grounds to believe that, as the highest ranking FRPI (the Union des patriotes Congolais) commander, and by designing the common plan and ordering his subordinates to execute it, Germain Katanga's contribution was essential to its implementation."[137] Thomas Lubanga Dyilo founded the FRPI as the military wing of the UPC and immediately became its Commander-in-Chief and remained in this position until the end 2003 at least.[138] Callixte Mbarushimana has been (only) the Executive Secretary of the FDLR since July 2007 but later, after the arrest of the FDLR's President in November 2009, he inherited part of the latter's powers.[139]

However, this attitude varied in the next cases. Although it can mainly be said that the highest ranking perpetrators were prosecuted there have been several exceptions to this rule. As a matter of fact the policy adopted by the Prosecutor is not coherent. Certainly, it can be said that the most responsible are being prosecuted. However, the Prosecutor chooses the defendants quite randomly – perhaps basing on the evidentiary material that is at his disposal as gathered during the preliminary examination or perhaps basing on the principle of exemplary prosecution.

In the situation in Sudan, when the Prosecutor applied in 2009 for the warrant of arrest for Omar Al Bashir we can say that the policy of prosecuting the most senior leaders was obviously applied. The Pre-Trial Chamber agreed with the choice of the Prosecutor, concluding that there were reasonable grounds to believe that Omar Al Bashir has been the de jure and de facto President of the State of Sudan and Commander-in-Chief of the Sudanese Armed Forces from March 2003 to 14 July 2008, and that, in that position, he played an essential role in coordinating, with other high-ranking Sudanese political and military leaders, the design and implementation of counter-insurgency campaign led by the Government of Sudan.[140] Ahmad Harun, chosen to be prosecuted in the frames of the same situation, served as Minister of State for the Interior of the Government of Sudan and coordinated different bodies responsible for counter-insurgence actions.[141] Also in the situation in Côte d'Ivoire there can be no doubt that the Prosecutor selected

[137] Warrant of Arrest for Germain Katanga, ICC-01/04-01/07, 2 July 2007.
[138] Warrant of Arrest for Thomas Lubanga Dyilo, ICC-01/04-01/06, 10 February 2006.
[139] Warrant of Arrest for Callixte Mbarushimana, ICC-01/04-01/10, 28 September 2010.
[140] Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, 4 March 2009.
[141] Warrant of Arrest for Ahmad Harun, ICC-02/05-01/07, 27 April 2007.

Laurent Koudou Gbagbo on the basis of the fact that he was the main leader and top official standing behind the violence in the aftermath of the presidential elections. He was considered to be an indirect perpetrator standing at the head of a joint criminal enterprise responsible for actions conducted in Côte d'Ivoire by pro-Gbagbo forces who attacked the civilian population in Abidjan and targeted civilians who they believed were supporters of the other presidential candidate Mr Ouattara. However, the cases of Simone Gdagbo and Charles Blé Goudé were chosen on a totally different basis – they both belonged to the inner circle of Mr Gbagbo and "met frequently to discuss the implementation and coordination" of the common plan.[142]

In the situation in Kenya, however, the warrant of arrest concerned two levels of hierarchy: not only the top leaders were chosen to be prosecuted but also the local leaders. Among the top leaders members of governments were summoned: Muthaura (Head of Civil Servant), Kenyatta (later the President) and Ali (Police Commissioner) were suspected to be criminally responsible for the crimes against humanity alleged either as indirect co-perpetrators pursuant to Art. 25(3)(a) of the Statute or, in the alternative, as having contributed to a crime committed by a group of persons under Art. 25(3)(d) of the Statute (joint commission).[143] On the other hand, three commanders were selected – Ruto, Kosgey and Sang – who established a network of perpetrators on the local level, responsible for the attack against the civilian population that was committed pursuant to an organizational policy. The network was under responsible command and had an established hierarchy, with Ruto as leader, Kosgey as deputy leader and treasurer and Sang as responsible for communicative purposes.[144]

Also in the situation in Libya, the political leaders and the leaders of various levels of military forces were selected – every one of the three defendants seems to be chosen according to a different principle. Muammar Gaddafi was the Commander of the Armed Forces of Libya and held the title of Leader of the Revolution, and as such, acted as the Libyan Head of State. The Pre-Trial Chamber established that as the recognized and undisputed leader of Libya he had absolute, ultimate and unquestioned control over the Libyan State apparatus of power, including the Security Forces. Saif Al-Islam Gaddafi acted as the Libyan de facto Prime Minister. Although he did not have an official position, he was the unspoken successor and the most influential person and exercised control over crucial parts of the State apparatus, including finances and logistics.[145] On the other hand, Abdullah Al-Senussi, was a colonel in the Libyan Armed Forces – being at the same time the current head of the Military Intelligence.[146] The Prosecutor pre-

[142] Warrant of Arrest for Laurent Koudou Gbagbo, ICC-02/11, 23 November 2011.

[143] Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ICC-01/09-02/11, 8 March 2011.

[144] Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, ICC-01/09-01/11, 8 March 2011.

[145] Public Court Records – Pre-Trial Chamber I, 27 June 2011, pp. 7-8.

[146] Warrants of arrest for Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, ICC-01/11-01/11, 27 June 2011.

sented evidence in support of his application for a warrant of arrest from which results that inhuman acts that severely deprived the civilian population of its fundamental rights were inflicted on it by the Security Forces under the command of Al-Senussi. He also exercised his role as the national head of the Military Intelligence, one of the most powerful and efficient organs of repression of Gaddafi's regime and the state security organ in charge of monitoring the military camps and members of the Libyan Armed Forces. However, proceedings against Al-Senussi before the ICC came to an end on 24 July 2014 when the Appeals Chamber confirmed Pre-Trial Chamber I's decision declaring the case inadmissible before the ICC – on the grounds of complementarity not because of the lower rank of the suspect.[147] The defendant at that time was subject to both a military and civilian investigation due to his extradition to Libya.

CONCLUSIONS

In the case of international criminal tribunals, we can observe a functional need to be selective. No legal system is currently capable of prosecuting all cases of criminal law infringement. In national systems, selectivity is introduced either through provisions of the substantive law (using the criteria of a socially dangerous act) or by implementation of the prosecutorial principle of opportunism.[148] In the case of the ICC, substantive law does not solve the problem, as it leaves us with an indefinite number of possible perpetrators – and only one court. There is still the principle of complementarity, in accordance to which it is mainly the state's responsibility to prosecute perpetrators of international law crimes. However, it seems that national jurisdictions are not able, prepared or willing to fill the "impunity gap". We have seen that the selection of defendants is indispensable. We have also experienced what importance for the practical operations of the Court – its credibility and efficiency – has the coherent and clear method of selection of defendants.

In the Nuremberg and Tokyo Tribunals, prosecutorial discretion was subordinated to governments of the victorious states that had already decided who would be tried. The jurisdiction of the ad hoc tribunals for Rwanda and the former Yugoslavia was limited from the beginning by the resolution of the Security Council, which determined their temporal and geographical frames. The prosecutors of these tribunals could select situations and cases only within this framework. Their discretion was therefore, by definition, limited. Nevertheless, it was at these tribunals that the foundations of the meaning and significance of prosecutorial discretion in international criminal procedure

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[147] Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled "Decision on the admissibility of the case against Abdullah Al-Senussi", ICC-OI/II-OI/IIOA6, 24 July 2014.

[148] This tendency highlighted by R. Cryer, *supra* note 26, p. 192. *See also* K. Ambos, *Comparative Summary of the National Reports*, [in:] L. Arbour, A. Eser, K. Ambos, A. Sanders (eds.), *The Prosecutor of a Permanent International Criminal Court*, Iuscrim, Freiburg: 2000, pp. 495 and 505-509.

were set. In the process before the ad hoc tribunals, questions of the limits of prosecutorial discretion were asked for the first time and fundamental comparisons between this system and national systems were drawn.

It is only at the ICC that we observe the importance of this problem of setting the correct extent of prosecutorial discretion, resulting from the universal scope of the ICC jurisdiction. Because of this scope, the selection of defendants stands at the basis of its effective and correct functioning. Although some observers argue that the Rome Statute obliges the Prosecutor to act according to the principle of legalism – adapted to the role of the ICC by the way of complementarity of jurisdiction – the OTP assumed that the "impunity gap" is an indispensable – and therefore necessary – element of the selection strategy. This assumption serves as the foundation of the principle of opportunism. Even if we assumed that the ICC Statute operates on the basis of the principle of legalism, we could come to a conclusion that this principle remains solely an assumption made in the written law of the Rome Statue – it was never the aim of the ICC Prosecutor to follow this maxim. In this situation, we can conclude that the obligation to act, which is mentioned in Art. 53(1) of the ICC Statute by the use of words "shall act", was supposed to relate only to a situation when the Prosecutor (subjectively) considers that the conditions from this Article have been fulfilled. The Prosecutor concentrates not on the "shall" notion, but rather on the discretionary possibilities that are given by the criteria coming afterwards.

We cannot forget that there are also other different factors that may limit prosecutorial discretion. We can name among them factors such as judicial control of the Pre-Trial Chamber, hierarchical dependence and political considerations, and financial abilities of the OTP resulting from the budget. A discussion of the selection of defendants involves a number of issues related to political motivations lying behind the process and reasons for choosing the specific defendant. The Prosecutor has to take decisions taking into consideration various issues: bringing back peace, expectations of international society, and expectations of the victims. We cannot ignore a danger that a conflict may arise between political and legal interests. The Prosecutor's role is to meander between these interests and the interests of justice. This complex interrelationship between legal and political motivations requires the Prosecutor to make decisions that are both compliant with objective legal criteria but also taken with a due consideration to the political and social context and executed in a manner that fosters the support of states.[149]

[149] Brubacher, *supra* note 14, p. 74.

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NATIONAL TREATMENT RULES IN EU REGIONAL TRADE AGREEMENTS

Abstract

Most favoured nation (MFN) treatment and national treatment (NT) are two standards usually related to the general principle of non-discrimination. However, while the MFN treatment was undoubtedly and clearly defined already during the negotiation of the General Agreement on Tariffs and Trade in previous works and judgements of various international bodies, the NT standard needed to be clarified. An additional reason to concentrate on NT rules is that their content and scope may influence trade more than the scope of MFN granted. The concept of NT is also subject to relatively rare analysis in comparison with other aspects of regional trade agreements' (RTA) rules which overlap with WTO law.

The aim of this article is to analyse the scope and wording of the NT standard in various RTAs concluded by the European Union. In particular, it inquiries into the extent to which the NT clause remains universal across its different regional trade agreements, and examines the reasons (and consequences) for the differences, if any, in its formulation.

Keywords: EIA, EU, European Union, national treatment, regional trade agreement, RTA, WTO

INTRODUCTION

The Most Favoured Nation (MFN) and National Treatment (NT) principles are the cornerstones of the World Trade Organization (WTO). They are general non-discrimination rules constituting the world trade order constructed after World War II. However, the current proliferation of regional trade agreements (RTAs) as a form of institutionalization of economic integration,[1] causes the MFN today to be more the excep-

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[1] Economic integration is an exceptional reason for suspending the general non-discrimination rules of GATT/WTO and substituting them with discrimination in the form of preferences granted to the (usually

tion than the general rule.[2] All RTAs involve discriminatory liberalization of trade, concerning only chosen partners instead of all WTO Members.

The recent RTAs cover an ever broader range of subjects. Although their name contains the words "Regional" and "Trade", in fact their scope goes considerably beyond the international trade of goods and services.[3] They include, among other things, principles of international production cooperation, foreign direct investments and labour standards, environmental and intellectual property protection, thus becoming one of the main regulatory forms of economic cooperation on a global scale. RTAs have become inter-regional as well. As almost all geographically adjacent countries are already involved in RTAs (and have to fulfil their respective obligations), there are not many candidates for partners in a new agreement among neighbouring countries. Consequently, RTAs increasingly connect states from different continents (e.g. the USA and Israel). In addition, even geographically distant countries may be more desirable partners in RTAs if they have complementary economies and similar policy objectives.

According to the WTO database, the European Union (EU) has notified over forty RTAs. Some of them are currently being negotiated,[4] while others have been in force for a long time. The degree of integration within these RTAs varies by region and their time of conclusion. There are also various standards of treatment granted in these agreements. The most popular are NT and MFN clauses, both of which are standards related to the general principle of non-discrimination. But the clauses may differ among various RTAs, impacting on economic cooperation between the partners and overlapping with WTO law, as they are both fundamental principles of the WTO legal system.[5]

This bring us to the purpose of this article, which aims at analysing the scope and wording of the NT standard in various RTAs concluded by the EU. In particular, it inquires into the extent to which the NT clause remains universal across different

relatively small) group of particularly close economic partners. As especially intensive economic cooperation connects usually adjacent countries (belonging to the same geographic region), agreements constituting this form of preferential cooperation are called "regional".

[2] The WTO itself ironically proposed the name MFN rather LFN (Least-Favoured-Nation). *See* Report by the Consultative Board to the former Director-General Supachai Panitchpakdi, *WTO 10th Anniversary: The Future of the WTO*, WTO, Geneva: 2004, p. 19.

[3] Usually the term international trade means exchange of goods. Traditionally services were non-tradable because of their specificity (e.g. simultaneous production and consumption, constraints on the possibility of transfer). Together with technological progress (especially communication technology) and the increased openness of a growing number of countries, services become more and more a subject of international trade. For the same reason, trade liberalization was conventionally connected with the free exchange of goods. Given the increasing tradability of services, general international rules of liberalization of international trade in services have been introduced as well (*see* General Agreement on Trade in Services.

[4] They are notified on the basis on an early announcement procedure introduced by the General Council Decision of 14 December 2006 on Transparency Mechanism for Regional Trade Agreements,

[5] It is worth mentioning that the MFN and NT principles, both within the framework of the WTO as well as the preferences granted under RTAs, are club goods available only to the members of – respectively – the WTO or a given RTA. The willingness to take advantage of them can even be the main reason for participation in the WTO or an RTA.

regional trade agreements, and examines the reasons (and consequences) for the differences, if any, in its formulation.

The article is organized as follows: The first part presents the EU RTAs, concentrating on their typology and classification and explaining which agreements have been chosen for further analysis and why. This is a crucial part of the text, as the type of agreement determines the type of the NT clause used in it. The second part briefly describes the NT standard as well as clauses related to the NT principle in the WTO agreements. The third part analyses in more detail the different NT clauses used in the EU RTAs and assesses their influence on EU trade with different partners. The last part summarizes and offers conclusions.

1. CLASSIFICATION AND CHARACTERISTICS OF EU REGIONAL TRADE AGREEMENTS

The EU is itself a regional trade agreement within the meaning of WTO law. It is covered by Art. XXIV of the General Agreement on Tariffs and Trade (GATT[6]) as a customs union,[7] and Art. V of the General Agreement on Trade in Services (GATS). The Union as such and its predecessors – the European Economic Community (EEC) and European Community (EC) – has always been a great proponent of regional integration and has a long history of establishing free trade agreements.

Most of the RTAs have been concluded by the EU as association agreements (AA). Such agreements are a special kind of international treaty concluded by the EU (formerly by the EEC and EC) with especially close partners. It has a specially-designed legal basis, which currently is provided by Art. 217 of the Treaty of functioning of the European Union (TFEU). As the European Court of Justice said in the *Demirel* case, association agreements create "special, privileged links with a non-member country which must, at least to a certain extent, take part in the Community system."[8] This fact strongly influences both the mode and the very sense of granting NT to a given state. In some AAs a partner state is obliged to simply implement in its law the regulations

[6] Establishment of the EEC required notification under Art. XXIV GATT (after conclusion of the Treaty establishing the European Economic Community in 1957).

[7] RTAs described in WTO law differ considerably from the real RTAs. In GATT/WTO law only some aspects of real RTAs are considered. Art. XXIV GATT provides certain standards for free trade areas (FTAs) and customs unions (CUs). The Enabling Clause allows for the creation of preferential trade agreements connecting developing countries (with less restrictive rules than those constituting the basis for FTAs and CUs). At the same time many RTAs include rules of bilateral treatment of parties' investments (foreign property) not covered by the GATT/WTO law. The EU is still treated by the WTO as a customs union, even though it has achieved much deeper integration (if we consider the Eurozone then we come near to the highest stage of integration in the Balassa setting (*see* B. Balassa, *Economies of Scale in the European Common Market*, 14(2) Economia Internazionale 198 (1961). When the then-EEC was created, doubts were expressed whether it was really compatible with Art. XXIV GATT.

[8] Case 12/86, *Meryem Demirel v. Stadt Schwäbisch Gmünd* [1987] ECR I-3719, para. 9.

and directives listed in annexes to the AA. Some AAs also copy provisions of the TFEU, which might be essential to the meaning of the NT clauses, such as, for example, general exceptions in relation to goods.

Although AAs cover a very broad range of issues, they always have a trade part, which includes the establishment of an FTA, but also covers trade in services and other trade-related issues, which might be qualified as the "WTO Plus" commitments.[9] Consequently, AAs can be qualified as economic integration agreements (EIAs) within the meaning of WTO law. Therefore AAs almost always need to be notified to the WTO as an FTA and EIA (and consisting of provisions on free trade in goods and services).

The first AA was concluded by the EEC[10] and Turkey shortly after the Community's creation.[11] As its aim was to prepare Turkey for EEC accession, it created (in three steps) a customs union between Turkey and the EU. The full customs union came into effect in 1995 on the basis of the Decision of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union (96/142/EC).[12]

The deepest and broadest AA is the Agreement on the European Economic Area (EEA), which was signed in 1992 with the European Free Trade Association (EFTA), except for Switzerland, and entered into force in 1994. The EEA established not only a free trade area but also a common economic market. It is not a customs union though. The degree of integration, including common economic policies, is much higher than in any of the other RTAs concluded by the EU. The EEA agreement is supplemented by a separate agreement with Switzerland, signed in 2004 (which replaced the previous one from 1999). Formally, the agreement with Switzerland covers only trade in goods, but the EU and Switzerland concluded a series of sectoral agreements covering various services and, e.g., the free movement of persons. All of this makes the agreements with the EFTA states quite exceptional among typical RTAs. Hence analysis of these two agreements fall outside the scope of this article.

The EU also has a long tradition of concluding AAs with states which intend to join the Union (which usually expire after the respective country accedes to the EC or the EU). The non-discriminatory treatment granted in these agreements is their important part. The level of integration between future members and the EU is usually higher than with other partners. The NT granted tends to have a greater scope (i.e. in relation to services),

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[9] Agreements designated as "WTO Plus" go beyond the GATT/WTO law concerning RTAs. They contain rules of economic cooperation not regulated in GATT/WTO law (e.g. foreign direct investment). As there is no international law regulating these issues, they are not internationally controlled. This can lead their conclusion based on arbitrarily chosen rules (usually set by the stronger partner) and make them very discriminative and – eventually – even welfare decreasing (they then become "WTO Minus").

[10] Information concerning the EU agreements and trade relations is based on: http://ec.europa.eu/trade/policy/countries-and-regions/ (accessed 30 March 2015).

[11] Agreement establishing an Association between European Economic Community and Turkey, signed on 12 September 1963, OJ L. 361, 31 December 1977, p. 1.

[12] This agreement violated the GATT rule of establishing free trade within a "reasonable" time (usually not more than 10 years after signing the agreement). *See* A. Estevadeordal, K. Suominen, *The Sovereign Remedy? Trade Agreements in a Globalising World*, Oxford University Press, Oxford/New York: 2009, p. 129.

or may not be necessary (in relation to goods) due to other provisions ensuring non-discriminatory treatment and lowering the level of barriers to trade. Because of the greater level of harmonization of legislation these potential barriers to trade can be lowered.

The EU tendency to precede full membership by AAs became especially visible in the 1990s. The EC concluded so-called "Europe Agreements" with the post-communist states. All these agreements established free trade areas (however with exclusions or postponements for "sensitive" areas[13]). Europe Agreements were concluded with Poland and Hungary in 1991, with the Czech Republic, Slovakia, Bulgaria and Romania in 1993, with the three Baltic States (Estonia, Latvia and Lithuania) in 1995, and with Slovenia in 1996. All the agreements had a similar content. None of them is currently in force due to the subsequent accession to the EU by the then non-member states, but they serve as an example of a group of RTAs. They should also be taken into account in further analyses as a certain step in the evolution of EU RTAs.

The EU also currently has a group of AAs negotiated and signed with non-EU countries with the ultimate objective of full EU membership. The new generation of such EU agreements, signed since 2000, are called Stabilization and Association Agreements (SAAs). They have been concluded with the Balkan states – in the year 2000 with the Former Yugoslav Republic of Macedonia (FYROM); in 2005 with Croatia (no longer in force due to Croatia's accession to the EU in 2013); in 2006 with Albania; in 2008 with Serbia; and in 2010 with Montenegro. In 2008 a Stabilization and Association Agreement was also signed with Bosnia and Herzegovina, but it is still not in force, although the Interim Agreement with Bosnia and Herzegovina, which covers only trade in goods, has been operational since 2008.

A very special kind of free trade area, which has been notified by the EU, is the Association with Overseas Countries and Territories (OCTs[14]). OCTs are not independent entities. They have various degrees of autonomy, and are closely related to some of the EU Member States. The Association with OCTs, although notified as an international agreement, has been established on the basis of the EEC Treaty and its current legal basis is Art. 198 of the TFEU, together with EU secondary legislation issued by the Council of the EU.[15] The nature of the association with OCTs precludes granting them any sort of special treatment – there is only a general prohibition of discrimination

[13] *E.g.* the majority of Polish goods had free access to the EU market at the beginning of 1996. However, in the case of the sensitive goods the EU barriers were maintained much longer. Sensitive areas included especially labour- and raw material-intensive industries (i.e. steel, iron, chemicals, textiles and food products). Their products constituted at that time over 40% of Polish export to the EU countries. *See* E. Czarny, K. Śledziewska, *Polska w handlu światowym* (Poland in international trade), PWE, Warszawa: 2009, p. 177.

[14] Aruba, Anguilla, Bonaire, British Virgin Islands, Cayman Islands, Curaçao, Montserrat, Saba, Saint-Barthélemy, Saint Eustatius, Sint Maarten, Turks and Caicos Islands, Bermuda, Taaf, French Polynesia, New Caledonia, Pitcairn, Wallis and Futuna, Falkland Islands, Greenland, Saint Pierre and Miquelon, Saint Helena, Ascension, and the Tristan da Cunha Islands.

[15] Currently Council Decision 2001/822/EC of 27 November 2001 on the association of the overseas countries and territories with the European Community¸ OJ L. 324, 7 December 2001, p. 1, which will soon be replaced by a new act.

included in the Council Decision. The EU also notified an agreement concluded with Faroe Islands, which is a dependent territory of Denmark. This Agreement was signed in 1997 and replaced the previous one from 1991.

The EU also has special agreements with miniature European states,[16] such as San Marino and Andorra. It is worth mentioning that in relation to San Marino an exception from the GATT most-favoured nation clause was agreed upon already during the Havana Conference in 1945. Formally, the agreement establishing a customs union between the EU and San Marino entered into force in 1992, while the agreement with Andorra entered into force in 1991.

It would be an exaggeration to say that the above-mentioned agreements are simple free trade agreements in the sense of WTO law (Art. XXIV GATT). They are rather the natural consequence of complex relations between the EU Member States and some small, dependent territories. Their influence is limited, and the volume of goods exchange which they cover (together with their overall economic potential) is relatively small.

The EU has special relations, but based on a regular AA, with a group of African, Caribbean and Pacific (ACP) states. All of these ACP states are former EU Member States' colonies and have preferential access to the European market, originally granted on the basis of the above-mentioned OCT Association. As a result of decolonization, these states gained independence and needed a separate international agreement to retain the existing trade preferences that they enjoyed. ACP countries are linked by a series of international conventions establishing association with the EU (and previously the EEC and EC), which were signed every five years following 1963,[17] until the Cotonou Agreement was concluded in 2000. This Agreement did not itself establish a free trade area or any other form of economic integration within the meaning of WTO law, but rather provided for preferential treatment of goods originating from ACP countries. FTA (or FTA and EIA) was supposed to be covered by separate agreements concluded with the groups of ACP states – the so-called Economic Partnership Agreements (EPAs). But so far only one complete EPA has been concluded. In 2008 the EU signed such an agreement with CARIFORUM – member states of CARICOM and Dominican Republic. In 2014[18] negotiations concerning an EPA with West African[19] states were

[16] They are perceived as independent states, even though they are partly dependent on their larger neighbours. *See* A. Przyborowska-Klimczak, *Ewolucja prawnomiędzynarodowej sytuacji europejskich państw miniaturowych* (Evolution of international legal situations of European miniature states), [in:] J. Menkes (ed.), *Prawo międzynarodowe – problemy i wyzwania*, Uczelnia Łazarskiego, Warszawa: 2006, pp. 444-48.

[17] After the Younde Convention, signed in 1963, there was a series of the Lome Conventions. The Younde Convention was concluded only by African states, but the group of ACP states was growing over time because of two simultaneous processes – more countries gained independence and the number of colonies has been descending, and further member states joined the EU, enabling their former colonies to join the group entitled to preferences on the basis of the Lome Conventions.

[18] Information on the dates and stages of conclusion of various agreements is based on: http://ec.europa.eu/trade/policy/countries-and-regions/ (accessed 30 March 2015).

[19] Benin, Burkina Faso, Cape Verde, Ivory Coast, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, and Togo.

claimed to be concluded, and subsequently the agreement was backed by the Economic Community of West African States, but is has not yet been signed. In July 2014 the EU announced the conclusion of negotiations with the Southern African Development Community[20] (SADC), but none of the texts have been revealed yet. What is clear is that a full EPA grants preferences not only to trade in goods, but also to trade in services and in some other trade-related aspects of economic relations.

In addition, in 2009 the EU concluded a few interim economic partnership agreements with some ACP states. These are less developed agreements, creating only free trade areas. Such an interim EPA was signed with the Eastern and Southern Africa region,[21] with Central Africa (signed eventually only by Cameroon), with the Pacific states (Papua and Fiji), and with Ivory Coast from the West Africa region. An interim agreement with Ghana (also from West Africa) was initialled in 2007, but has not been signed yet. Contrary to the EPA with Western Africa, the text of this agreement was published, hence it is covered by my further analysis. An agreement with the East African Community[22] was initialled in 2007, but never signed.

In contrast to the interim SAAs with the Balkan States, which were negotiated and signed together with an entire association agreement, and where the trade part of the association became operational before completion of the ratification procedure in every EU Member State, interim EPAs are separate agreements which are separately negotiated and require a complete ratification procedure. They do not cover all aspects usually covered by a potential EPA. They name areas for future negotiations instead, and liberalize only trade in goods.[23] They have been notified to the WTO on the basis of Art. XXIV GATT.

Another group of countries which have some special ties with the EU are Mediterranean states located in North Africa and the Middle East. The EC signed Euro-Mediterranean agreements establishing an association with seven states of that region. Euro-Mediterranean agreements were signed between 1995 (with Tunisia and Israel) and 2002 (with Algeria and Lebanon[24]). In 1996 an agreement was signed with Morocco, in 1997 with Jordan and in 2001 with Egypt. An agreement with the Palestinian Liberation Organization acting for the Palestinian Authority of the West Bank was signed in 1997. In 2008 an agreements with Syria was initialled, but have not yet been signed due to Syria's internal unrest. As the deepening relations with Mediterranean states is an ongoing process, the EU recently opened negotiations on a new, more modern

[20] Botswana, Lesotho, Mozambique, Namibia, South Africa and Swaziland. South Africa agreed to replace its current agreement by an EPA.

[21] Madagascar, Mauritius, the Seychelles, and Zimbabwe.

[22] Kenya, Uganda, Tanzania, Burundi, and Rwanda.

[23] Although preferential access to the EU market for all ACP states is granted on the basis of the Generalized System of Preferences (GSP) for developing countries. The GSP was introduced in 1970 by the UNCTAD. It was a form of one-sided preferences granted by the developed countries. The EEC established its GSP in July 1971.

[24] Lebanon is not a member of the WTO, but the RTA with Lebanon has been notified to the WTO as an FTA.

agreement called "Deep and comprehensive free trade area" with Morocco,[25] and it intends to open negotiations also with Tunisia, Egypt and Jordan.[26] None of the Euro-Mediterranean Agreements have been notified as an EIA to the WTO,[27] which might be surprising as they all cover trade in services. On the other hand they all have been notified as FTAs.

Beside agreements with former colonies and future member states, the EU has signed a few agreements with other partners, mainly from Central and South America. A framework agreement with Mexico was signed in 1997 (it entered into force in 2000). A Free Trade Agreement and liberalization of trade in services were introduced subsequently, in two decisions of the Joint EC–Mexico Council: Decision 2/2000 establishing a free trade area for goods[28] and Decision 2/2001 establishing an EIA with liberalization of trade in services.[29] In 2002 the EC signed an association agreement with Chile. This agreement, besides other fields of cooperation, covers trade in goods and services. In 2012, the EU concluded two more RTA-like agreements. One of them, with Central American countries, is an association agreement. Its trade-related part recently became operational with three of the six signatory central American states (i.e. Honduras, Nicaragua and Panama; the other three being Guatemala, Costa Rica and El Salvador). Another agreement is a free trade agreement with Peru and Columbia (referred to in the agreements as the Andean Community), which is also provisionally operational since 1 August 2013. In July 2014 Ecuador also joined the agreement,[30] but the formal process of conclusion is not finished yet.

The majority of the above agreements have been concluded with partners significantly less developed than the EU. However, in 2010 the European Union concluded its first free trade agreement with a developed country – South Korea. This agreement, being as well the first agreement concluded by the EU with an Asian state, entered into force in 2011. In December 2012 another deep and comprehensive free trade agreement was finalized with another Asian state, as the EU completed its negotiations with Singapore.

Another group of countries which intend to establish closer ties with the EU are member states of the EU Eastern Partnership. The EU concluded negotiations of an AA with Ukraine in 2012, but the agreement was signed only two years later, in June 2014, due to the political tensions. The Deep and Comprehensive Free Trade Areas

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[25] The first round of negotiations took place in April 2013.

[26] Based on European Commission, *Overview of FTA and Other Trade Negotiations*, available at: http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf (accessed 30 March 2015).

[27] *Cf.* Regional Trade Agreements Information System, available at: http://rtais.wto.org/UI/PublicSearchByCrResult.aspx (accessed 30 March 2015).

[28] OJ L. 157, 30 June 2000, p. 10.

[29] OJ L. 70, 12 March 2011, p. 7.

[30] The agreement was prepared as an agreement with the "Andean States", even though originally only Columbia and Peru were parties. In 2014 Ecuador notified its willingness to become a party as well. This required the introduction of some changes related to concessions, but the basic provisions remain the same. The modified agreement was prepared, but has not been signed yet.

with Moldova and Georgia were signed on the same date. They are all full association agreements, but also include so-called Deep and Comprehensive Free Trade Agreements (DCFTAs) covering trade in goods as well as trade in services. The trade parts of the agreements with Moldova and Georgia became operational from 1 January 2015, but for Ukraine this entry into force was postponed until 1 January 2016.

Recently the EU and Canada announced that they finally concluded negotiations of the Comprehensive Trade and Economic Agreement (CETA). The agreement was not formally initialled, but it has been published. Hence it is included the in the further analysis.

As can be seen, the process of concluding agreements is extremely vivid in the EU, and there are several other agreements currently being negotiated with other developed and developing countries, mainly with Asian and American ones. The EU opened FTA negotiations with some ASEAN countries (Malaysia, Vietnam and Thailand) and it is negotiating FTAs with Japan and India as well. Negotiations on the much-commented-upon Transatlantic Trade and Investment Partnership (TTIP) with the United States were launched in 2013.

Table 1 (attached as Appendix no. 1) shows the 31 agreements taken into account in this study. I excluded from the study agreements notified to the WTO which have been concluded with non-independent countries. I also excluded some EFTA member states – Iceland, Norway and Switzerland. These states are linked to the EU by very special ties, which include deeper integration, covering the majority of EU economic legislation. I also excluded Syria, with which an agreement has been notified, but is not operational. The agreements listed in the Table 1 are the subject of my analysis of NT rules, however other agreements negotiated and signed by the EU are commented on as well for comparison.

2. NATIONAL TREATMENT – HISTORY AND CHARACTERISTICS OF THE CLAUSE

The NT clause, together with MFN, is essential in the context of economic integration as it prevents discrimination. Both are therefore central elements of the WTO legal system. But the NT standard, besides being far more complex and miscellaneous, is less discussed by academia than the MFN standard.

The NT and MFN are both traditional standards of treatment in international economic law. Although the concept of national treatment was developed no earlier than in the nineteenth century, nevertheless some scholars trace its origins back to agreements within the Hanseatic League in the twelfth and thirteenth centuries.[31] This results main-

[31] *See e.g.* A. Newcombe, P. Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, Kluwer Law International, Austin: 2009, p. 152; A. Bjorklund, *The National Treatment Obligation*, [in:] K. Yannaca-Small (ed.), *Arbitration under International Investment Agreements: A Guide to the Key Issues*, Oxford University Press, Oxford: 2010, pp. 412-13; but they refer to G. Schwarzenberger, *The Principles*

ly from the fact that states were then more interested in diminishing duties than in lifting discrimination against foreigners. National treatment was primarily used to grant equal treatment for navigation.[32] It was perceived as the highest possible preference, as "no state grants foreigners better treatment than it grants to its own nationals."[33]

NT has been classified as one of seven standards of international economic law in the numerous classic works of Schwarzenberger,[34] although he underestimated that standard compared to the MFN. He defined the NT as a standard which has as its objective to grant internal parity of partners. He recommended it to be used by "countries with a similar structure and complementary interests."[35] He also admitted that it was especially useful in the fields of establishment, in "personal and property rights of nationals abroad, their right of free access to local courts and equality regarding taxation and navigation." It is interesting to note that such a judgment was made after the GATT entered into force.

The lack of broader analysis of NT under international law is caused by the fact that it is less standardized than the MFN clause. Contrary to the MFN, NT was not a subject of discussion in the International Law Commission or in theoretical analysis (except within the framework of the WTO legal system). The vast literature concerning the national treatment standards concentrates on its three main usages and not on its general construction which may differ depending on the usage. In the older literature national treatment is analyzed in the context of the Calvo doctrine and general discrimination of foreigners. More modern works analyze NT in WTO law, and recently in investment agreements. The wording and actual meaning may be very different depending upon the field in which NT has been granted. Simultaneously, the authors writing about NT clearly did not imagine that it can grant better treatment in some fields to foreigners than to its own nationals.

Nowadays we can observe several ways of formulating NT clauses. The first type is "treatment no less favourable than that accorded to like domestic" products, producers, services suppliers, procurement etc. (depending on the field). Such a wording does not exclude a situation in which foreigners are treated better than nationals. Another type of clause stipulates that a party should "ensure the same treatment as compared to

and Standards of International Economic Law, Hague Academy of International Law, Leyden: 1966, pp. 18-26 and P. Verloren van Themaat, *The Changing Structure of International Law*, Hague: 1981, pp. 19-21, who both write about the general development of standards of treatment and the principle of non-discrimination as developing since the Hanseatic League, seeking general routes of standards of treatment in international economic law rather than in national treatment as such.

[32] *See* G. Butler, S. Maccoby, *The Development of International Law*, Longman, London: 1928, p. 506.

[33] *See* R. Riedl, *La clause de la nation la plus favorisée. Documentation présentée au Comité économique de la Société des nations et à la Chambre de commerce internationale par le Comité national autrichien de la Chambre de commerce internationale*, Vienne: 1928, p. 4.

[34] *See* G. Schwarzenberger, *International Law and Order*, Stevens & Sons, London: 1971, p. 157; G. Schwarzenberger, *The Frontiers of International Law*, Stevens & Sons, London: 1962, p. 220; Schwarzenberger, *supra* note 32*,* p. 67.

[35] *See* Schwarzenberger (*The Frontiers*)*, supra* note 34, p. 220.

its own nationals", or "most favourable treatment,"[36] which implies that the treatment should be comparable. Neither foreigners nor nationals should be granted any preferences. Both wordings have in common the fact that the so-called *tertium comparationis* is always a domestically-produced good, national company, operator or producer of goods or services. The crucial point here is the word "like", as it does not have a clear meaning and leaves space for further interpretation. The possibility of comparison with the domestic situation is the most important element of the NT clause. It also enables to differentiate between classic NT clauses and non-discrimination clauses, although they are very similar and – what is probably most important – have the same objective. Ordinary non-discrimination clauses require only that a state-party does not discriminate, without any references to treatment of domestic goods, services or companies, and without defining exactly which *tertium comparationis* should be taken into account. Therefore, it is weakened by the fact that it is deprived of comparison, and as a result of further clarification on how not to discriminate.

3. NATIONAL TREATMENT IN THE WTO LEGAL SYSTEM

A benchmark for NT clauses in regional trade agreements are always the clauses from the WTO, especially because almost all partners of RTAs with the EU are WTO Members (only Lebanon is not a WTO member state, nor does it have observer status, while Algeria, Bosnia and Hercegovina, Serbia and Bahamas (CARIFORUM) are not members but have obtained observer status at the WTO and are preparing for full membership).

NT clauses can be found in both GATT and GATS, as well as in other WTO agreements, such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the Agreement on Government Procurement (GPA). A separate NT clause is included in the Agreement on Technical Barriers to Trade (TBT), even though it is supplementary to the GATT as it relates to trade in goods. The basic NT clause is Art. III GATT 1994. Its aim is to prevent discrimination of imported goods with respect to non-tariff barriers. It stipulates that internal taxes and regulations should not be applied so as to afford protection to domestic goods. The main obligation of NT is closely linked to many other GATT obligations, such as Art. I (MFN), Art. XI (elimination of quantitative restrictions) or Art. XX (the general exceptions).

Art. III GATT 1994 has been interpreted by GATT/WTO panels and the Appellate Body (AB) in numerous cases. Recently, this vast and well-established jurisprudence has been supplemented by interpretation of the TBT NT clause. The great majority of the WTO jurisprudence concerning the clause concentrates on the notions of "like products" and likeness of treatment, as well as the concept of products that are "competitive and directly substitutable" (as added in the explanatory notes to para. 2 of Art. III GATT 1994).

[36] *See* A. Reinish, *Standards of Investment Protection*, Oxford University Press, Oxford: 2008, p. 54.

Panels and the AB have worked out certain criteria of interpretation that might potentially, but not automatically, be applied to the same notion in RTAs. Although the AB underscored that it is not possible to define firm criteria for the "likeness" of products,[37] WTO dispute settlement bodies usually use a test elaborated by the Working Group on Border Tax Adjustment,[38] using criteria such as the end-use of a product, stating simply that two product are "like" or "competitive and directly substitutable" if they are perceived as such by consumers.[39] The GATT/WTO case law has made it clear that the aim of NT is to avoid protectionism and to assure "equality of competitive conditions".[40] It was also confirmed that an NT clause covers not only *de jure* but also *de facto* discrimination. In *Korea – Various Measures on Beef*, the panel stated clearly that "the object of Article III:4 is, thus, to guarantee effective market access to imported products and to ensure that the latter are offered the same market opportunities as domestic products."[41]

Analysis of the notion of "likeness" is closely related to the panels' and the AB's analysis of the notion of "less favourable treatment", which is a crucial element of every NT clause. Already in the *US – Section 337* report, the GATT panel stated that the prohibition of less favourable treatment "calls for effective equality of opportunities" for foreign goods.[42] Thus it is quite clear that compliance with the NT does not require identical treatment of domestic and foreign goods. The state simply should not differentiate the conditions of market access for foreign goods.

The logic of Art. III, based on the concept that "modification of the conditions of competition" as an objective criterion for establishing less favourable treatment obligation, was modified by recent TBT case law. In its interpretation of the TBT NT

[37] *See* the famous AB Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 4 October 1996, p. 21, later confirmed in Panel Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes* WT/DS406/R, 2 September 2011, para. 7.2. For discussion in the literature, *see e.g.* O.K. Fauchald, *Flexibility and Predictability under the World Trade Organization's Non-Discrimination Clause*, 37(3) Journal of World Trade 443 (2003), p. 452.

[38] It referred to product's end-use on a given market and consumers' tastes and habits, which may change from country to country, as well as a product's properties, nature and quality; but also stated that this list is not exhaustive (*Report of Working Party on Border Tax Adjustment*, BISD 18S/97, 2 December 1970, para. 18).

[39] *See* AB Report, *European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, 12 March 2001, WT/DS135/AB/R, para. 111, *see also* G. Grossman, H. Horn, P. Mavroidis, *The Legal and Economic Principles of World Trade Law: National Treatment*, IFN Working Paper No. 917, 2012; p. 57; J. B. Goco, *Non-Discrimination, "Likeness", and Market Definition in World Trade Organization Jurisprudence*, 40(2) Journal of World Trade 315 (2006). On the other hand in some cases we can also find references to formal classification of products from tariff codes: Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, 12 June 2007, WT/DS332/R, WT/DS332/R, para. 7.415.

[40] *See e.g.* Panel Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/R, WT/DS10/R, WT/DS11/R, 1 November 1996, para. 5.5; AB Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/AB/R, 17 February 1999, para. 119.

[41] Panel Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/R; WT/DS169/R, 10 January 2001, para. 627.

[42] GATT Panel Report, *United States – Section 337 of the Tariff Act of 1930*, 7 November 1989, L/6439 – 36S/345, para. 5.11.

clause, the AB stressed the importance of "even-handedness" in how the distinction in treatment was designed and applied.[43] Although related to a much narrower scope of application, the regime of Art. 2.1 TBT is similar to that of Art. III GATT. Art. III GATT does not leave space for even a legitimate difference in treatment, unless it is justified under Art. XX GATT.[44] Despite the fact that the only requirement of Art. 2.1 is the even-handedness of a measure, the interpretation of this notion is broad and covers also the necessity test of a measure, as well as lack of arbitrary discrimination taken from Art. XX GATT.

A similar clause granting NT can be found in Art. XVII GATS. The nature of the GATS NT clause is, however, different than the GATT one. First of all, its scope is limited only to commitments expressly granted by specific WTO Members. It can be limited by mode and by sector. The key elements here are Member-specific lists of commitments. Before examining whether there is a breach of Art. XVII GATS, the dispute settlement body must check whether a defendant has undertaken a commitment in a relevant sector and mode of supply; has adopted or applied a measure affecting the supply of services in that sector and/or mode of supply; and finally whether the measure under examination accords less favourable treatment to foreign services or service suppliers.[45] The wording of the GATS NT is also different compared to GATT. Contrary to the GATT's Art. III, Art. XVII GATS does not differentiate between types of measures (such as taxes and regulatory actions in relation to goods). It covers not only services, but service suppliers as well. It also covers "all measures", without any further clarifications, which means that, once granted, there are no national measures which fall outside the scope of the NT clause.[46]

On the other hand, the GATS NT clause is, like the one from GATT, a "no less favourable" clause, which means that theoretically it prohibits only negative discrimina-

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[43] AB Reports, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, 24 April 2012, paras. 182 and 215; *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, 16 May 2012, paras. 216 and 225; *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/AB/R WT/DS386/AB/R, 29 June 2012, paras. 271, 272, and 341, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R WT/DS401/AB/R, 22 May 2014, paras. 5.307-5.308; for critical assessment *see* B. Natens, D. Geraets, *Modification of the Conditions of "Competition for Goods and Services" Has "Treatment No Less Favourable" Lost its Meaning*, KU Leuven Working Paper No. 142 (July 2014).

[44] *See* AB Report, *EC - Seal Products*, para. 5.311, for comments *see* S. Hartmann, *Comparing the National Treatment Obligations of the GATT and the TBT: Lessons Learned from the EC-Seal Products Dispute*, 40(3) North Carolina Journal of International Law and Commercial Regulation 629 (2015).

[45] Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, (EC – Bananas III)*, WT/DS27/R/ECU, para. 7.314; *see also* G. Verhoosel, *National Treatment and WTO Dispute Settlement, Adjudicating the Boundaries of Regulatory Autonomy*, Hart Publishing, Oxford: 2002, p. 20 (on the meaning of "affecting").

[46] *See* M. Krajewski. *National Regulation and Trade Liberalization In Services*, Kluwer Law International, Hague, London. New York: 2003, p. 96; B. Hoekmann, A. Matoo, *International Trade: Trade in Services*, [in:] A. Guzman, A. O. Sykes (eds.), *Research Handbook in International Economic Law*, Edward Elgar, Cheltenham: 2007, p. 122.

tion of foreign services and service suppliers. Also the test used by panels and the AB seems quite similar in construction to the one used in relation to trade in goods. Firstly, a panel/the AB has to verify whether a measure at issue is a measure affecting trade in services, secondly it has to check whether domestic and foreign services are "like" services or service suppliers are "like", and finally it has to examine whether the foreign services or service suppliers are treated no less favourably than the domestic ones.[47] Unlike in relation to GATT's Art. III, panels and the AB do not need to analyze whether or not a measure is formally identical, or whether a discrimination is only *de jure* or also *de facto*. This has been already explicitly determined in Article XVII itself, which stipulates in paras. 2 and 3 that the requirements may be met by "either formally identical treatment or formally different treatment that it accords to its own like services and service suppliers" and that what is decisive is whether a measure "modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member." The change in wording though, does not change the substance of both provisions, as they should be interpreted in a similar manner. The wording of Article XVII GATS seems to implement the already-existing interpretation of the notion of discrimination.

The NT clauses in GATT's Art. III and GATS's Art. XVII are not the only NT clauses in WTO agreements. The most important are those included in Art. 3 TRIPS and in Art. III GPA. The TRIPS NT clause is mandatory for all WTO Members. There are exceptions provided by the clause which arise directly from various international agreements listed in the provision.[48] With respect to the GPA's NT clause, the most significant disadvantage arises from the nature of that agreement. As it is a plurilateral agreement, not every WTO Member is automatically a signatory of the GPA. There are only 43 parties of the GPA, including the 28 Member States of the EU and the European Union itself. Among the partners in European Union RTAs which are already operational[49] and are the subject of my analysis,[50] only Israel and Korea are parties to the GPA. The clause itself has a relatively broad scope. It covers products, services and suppliers, who should be treated not less favourably than domestic ones. In addition, Art. III:2 GPA stipulates that there should not be any differences in treatment between locally-established suppliers on the basis of their ownership. Locally established suppliers owned by foreign investors should not be discriminated against.

[47] Based on P. van den Bossche, *The Law and Policy of the World Trade Organization, Text, Cases and Materials*, Cambridge University Press, Cambridge: 2011, pp. 393-395.

[48] The Paris Convention for the Protection of Industrial Property (1967), the Berne Convention for the Protection of Literary and Artistic Works (1971), the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961) and the Treaty on Intellectual Property in Respect of Integrated Circuits (1989).

[49] Among those who are negotiating or have finished negotiations are: Armenia, Canada, Japan, Singapore and the United States.

[50] GPA members also include: Iceland, Norway and Switzerland (together with Liechtenstein), as well as the Netherlands with respect to Aruba.

4. NATIONAL TREATMENT IN THE EU REGIONAL TRADE AGREEMENTS IN RELATION TO GOODS

First of all we must keep in mind that the EU RTAs usually cover a broader range of issues than just trade in goods. Even these RTAs which have not been notified to the WTO as EIAs sometimes cover cross border supply of services and establishment of companies as well.[51] The EU RTAs usually consist other issues, such as maritime transport, public procurement and intellectual property protection. Therefore in the following analysis all possible clauses will be taken into account.

As can be seen in Table 1, among the 31 agreements taken into account for the purposes of this article, only thirteen contain NT clauses in relation to trade in goods. This lack of a directly-granted NT does not seem to be connected with a lack of trust in the relations with partners. It is quite significant that agreements with especially close partners (which concluded SAA and Euro-Mediterranean agreements) do not include NT clauses in relation to goods. One may suppose there are two reasons for this. Firstly, the lack of an NT clause is probably compensated for by other provisions which provide for non-discriminatory treatment. It must be noted though, that these might be weakened by the lack of a defined benchmark (*tertium comparationis*). Secondly, the lack of an NT clause in an agreement may be to some extent compensated for by the GATT NT clause with respect to relations between the EU and a given partner.

Art. III GATT is quite clearly the most important benchmark and inspiration for the NT clauses. Since the majority of the EU's RTA partners are WTO Members, less favourable treatment of goods as well as discriminatory taxation is prohibited by that article. Technical requirements are also governed by the TBT Agreement. Hence there is not much need for an additional grant of national treatment or other means to provide for non-discrimination. Despite that fact the EU and its partners decided to grant NT or at least invoke NT from the GATT.

Among the agreements that explicitly grant NT are all EPAs and Interim EPAs concluded with ACP countries. The wording of all these clauses is very similar and is obviously inspired by Art. III GATT. The scope and listed internal measures are exactly the same. Paragraph 1 of the NT clauses in these EPAs and Interim EPAs mirrors Art. III:2 GATT and concerns internal taxation; paragraph 2 mirrors Art. III:4; while paragraph 3 mirrors Art. III:1 of GATT. The exceptions are also the same and cover internal subsidies and public procurement as well as trade defence instruments. But the NT clauses in these agreements do not fully mirror the entire Art. III GATT and only pick internal taxation and internal regulation, leaving internal quantitative restrictions relating to process and production methods (Art. III:5) outside the scope of the NT granted on the basis of an RTA. Although the problem with requirements related to process and

[51] The term "establishment" is often used in the EU RTAs. It is taken from the TFEU (and its predecessors), and means the right to establish a company, a branch or subsidiary of a company in a given state. It aligns mode 3 of the GATS (commercial presence) and sometime also mode 4 (presence of natural persons).

production methods is widely discussed (mainly in relation to environmental impact and the likeness of products[52]), they are usually subject to "internal regulation" and as such are covered by Art. III:4 GATT and respective provisions of NT clauses in RTAs.

The differences in wording are not significant, with one exception. Art. 18.6 of the EPA concluded with Eastern and Southern Africa stipulates that African states, especially those which are least developed countries, can depart from the NT obligation "to promote the establishment of domestic production and protect infant industry." The decision is taken by an EPA Committee, but some exceptions have been listed directly in the Annex III to the Interim EPA. This is probably the most significant modification of GATT obligations and value added to pre-RTA obligations and rights of partners.

Beside the ACP countries being signatories of EPA, only in two other agreements can one find similar clauses. Art. 13 of the decision establishing a free trade area with Mexico and Art. 77 of the EU–Chile Association Agreement also contain wording exactly mirroring Art. III GATT. The difference between the NT clauses with Chile and Mexico and with the ACP States is that the NT clauses in the Chile and Mexico agreements expressily encompass measures covered by Art. III:5 GATT.

The actual meaning of these clauses, both in the EPAs and in the Chile and Mexico agreements, is debatable, with an unclear added value. On one hand this may be seen as a step forward in regional trade agreements and proof of the growing significance of non-tariff measures in international trade. As all agreements that comprise NT clauses are inspired by the GATT, it might be a sign of a new trend in the EU strategy with respect to future RTAs. On the other hand, almost all of the EU's partners in these agreements are WTO Members, which are obliged to grant NT for exactly the same measures on the basis of the GATT. But there may be some differences arising from the fact that GATT's Art. III was not directly invoked. A question can be raised of interpretation of this exact same wording. There is not yet any existing case law. Even though all RTAs include dispute resolution mechanisms, they have never been used.[53] Therefore it is difficult to predict whether adjudicators will follow the WTO panels' and AB's reasoning. The slightly different scope of covered measures, as well as the lack of invocation of the explanatory notes of Article III, might possibly lead to a different interpretation.

It is worth underlining that no NT clause with respect to trade in goods was included into the agreement with the only non-WTO Member or observer – Lebanon. The same objective seems to be attained in the agreement with Lebanon through different clauses that prohibit quantitative restrictions and discrimination, but nonetheless full NT is still absent.

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[52] *See e.g.* 11(2) European Journal of International Law (2000), where the entire volume was dedicated to that problem. *Cf. also* M. Joshi, *Are Eco-labels Consistent with World Trade Organization Agreement?*, 38(1) Journal of World Trade 69 (2004), p. 74; D. Vogel, *The WTO, International Trade and Environmental Protection: European and American Perspectives*, EUI Working Papers 2002/34.

[53] There also have been no disputes between the EU and its partners within the framework of the WTO after conclusion of an RTA.

There are two other agreements already in force, and two negotiated, which include clauses granting NT in relation to trade in goods, albeit with different wordings. The core element of these clauses is the direct invocation of Art. III GATT. First, in the EU-Peru and Colombia Agreement not only was Art. III directly invoked, but also its interpretative notes, which should be *mutatis mutandis* applied to the EU-Peru and Colombia Agreement. Also some additional clarification was included, that NT should be granted by any level of government or authority to "like, directly competitive or substitutable domestic goods". The last statement might be difficult to interpret because, on one hand, according to the same article it should be read exactly the same way as Art. III GATT, while on the other hand in GATT we can find only a "like" product, which however is explained in numerous judgments as the same as "directly competitive or substitutable". The notion of goods that are competitive and directly substitutable can also be found in the explanatory note added to Art. III:2 (only to taxation). The clarification added in above-mentioned agreements covers all measures from Art. III GATT. The same wording was used in the newly negotiated agreements with Singapore and Canada. Therefore we can assume that the direct invocation of the GATT, together with some added clarifications, constitutes the "model NT clause" currently in use with respect to goods in the EU RTAs. Compared to those agreements that fully or partly repeat Art. III's wording instead of directly invoking it, the RTAs with Peru and Colombia, Singapore and Canada leave much less space for interpretation. It should be assumed that the NT, even if interpreted by a body other than a WTO panel or AB, should be construed in line with the WTO rulings.

The EU-South Korea agreement also directly recalls GATT and the fact that national treatment should be granted in accordance with the GATT. Although it is similar to the one with Peru and Colombia, in this agreement "non-tariff measures" are especially emphasized and it is confirmed that they should be a subject of national treatment. This agreement also contains another specific provision that might be classified as an NT clause. It requires that both partners grant NT with respect to access to public participation in decision-making processes for issuing technical standards. Such treatment should be granted to "economic operators and other interested persons". This proves how important technical measures have become to international trade in goods. The provision does not refer to the TBT though. In this context, it might be interesting to note that although the majority of the EU RTAs do have some provisions on technical barriers to trade, there are no NT clauses in any of them. There are only general references to the TBT Agreement, which should be applied in all aspects except those which are explicitly modified. This means that the NT from the Article 2.1. of TBT is applicable here too.

In all of the Interim EPAs, the NT clauses in relation to trade in goods are the only ones, because Interim EPAs by definition cover only trade in goods. The only exception is the Agreement with Central Africa (Cameroon), which also stipulates NT for products in transit. Similar clauses, with slightly different wordings, are included in the agreements with Peru and Colombia (Art. 63) and with Central America (Art. 165). All of these clauses are in chapters covering trade in goods.

5. NATIONAL TREATMENT IN THE EU RTAS IN RELATION TO OTHER AREAS

A greater variety in the NT clauses can be found in relation to trade in services. First it must be observed that the majority of the EU RTAs do not follow the GATS model of liberalization of trade in services and do not belong to any of the agreement "families".[54] They are in fact not similar either to GATS or to other RTAs such as NAFTA. As a consequence, in the majority of the EU RTAs the liberalization of trade in services is not described by modes.

Usually the EU RTAs contain separate provisions concerning services and service suppliers (mode 1 and partly also mode 2 of services' supply) and establishment, which is close to the GATS mode 3 (commercial presence). This is clearly inspired by the logic of the TFUE and four freedoms of the EU. As with the EU internal legislation, the division between supply of services (which covers cross border supply both within and without a physical presence in a partner territory) and the right to establish a company differs with the level of liberalization. Establishing a company (a branch, subsidiary etc.) is always related to fulfilment of all the requirements which nationals need to comply with. The scope of such a liberalization, thanks to the high level of control exercised by domestic authorities over a company, may be quite vast. Because of its temporary nature, cross border supply of services need to be more limited in scope. On the other hand, it is impossible to require from suppliers abroad that they meet and fulfil all requirements of a foreign country's domestic legal system.

Only two EU RTAs have been classified as GATS-like – the agreements with Mexico and with Chile, which refer to such typology of liberalization of trade in services. The GATS-like construction of these agreements also influences the wording of their NT clauses. The EU-Chile Agreement and the Decision 2/2001 of the EU-Mexico Joint Council both contain an NT clause which exactly mirrors Art. XVII GATS. It must be noted though that the EU–Chile Agreement is comprised of two NT clauses in relation to trade in services. There is a separate clause, with exactly the same wording, granting national treatment to establishment. Almost identical clauses (to both services and establishment) were used in the EU–Singapore agreement. The same separate clauses have been used in the EU-CARIFORUM Agreement and the recently concluded agreement with Central America. The agreement with South Korea is also based on the same model, although besides granting NT for establishment, it also covers investors. The not-yet signed agreement with Canada replicates a similar model, but the term "establishment" was not used, probably because it was considered too characteristic of EU law. There are two clauses – one in relation to services and service suppliers and the other to investment and investors – instead of establishment.

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[54] For the typology and notion of "families" of regional agreements in relation to services, *see* P. Latrille, J. Lee, *Services Rules in Regional Trade Agreements: How Diverse and How Creative as Compared to the GATS Multilateral Rules?*, WTO Staff Working Paper, 2012.

It is not easy to track the reasons why the reference to investors was added. The clause itself resembles relevant clauses from RTAs concluded by the US, but the philosophy there is slightly different. The US has often combined trade and investment agreements. In the EU RTAs, granting NT also to investors may be a sign of change in the EU's previous philosophy, strengthened by the fact that investment protection was included into the EU trade policy in the Lisbon Treaty in 2009.[55] Investors are defined very broadly, hence by means of an NT clause they gain the same level of non-discriminatory treatment that is usually obtained through investment agreements. On the other hand, any form of financial compensation was explicitly excluded in the same article.[56]

Unlike a NT clause replicated from the GATT, here – in relation to services – repeating clauses from the GATS has its legal significance. In all of these above-mentioned agreements, the key element of liberalization of services is a list of commitments, broadened in comparison to GATS commitments. In such a situation the scope of the NT has also been broadened – it might be applied to a much larger variety of services and situations. As a result, even the exact same wording and interpretation of the clause adds something to the level of liberalization, because it can be applied to other types of services. Moreover, the scope of services covered by the NT may vary not only among RTAs, but also within a given RTA by an EU Member State, which may grant some additional commitments within the framework of an EU RTA.

A slightly different clause has been used in the EU-Colombia and Peru Agreement. Here we also have two separate articles – one related to a right of establishment and investors, and the other to services and service suppliers. Both articles contain three analogical provisions – each for a different party of the agreement. The wording is precise in defining the scope of application, but it does not contain any additional explanations. As a result it mirrors only Art.XVII:1 GATS, concentrating mainly on the scope of concessions made by parties listed in annexes to the agreement.

The lack of information on its negotiating history makes it difficult to identify the reasons behind such a wording. Here a question may arise whether such a change, together with the lack of an interpretative paragraph in the EU-Colombia and Peru agreements, really influences its actual legal meaning. In my opinion it does not. If we use GATT's Art. III as a comparison, it is obvious that "treatment less favourable" refers to both factual and legal treatments. Also, the answer to the question whether formally different treatment is in conformity with that provision is in my view affirmative. There are situations when formally identical treatment of domestic and foreign services and suppliers may not be possible. The decisive factor should, however, be the actual market access for foreigners and lack of modification of conditions and competition. The lack of an explanation, although it makes the provision less clear and more susceptible to interpretation, should not in fact influence the regime of NT.

[55] *See* new Art. 207 TFUE.

[56] Art. 7.12 of the EU–South Korea Free Trade Agreement, OJ L. 127, 14 May 2011, p. 27.

Another group of the EU agreements that comprise an NT clause are SAAs. All of them, except the interim SAA with Bosnia and Herzegovina, have been notified not only as FTAs but also as EIAs to the WTO, and all contain chapters related to the cross border supply of services and establishment, but none of them contain a pure NT clause in these areas. All SAAs, as well as all DCFTAs with the Eastern Partnership states, contain a clause related exclusively to the establishment and operation of subsidiaries and branches of companies. The clause stipulates that parties grant each other treatment no less favourable than that accorded to a partner in their own companies (branches or subsidiaries) or to any company of any third country, whichever is better. This makes for a combination of MFN treatment and NT in one clause. Such a combination of non-discriminatory clauses are apparently similar to those used traditionally in investment protection agreements. It may be much stronger than a regular NT clause, as it may give better treatment than NT if based on some privileges given to other states. It is interesting that such treatment was granted only to the closest partners of the EU, with whom the agreements' ultimate aim is future EU membership.

In every SAA the combination of MFN and NT is granted in relation only to commercial presence (mode 3), but there is also a possibility of widening the scope of the clause so that it also covers self-employed persons. Such a decision is going to be taken by the Stabilisation and Association Council a few years after the entry into force of a given agreement. This time period is five years for the FYROM and Albania, and four years for Serbia and Montenegro. No such a decision has been taken yet.

The clauses granting NT in SAAs are supplemented by additional provisions that enable one of the parties to the agreements to introduce some additional requirements to the other party concerning the establishment and operation of a company, if they are justified by legal or technical differences. This seems to be a crucial provision as it may serve as the legal basis for introducing measures which may seriously impair market access.

What differs SAAs from other EU RTAs (including the recent DCFTAs) is the fact, that they do not contain a specific list of commitments. Therefore the scope of NT for establishment is very broad and may be applied to all sectors. This might be explained by the ultimate purpose of SAAs, which is full EU membership of the currently non-EU party. The same model has been used in the past in the Europe Agreements. The right to establishment has only been limited by legal and technical differences between partners.

Contrary to establishment, the right to provide services has not been granted either in the Europe Agreements in the past nor in the present SAAs. They all contain chapters related to supply of services, but without granting NT treatment. NT treatment was granted only in explicitly designated sectors – in maritime transport (operating of ships) in the EU-Albania, EU-Serbia and EU-Montenegro agreements. The three partners should grant NT also to the EU Members' nationals in relation to real estate acquisition, but Albania should do so in accordance with its GATS's list of concessions. Such a difference is a result of the fact that only Albania has WTO membership. The aforementioned concessions related to the supply of services have not been included in the EU-FYROM agreement, perhaps because the SAA was signed with the FYROM a few years earlier.

On the other hand, the recent DCFTAs with the Eastern Partnership states contain an NT clause related to market access for service suppliers. Its wording, as in many other EU agreements, mirrors the GATS clause. The reason for such a deep commitment is the fact that it has a limited scope. National treatment is granted only to these sectors and suppliers who have explicitly granted market access in the annexes. This can be a signal of a new tendency in the EU agreements, but also proof of a deepened relationships with these partners.

Although the liberalization of services is usually only an added element to an FTA or a CU, it is interesting to note that although the agreements with the Mediterranean states have not been notified as EIAs to the WTO, they all contain chapters concerning trade in services. They all prohibit discrimination based on nationality in relation to workers and working conditions, but the clauses so stipulating do not have the characteristics of NT clauses. Nonetheless, two of them – with Algeria and Jordan – contain clauses exactly the same as in the SAAs. They provide a combination of MFN and NT, whichever is better, in relation to establishment. Such a wording, as explained above, is more advantageous for foreigners, because they can be entitled to a better treatment than nationals on the basis of MFN. Probably such a clause was used by the EC for the first time in the EC-Jordan agreement, as it was earlier than any of the SAAs. In the EU-Algeria agreement, a similar clause has also been used in relation to maritime transport.

Separate clauses granting NT in relation to maritime transport services are quite common in the EU agreements. Also a few other agreements contained such clauses – the EU-Colombia and Peru, the EU-Central America, decision 2/2002 of EC-Mexico Joint Council and the EU-South Korea agreement. The future AA with Ukraine also contains such a clause, supplemented by the exception of a special right arising from bilateral agreements concluded with the EU Member States. Moreover, in the agreements with Central America and South Korea there are NT clauses in relation to some aspects of telecommunication services. In the agreements with South Korea and Mexico NT is granted for financial services.

As was mentioned above, the EU RTAs very often cover a broader scope of issues than trade in goods and services. The geographical scope of the GPA is significantly widened by the EU RTAs. The majority of agreements which cover trade in services also contain a chapter related to public procurement. As there are only two GPA members among the EU partners, they often contain a provision that grants national treatment to public procurement. The clauses themselves exactly mirror Art. III of the GPA. Such a clause can be found in the EU agreements with Albania, the FYROM, Serbia and Montenegro (in all SAAs), with Peru and Colombia, and with Chile and Central America. Also the agreement with Ukraine contains such a provision. NT is not granted in agreements with parties which are also GPA parties. Therefore we can assume, that the purpose of the clauses is not the modification of GPA and its regime, but simply widening the geographical scope of it.

Only two agreements contain national treatment clauses in relation to intellectual property rights – the one with Colombia and Peru as well as the one with Central America. In both cases though the clauses recall TRIPS, and include both NT and MFN. The clauses provide for treatment "not less favourable" than accorded to a party's own nationals. But instead of listing exceptions they only invoke exceptions from Arts. 3 and 5 TRIPS. As a result, the scope and discipline of the clauses seems to be exactly the same as the TRIPS NT clause.

CONCLUSIONS

The NT clause is often used in the EU RTAs, although not every agreement includes that standard. A benchmark is always WTO law and its NT obligations as provided by Art. III GATT and Art. XVII GATS (and other relevant agreements such as GPA or TRIPS). In principle, the clauses used in the EU RTAs mirror the WTO language. This may be a sign that the well-developed WTO NT clauses, with its settled case law (compared to the nonexistent case law under RTAs), is really difficult to develop through regional integration. NT, as it is interpreted by the WTO adjudicating bodies, has a very vast scope. It is thus almost impossible to add any value to liberalization by granting additional NT in an RTA. Therefore we can assume that these clauses are intended more to remind the parties that any form of discrimination is prohibited. They are probably more important when it comes to trade in services, but not so much because of their specific formulation but due to extent of commitments made by the parties.

At the same time, it should be noted that the GATT/WTO NT is binding only on WTO Members and is not yet universal. This means that for a non-EU party from outside the WTO, the NT granted within the framework of an RTA with the EU is the only way to enjoy this type of preference (which, by the way, can be easier to obtain than through membership in the WTO). Having said that one also needs to admit that there are only a few partners of the EU RTAs which are not WTO Member at the same time.

We can clearly observe an evolution in the EU's way of formulating NT. First, the number of clauses is increasing. In older EU RTAs the NT clause was rarely used. There are probably two reasons for this. The first was a stronger former belief that the GATT NT clause was sufficient. NT clauses are almost always present in the newest RTAs concluded by the EU. This might be a sign of the growing importance of non-discrimination, but primarily it is a sign of the growing importance of non-tariffs measures, which have become a shaping factor of international trade. On the other hand, the NT clauses in relation to goods, although present, do not seem to add much to the WTO NT obligation. Such clauses do not change the way foreign goods and foreign producers are treated, but may have consequences with respect to the choice of judicial body for dispute settlement should a dispute arise. The second reason for the growing need of NT clauses is deeper integration in the form of EIAs. When an agreement covers services, the scope of commitments and coverage of sectors is usually wider than the

GATS commitments. Therefore a separate NT clause is needed. In such a case, its resemblance to the GATS' NT clause is natural. Despite that, the possibility of a change of the forum for potential dispute settlement is also possible here.

The way of wording NT clauses shows as well that the EU is a strong negotiator, which often concludes agreements with weaker partners (it makes its RTAs hub-and-spokes-like). There are sorts of "families" of treaties with almost identical clauses (not only those related to NT). There is an EPA family and SAA family, although the SAA family has evolved over time. The first SAA agreement (with the FYROM) was clearly influenced by the earlier Europe Agreements with the states from Central and Eastern Europe. It also became an inspiration for the newly signed agreements with the Eastern Partnership states. There is a bigger variety in the Euro-Mediterranean Agreements, which can be explained by the fact, they were concluded in two waves, and the time factor is very important in the EU RTAs.

What's also interesting in the NT clauses in relation to services is that apparently there is no "model clause" used by the EU, even in its most recent agreements. Different approaches were used in the purely economic agreements with developed partners (South Korea, Canada, Singapore) and in the association agreements with the Eastern Partnership states. And the most important differences are difficult to discover, as they are stipulated in annexes and can vary by scope, by the EU Member State, and the sector of services.

APPENDIX no. 1

Table 1

Signatory	Association Agreement	Type of agreement	Year	EIA Y/N	MFN – goods	MFN – services	NT – goods	NT – services
Albania	Y	SAA	2006	Y	N	Y	N	Y
Algeria	Y	Euro-Mediterranean	2002	N*	N	Y = GATS	N	Y
Bosnia & Hercegovina	Y/N	Interim SAA	2008	N	N	N	N	N
Cameron	Y/N	Interim EPA	2009	N	Y asymmetric	N	Y	N
Canada	N	CETA	-	Y	N	Y	Y	Y
CARIFORUM	Y/N	EPA	2008	Y	Y asymmetric	Y	Y	Y
Central America	Y	FTA/Association Agreement	2012	Y	N	Y	N	Y
Chile	Y	FTA/association	2002	Y	N	N	Y	Y
Columbia & Peru	N	FTA	2012	Y	N	N	Y	Y
Eastern African Community	Y/N	Interim EPA	-	N	Y asymmetric	N	Y	N

Table 1 cont.

Signatory	Association Agreement	Type of agreement	Year	EIA Y/N	MFN – goods	MFN – services	NT – goods	NT – services
Eastern & Southern Africa	Y/N	Interim EPA	2009	N	Y asym-metric	N	Y	N
Egypt	Y	Euro-Mediterranean	2001	N*	N	Y= GATS	N	N
Georgia	Y	Association/ DCFTA	2014	Y	N	Y	N	Y
Israel	Y	Euro-Mediterranean	1995	N*	N	Y= GATS	N	N
Ivory Coast	Y/N	Interim EPA	2009	N	Y asym-metric	N	Y	N
Jordan	Y	Euro-Mediterranean	1997	N*	N	Y	N	Y
Korea	N	FTA	2010	Y	N	Y	Y	Y
Lebanon	Y	Euro-Mediterranean	2002	N*	N	Y= GATS	N	N
FYROM	Y	SAA	2000	Y	N	Y	N	Y
Mexico	N	FTA	2000	Y	Y	Y	Y	Y
Moldova	Y	Association/ DCFTA	2014	Y	N	Y	N	Y
Montenegro	Y	SAA	2010	Y	N	Y	N	Y
Morocco	Y	Euro-Mediterranean	1996	N*	N	Y= GATS	N	N
Pacific countries	Y/N	Interim EPA	2009	N	Y asym-metric	N	Y	N
Palestinian Authority	Y	Euro-Mediterranean	1997	N	N	N	N	N
Serbia	Y	SAA	2008	Y	N	Y	N	Y
Singapore	N	FTA	-	Y	N	N	Y	Y
South Africa	N	Trade Development and Cooperation	1999	N	N	Y= GATS	N	N
Tunisia	Y	Euro-Mediterranean	1995	N*	N	Y= GATS	N	N
Turkey	Y	Custom Union	1996	N	N	N	N	N
Ukraine	Y	Association/ DCFTA	2014	Y	N	Y	Y	Y

* Agreements cover services but are not notified as EIA.

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PROTECTION OF INTERNALLY DISPLACED PERSONS: AN INTERNATIONAL LEGAL OBLIGATION?

Abstract:
This article examines the phenomenon of internal displacement from the perspective of the existing legal framework and those measures which should guarantee protection for internally displaced populations worldwide. With this aim in mind, the article begins by assessing the role of international law and try to ascertain which legal norms are applicable to protect internally displaced persons. As a second step, it analyzes the question of responsibility for the protection of internally displaced persons, i.e. whether this lies with the state of origin through its national law, or rather with the international community, and examines the relevant provisions of international law. While concluding and identifying the existing gaps in the current legislation, the article demonstrates that internally displaced persons should become the objects of a specific system of law and legal protection. At the same time, the text intends to contribute to the contemporary debate promoting efforts to strengthen the protection of internally displaced persons and to disseminate knowledge about this vulnerable group of people.

Keywords: IDP, internal conflict, internally displaced person, internal displacement, international human rights law, international humanitarian law, international refugee law

INTRODUCTION

Internal displacement is one of the most pressing humanitarian, human rights and security problems faced today by the international community. On a global scale, the number of internally displaced persons (IDPs) forced to move by armed conflicts, generalised violence and human rights violations increased, as of December 2014, to an estimated 38 million (the highest number of IDPs noted since 1994).[1] Among the

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[1] The statistics are based on the analysis presented in the Annual Report of Internal Displacement Monitoring Center: *Global Overview 2015: People internally displaced by conflict and violence*, Internal Displacement Monitoring Center (IDMC), May 2015.

countries with the largest internal displacements in 2014 were: Syria, Colombia, Iraq, the Democratic Republic of the Congo, Sudan, Pakistan and Nigeria.[2] In addition, the internal displacement in Ukraine has been one of the most recent large movements of people, with at least 1,236,500 already displaced from their homes due to the armed conflict (as of March 2015).[3] However, this number can even be twice higher as not all displaced persons registered themselves in the centralised registration system created by the Ukrainian governmental authorities in October 2014.

As a rapidly increasing phenomenon, internal displacement is putting intense pressure on international law and its capacity for adaptation to the new realities and challenges. There is an urgent need to assess the role that international law, and particularly international human rights law (IHRL) and international humanitarian law (IHL), plays in developing an acceptable legal framework of rules governing this area. The present article focuses mainly on identifying the applicable principles and norms of international law and shows that, unlike with respect to refugees, there is no separate international convention directly protecting the rights of IDPs.[4] Their protection is still not linked to any special normative model, but depends on the analogical application of pre-existing norms of IHRL, IHL, and international refugee law (IRL). In current framework of international law the primary responsibility to protect IDPs should rest on the IDPs' state of origin. However, the reality demonstrates that the national authorities of states of origin are usually unable or unwilling to protect their IDPs, although the reasons for this vary. For instance, in situations of internal armed conflict, governments may not have control over all parts of the country. In these situations, IDPs are often found in areas under the control of non-state actors and out of reach of governmental assistance and protection.

The present article focuses on the avenues available in international law for the protection of IDPs when adequate protection is unavailable at the national level. It tries to identify which provisions of international law can guarantee the legal protection of IDPs. The growing international concern for internal displacement arises from the dramatic increase in the number of IDPs, who currently almost triple the global population of refugees.[5] IDPs and refugees are often forced to abandon their places of origin for similar reasons. In such situations, it would seem that crossing an internationally recognized border should no longer represent a necessary condition to gain access to international protection. The international community, however, has not yet adequately

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[2] The statistics based on analyses and monitoring of the IDMC, April 2015.

[3] State of play as of March 2015, based on the figures provided by the IDMC.

[4] The recently ratified African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (adopted 23 October 2009, entered into force 6 December 2012), together with its predecessor the Pact on Security, Stability and Development in the Great Lakes Region (adopted 15 December 2006, entered into force 21 June 2008), may be viewed as turning points towards creation of binding legal documents. However, they are only regionally binding acts with a limited scope of application.

[5] Pursuant to the statistics of the United Nations High Commissioner for Refugees (UNHCR) there were about 13 million refugees worldwide in the middle of 2014.

responded to the humanitarian crisis created by the global phenomenon of internal displacement. Importantly, states of origin typically refuse to acknowledge situations of internal displacement due to a fear that the international community will intervene in their internal affairs. This is particularly true in cases in which the national authorities themselves are responsible for the violence and human rights causing the displacement. At the same time, the estimated number of IDPs receiving no meaningful humanitarian assistance and facing indifference or hostility from their governments is growing each year. Taking this into account, it seems that the phenomenon of internal displacement has developed to the point that it can no longer be treated exclusively as a national internal issue. This article thus tries to determine the extent to which international law addresses the issue of protecting the needs of IDPs, and in particular analyses the role of international human rights, humanitarian and refugee law in the context of internal displacement and international protection guaranteed for IDPs. It demonstrates that internal displacement is not only a problem of domestic jurisdiction, but rather has become an area of concern for international law.

1. THE RELATIONSHIP BETWEEN THE CONCEPTS OF REFUGEE AND INTERNALLY DISPLACED PERSON

There are two main differences between the status of refugees and that of IDPs. The first is the fact that, unlike IDPs, refugees enjoy a proper legal status;[6] the second is represented by the transboundary element, which exists only for refugees. It was not until the last decade of the 20th century that the term "internally displaced person" came into regular usage and that international attention turned toward the potential creation of an international system to deal with IDPs.

The first important step in defining an IDP was the creation of the United Nations Guiding Principles on Internal Displacement in 1998 (UN Guiding Principles).[7] This major international document addressing the issue of internal displacement applies to "persons or groups of persons who have been forced or obliged to flee or to leave their

[6] Art. 1 of the Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954, 189 UNTS 137) provides that "the term 'refugee' shall apply to any person owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. In the case of a person who has more than one nationality, the term 'the country of his nationality' shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national."

[7] United Nations Guiding Principles on Internal Displacement, contained in the Annex of document E/CN.4/1998/53/Add.2, 11 February 1998.

homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters and who have not crossed an internationally recognized State border." This definition concentrates in large part on people who, if they had crossed an international border, would qualify as refugees. Essential parts of the definition of an IDP are duplications of several international documents addressing refugee issues, like the 1969 Organisation of African Union Convention governing the Specific Aspects of Refugee Problems in Africa[8] and the Cartagena Declaration,[9] as well as the more restricted definition of the 1951 Refugee Convention.[10] What is particularly significant in the definition in the UN Guiding Principles is that it also includes those who would not have earlier qualified as refugees, for example, those displaced by natural or human-made disasters. Furthermore, the expression "in particular" signals that the list of causes of internal displacement is not exhaustive.

According to E. Mooney, the phenomenon of internal displacement takes into account more factors than the flow of refugees. Despite the fact the IDPs are very often called "internal refugees", the concept of internal displacement encompasses additional causes of displacement which go beyond situations applicable to the flow of refugees. The internally displaced are grouped by one definition to the existence of a variety of causes of displacement which are followed by violations of their fundamental human rights. They present two similarities: 1) their displacement was forced, and 2) they stay within the borders of their state of origin. However, it should be underlined that this definition of IDP is descriptive, not legal, as it does not give a special legal status for IDPs in comparison to the position of refugees in the international legal system.[11]

Refugee status entitles its holders to certain rights and international protection, while being an IDP does not create a special legal status because internally displaced are still under the jurisdiction of their own government and may not claim any rights additional to those enjoyed by their compatriots. Furthermore, IDPs remain within the borders of their own country.[12] In practice, however, the division between these two groups of displaced people may be vague and overlapping, because when refugees return to their country of origin they are often unable to go back to their homes or communities, thus becoming IDPs. In rejecting the assimilation of the category of IDPs to refugees, much emphasis has been put on the definition of "refugee" under the 1951 Refugee

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[8] The Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (adopted 10 September 1969, entered into force 20 June 1974), 1001 UNTS 45.

[9] Cartagena Declaration on Refugees, Annual Report of the Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev. 1, 22 November 1984, pp. 190-193.

[10] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954), 189 UNTS 137.

[11] E. Mooney, *The concept of internal displacement and the case for Internally Displaced Persons as a category of concern*, 24(3) Refugee Survey Quarterly 4 (2005).

[12] J.C. Hathaway, *The Law of Refugee Status*, Butterworths, Toronto: 1991.

Convention and the requirement that a refugee must be outside his/her country of origin. By being outside their country of origin, refugees are in a fundamentally different situation than IDPs according to international law. One important consequence of this fact is that the international community's access to IDPs can be much more limited, or subject to more conditions, than its access to refugees.[13]

The specificity of the phenomenon of internal displacement creates a need to guarantee special protection for IDPs, mainly but not solely due to the lack of will or capacity on the part of their own governments to provide proper assistance to their displaced citizens. Critically, however, though IDPs and refugees have different legal statuses, the consequences and causes of both displacements have a common character. IDPs and refugees alike are frequently displaced to places foreign to their cultures, where the local people come from a different ethnic, religious or linguistic group. Like refugees, IDPs may feel like aliens in their dislocations, and not infrequently are viewed as strangers and a threat to the local structures surrounding them. In light of these parallels between the displaced groups, debates have raged over the question whether IDPs and refugees should be treated as a single category and protected by one and the same international organisation.[14] At the present time, the United Nations High Commissioner for Refugees (UNHCR) provides protection to IDPs. However, these actions have no legal basis in the statutory provisions of the Office. The UNHCR's policy on internal displacement derives from the fact that IDPs, like other citizens, are entitled to protection under national law, IHRL and IHL throughout the whole displacement process. In view of this, the Office has stated its readiness to work with national and international actors that are engaged in the establishment of laws and mechanisms that safeguard the rights of IDPs. From its side, the UNHCR guarantees that all of its activities with regard to the IDP issue conform to the norms of IHRL, IHL and the UN Guiding Principles. It is also noteworthy that the scope of the UNHCR's engagement with IDPs is mainly limited to internal displacement induced by armed conflicts. In internal displacement caused by natural disasters the UNHCR shares a key role with other UN bodies, i.e. the Office of the High Commissioner for Human Rights (OHCHR) and United Nations Children's Fund (UNICEF). It does not take a primary role and it usually gets involved based on the presence of refugees intermingled among persons displaced by natural disasters. For instance, when disaster happens at a close distance to a refugee camp, the UNHCR tries to provide at least minimum assistance. However, unlike for refugees, there is still no single international institution that explicitly addresses the protection, assistance and special needs of the internally displaced. Several UN humanitarian and human rights bodies and various international NGOs are engaged in providing assistance, protection, and development aid for the internally displaced. None of these organizations, however, has a global

[13] M. Barutciski, *Tensions between the refugee concept and the IDP debate*, 3 Forced Migration Review 11 (1998), p. 12; B. Rutinwa, *How tense is the tension between the refugee concept and the IDP debate?* 4 Forced Migration Review 29 (1999).

[14] C. Brun, *Internal Displacement*, Forced Migration Online (FMO), October 2005, pp. 2-3.

mandate to protect and assist IDPs. The international community tried to find a compromise solution in the creation of a collaborative approach and by making better use of existing institutional mandates. The collaborative approach requires that the capabilities of many international organizations are to be coordinated to address the problem of internal displacement. However, it should be underlined that the lack of resources and of political will to create a new international institution would seem to limit the international response and the options available for reacting.

With reference to the scope of the definition of IDP, some counter views can be also identified in the literature. In the opinion of M. Barutciski, and contrary to the opinions of experts in humanitarian aid and some scholars, a demarcation between the refugee and IDP regime should be made. The advocates of the holistic approach to treating both categories of the displaced persons seem to miss a significant element, which is that immediately upon crossing an internationally recognised border refugees become protected by specific international legal instruments and a specific legal order. Hence, the protection of human rights of refugees would not have the same value if it were to be made entirely applicable to IDPs, as refugees are rather viewed as aliens in a foreign state. The human rights provided for them aim at allowing refugees to survive outside their state of origin, where they do not possess citizenship. Thus, according to Barutciski, amending the definition of refugee by the insertion of an internally displaced category would seem to be superfluous in light of the fact that the notion of "refugee" denotes a displaced person in the territory of a foreign state. As Barutciski stressed, a fundamental international act being the legal foundation for international refugee law, that is, the 1951 Refugee Convention, is entirely based on the concept of flow from the state of origin. The idea of the 1951 Refugee Convention was to establish protection for displaced people in a place where they cannot benefit from the rights which are normally guaranteed to citizens of a country.[15] It is clear that although IDPs and refugees may be entitled to the same scope of human rights, protection of IDPs is limited by national sovereignty and by the internal policies of states of origin. This is aggravated by the fact that normally internal displacement is driven by armed conflicts, serious disturbances and the institutional collapse of a state of origin, all circumstances that may constitute permissible justifications for the derogation of basic human rights standards. Furthermore, notwithstanding the similarities with respect to the need for assistance of both categories of displaced persons, IDPs are still confronted with many constraints as regards their legal and institutional protection and this is not the case for refugees.

In sum, none of the proposed definitions of internally displaced persons included in the relevant international instruments is a legal definition, in contrast to the definition of refugee included in the 1951 Refugee Convention and other international legal documents. One may reasonably assume that it would be necessary to formulate a proper legal definition of IDPs in order to entitle them to legal rights.

[15] Barutciski, *supra* note 13, pp. 12-13.

2. APPLICABLE FRAMEWORK OF INTERNATIONAL LAW

As has been shown, IDPs do not enjoy a specific legal protection under international law that is exclusively applicable to them. However, there is no doubt that the principles of IHRL and IHL apply to IDPs in the course of conflict situations, and that the IHRL is also applicable in times of peace. Nonetheless, the specific needs of IDPs still tend to be neglected. Unlike refugees, IDPs do not benefit from a special international legal system exclusively geared to ensuring their protection and assistance. This absence of legal protection of IDPs comes from gaps in the international legal system, the first stemming from a lack of explicit provisions identifying the needs of IDPs, and the second related to the fact that the already existing general norms have not been adapted to the special needs of internally displaced persons.

Notwithstanding the existence of two multilateral instruments of legally binding force pertaining to internal displacement, an internationally binding legal document that establishes the full scope of IDP protection still awaits formulation. The above-mentioned instruments of legally binding force – the Pact on Security, Stability and Development in the Great Lakes Region[16] (Great Lakes Pact) and the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention)[17] – are documents with limited scope that cover only some regions of the African continent. Besides, the Kampala Convention, although a significant step in regional assurance for IDPs and a formulation of legal obligations for states, entered into force on 6 December 2012 but has been ratified by only 22 African states (as of December 2014) since its adoption in October 2009.

Hence IDPs are not protected by a single legal international regime. The UN Guiding Principles, which are based upon IHL, IHRL and analogous IRL, are an example of "soft", non-binding law with no sanctions system nor implementation procedures. The UN Guiding Principles do not attempt to explicitly address the gaps in the legal protection of IDPs, but they do restate the existing international laws related to them and attempt to provide governments and international organizations with guidance on how to respond to the needs of IDPs.

Reality demonstrates that the international law has not succeeded in preventing internal displacement. This fact results from the incomplete nature of this protection machinery, in particular the deficiencies of the international legal system as regards the implementation and enforcement of states' obligations under international law. As individuals who have not left their own country, IDPs remain entitled to the full range of human rights that are applicable to the citizens of that country. The challenge, however, is to identify those guarantees and concepts in existing international law that could

[16] The Pact on Security, Stability and Development in the Great Lakes Region (adopted 15 December 2006, entered into force 21 June 2008).

[17] African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (adopted 23 October 2009, entered into force 6 December 2012), available at http://au.int/en/content/african-union-convention-protection-and-assistance-internally-displaced-persons-africa.

relate to the special needs of IDPs and which may provide some protection for IDPs in particular situations. The human rights standards found in the most significant international legal acts, for instance the Universal Declaration of Human Rights (UDHR), the UN International Covenant on Civil and Political Rights (ICCPR) and the UN International Covenant on Economic, Social and Cultural Rights (ICESCR), should apply to them. Many human rights, however, may be derogated in times of national emergencies. In addition, governments which create situations resulting in internal displacement, or which are not sympathetic to the plight of those displaced for ethnic, religious, or political reasons, are generally unwilling to provide displaced persons with the rights found in international human rights instruments. Furthermore, IHRL does not directly address specific situations, such as the prohibition of forcible displacement and access to humanitarian assistance.[18]

As regards the complementarity of international humanitarian and human rights systems, the United Nations Human Rights Committee stated that

> the ICCPR applies also in situations of armed conflict to which the rules of IHL are applicable. While, in respect of certain rights of ICCPR, more specific rules of IHL may be specially relevant for the purposes of the interpretation of ICCPR rights, both spheres of law are complementary, not mutually exclusive.[19]

The above-mentioned Committee does not use the term *lex specialis*, but refers to the more specific norms of IHL. By avoiding the *lex specialis* approach, the Committee seems to imply that there is no need to choose one branch of law over the other, but rather relies on their simultaneous and harmonious application. According to this approach, as IHRL and IHL are two branches of law that have a common objective of protecting persons, they should be harmonised and interpreted in such a way that they complement and reinforce each other. In some cases, IHL will specify the extant rules and their interpretation, while in other cases it will be IHRL, depending on which branch of law is more detailed and adapted to a given situation.[20] In this context, it is worth noting that in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*[21] the International Court of Justice (ICJ) also underscored the supplementary application of IHL and IHRL in armed conflict situations.

2.1. Implications of International Human Rights Law

As highlighted at the beginning of this section, the phenomenon of internal displacement under international law cannot be elaborated without reference to the hu-

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[18] A. Balmanno, *Protecting the Internally Displaced under International Humanitarian Law*, 2(2) The Human Rights Brief 4 (1995).

[19] The UN Human Rights Committee, *General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant*, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004).

[20] S. Weill, *Interaction between humanitarian law and human rights in armed conflicts,* Geneva Academy of International Humanitarian Law and Human Rights, 2009.

[21] ICL, *Legal Consequences of the Construction of a Wall* (Advisory Opinion) 2004, available at http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm.

man rights legal system. There is an undeniable interface between internal displacement and human rights, first and foremost because infringements of international human rights are the primary reason for arbitrary displacement. As stated by the experts of the UNHCR, this is applicable both to persons leaving their places of origin individually and to people fleeing in groups. The human rights of displaced persons can be violated intentionally in domestic conflict by concurrent parties. Their infringement can be also provoked and influenced by poverty.[22] In 1992, the UN Commission on Human Rights[23] declared in its Resolution 1992/73[24] that the IDP concept is, at its core, a human rights issue. With a view to further sharpening the focus on the needs for protection of IDPs, the UN Commission on Human Rights strengthened the human rights aspects of the mandate of the Representative of the UN Secretary-General on IDPs by explicitly adding a reference to "human rights" to the mandate-holder's title.[25] It was thus within the human rights framework of the UN that the plight of the internally displaced came onto the international agenda and some international consensus around the issue was established. However, in the academic discourse there are also other existing interpretations of the position of IHRL towards the protection of IDPs. For instance, according to R. Murray, international law relating to the protection of refugees and displaced persons on the one hand, and IHRL on the other, have traditionally occupied separate spheres with their own institutions and mechanisms.[26]

IHRL, which is applicable both in times of peace and in situations of armed conflict, can provide important protection to IDPs. It aims both to prevent displacement and to ensure the basic rights of displaced persons. Among the rights of particular importance for the prevention of displacement are the prohibitions on torture, cruel, inhuman or degrading treatment or punishment, and the right to peaceful enjoyment of property and to home and family life. These rights must be granted to everyone without discrimination, including discrimination on the grounds of displacement. In addition to being protected by international human rights mechanisms implemented (at least in theory) in their state of origin, the rights of IDPs should also be guaranteed by the standards of customary international law binding upon all states. Importantly, situations involving the protection of human rights are present in all phases of the process of internal displacement that is, starting from its cause, to the particular circumstances and conditions, including reasons for extension, and ending with long-lasting solutions. Pursuant to the provisions of the fundamental human rights treaties and instruments having their basis in the provisions of the UDHR, states have an obliga-

[22] United Nations High Commissioner for Refugees, *The State of the World's Refugees*: *The Fifty Years of Humanitarian Action*, Oxford University Press, Oxford: 2000, p. 150.

[23] Replaced on 15 March 2006 by the UN Human Rights Council.

[24] UN Commission on Human Rights, *Resolution 1992/73, Internally displaced person*, E/CN.4/RES/1992/73.

[25] UN Commission on Human Rights, *Resolution 2004/55*, *Internally displaced person*, E/CN.4/RES/2004/55.

[26] R. Murray, *Refugees and Internally Displaced Persons and Human Rights: The African System*, 24(2) Refugee Survey Quarterly 56 (2005).

tion to guarantee universally recognised human rights to all their citizens. These are indispensable for their well-being and dignity.[27]

However, some authors argue that IHRL does not provide adequate protection for IDPs, inasmuch as it permits derogation in times of national emergency or internal strife and does not bind insurgent forces. It should be noted that this derogation is not applicable to the violation of core rights,[28] such as right to life, prohibition of torture or cruel, inhuman or degrading treatment, prohibition of slavery, etc. (specified in Art. 4 of ICCPR). Furthermore, no derogation exists from prohibitions against hostage-taking, abductions or unacknowledged detention, protection against genocide, discrimination, forcible deportation and displacement by expulsion.[29] However, the system of derogations can vary within international human rights instruments of a regional scope. The African Charter on Human and People's Rights[30] contains no derogation from the rights it guarantees. The American Convention on Human Rights[31] allows derogation in times of "war, public danger, or other emergency that threatens the independence or security of a State Party." The European Convention on Human Rights[32] permits derogation in time of war or other public emergency threatening the life of the nation. In sum, the regional international human rights treaties are not homogeneous in character. Aspects of protection vary from treaty to treaty, and each treaty contains a different enumeration of inalienable rights. However, according to L.T. Lee:

> [T]o the extent that their basic human rights have been violated, all human beings are entitled to protection and assistance whether as refugees abroad or as IDPs within their own countries. Equal rights for all individuals, be they nationals or aliens, refugees or IDPs are implied in all universal and regional human rights instruments through the use of such terms as all human beings, everyone, no one or all. Hence, not a single right in the UDHR, for example, is specified or implied as belonging only to refugees, but not to internally displaced persons.[33]

According to the provisions of the Manual on Field Practice in Internal Displacement[34] of the United Nations Office for the Coordination of Humanitarian Affairs (OCHA),

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[27] E. Mooney, *Bringing the end into sight for internally displaced persons*, 17 Forced Migration Review 4 (2003).

[28] So-called "peremptory norms" (*jus cogens*) – those human rights which cannot be derogated for the reasons of national security under any conditions.

[29] General Comment No. 29 of the Human Rights Committee, adopted at the 1950th meeting of the Committee on 24 July 2001, ICCPR doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001.

[30] African Charter on Human and People's Rights (adopted 27 June 1981, entered into force 21 October 1986), 1520 UNTS.

[31] The American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978), 1144 UNTS.

[32] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended).

[33] L.T. Lee, *The Refugee Convention and Internally Displaced Persons*, 13(3) International Journal of Refugee Law 363 (2001).

[34] The entire text of the OCHA Manual on Field Practice in Internal Displacement is available at http//: www.reliefweb.int/ocha_ol/pub/IDP (accessed 30 April 2015).

IDPs are not only victims in need of protection, but holders of rights to whom duties are owed by both the national and international authorities. Nevertheless, as is clearly stated in Art. 4 of the ICCPR, in times of public emergency that threaten the life of the nation (the existence of which is officially proclaimed), the state parties to the ICCPR may take measures in derogation of their obligations under the ICCPR to the extent such measures are strictly required by the exigencies of the situation and provided that they are not inconsistent with their other obligations under international law and do not involve discrimination solely on the basis of race, colour, sex, language, religion or social origin. However, according to Art. 4 no derogation from Arts. 6, 7, 8 (para. 1 and 2), 11, 15, 16 and 18 of the ICCPR may be made. This means that the following human rights can be distinguished as non-derogable: a) right to life; b) right to be free of slavery or servitude; c) right to be free of torture and cruel and inhuman treatment; d) right to be free of arbitrary detention; e) right to recognition everywhere as a person before the law; and f) right to religious freedom and freedom of speech and conscience.

As already described, IDPs do not have a special status in international law. Instead, they enjoy the rights guaranteed by IHRL to all human beings. These include the aforementioned non-derogable human rights and many others, including: the right to integrity and dignity of the person, non-discrimination, liberty of movement, respect for family life, an adequate standard of living (including access to basic humanitarian needs), medical care, access to legal remedies, possession of property, participation in public life and education.[35]

In recent decades, the proliferation of IHRL standards has been accompanied by a broad range of mechanisms that monitor, supervise and, on occasion, enforce these standards. At the international level, compliance is monitored by UN treaty bodies such as the committees established by the main human rights treaties, and by non-treaty-based bodies such as the UN Human Rights Council, whose work often has a direct impact on the protection of displaced people. Organizations such as the UNHCR, with their extensive field presence, have a responsibility to cooperate with these bodies, subject to considerations of security and confidentiality. Moreover, since its creation the UNHCR has emphasized the importance of national human rights structures. It has actively promoted the creation of national human rights bodies that support and implement international standards. These national institutions are becoming increasingly important partners for the UNHCR in the promotion and protection not only of refugees', but also IDPs' rights.[36]

Summarizing the discussion so far, no mention is made of the special needs and rights of IDPs in the existing legally binding human rights treaties. However, notwithstanding their status, IDPs are entitled to the human rights legal protection applicable for all human beings. These provisions however seem sometimes insufficient for providing

[35] D. Fisher, *Guide to International Human Rights Mechanisms for Internally Displaced Persons and their Advocates*, Brookings Institution – University of Bern Project on Internal Displacement, June 2006, pp. 24-25.

[36] UNHCR, *supra* note 21, p. 150.

comprehensive legal protection for various groups of displaced people. While human rights impose direct obligations on states and state actors, they can be subject to restrictions and derogations. Some human rights however are non-derogable, such as the right to life, freedom from torture and slavery, freedom of thought, conscience and religion, and prohibition of retroactive application of penal law. During peacetime, IHRL is applicable in its entirety. In the course of civil disturbances or riots IHRL is also applicable, though the suspension of certain rights may be justified. In situations of international armed conflict, IHRL law is applicable internally, but it is possible to suspend certain rights and political and civil liberties of citizens.

2.2. Implications of international humanitarian law

As mentioned in the previous sections of this article, the marginalised plight of IDPs should not be addressed in isolation from the enforcement of IHL. IHL, such as the law of armed conflict or law of war and their effects, aims generally at limiting the effects of war on people and property and protecting particularly vulnerable persons. Since war is one of the main causes of internal displacement the primary issue in the area of IHL is, within the context of internal displacement, to identify the extent to which IHL protects IDPs. This is the focus of the present section.

States have always been limited in the ways in which they conduct armed conflicts – from adherence to national laws and bilateral treaties to the observance of international customary law. In this regard, IHL may be described as a hybrid of sorts, a combination of treaty law and customary law.

Two types of armed conflict lie at the root of internal displacement: a) international armed conflict and b) internal armed conflict. International armed conflicts are conflicts between two or more states. The four Geneva Conventions of 1949 and Additional Protocol I of 1977[37] deal extensively with the humanitarian issues which arise from such conflicts. For example, the Fourth Convention stipulates, *inter alia*, the rights and duties of an occupying power that is a state whose armed forces control part or all of the territory of another state. However, reality demonstrates that modern armed conflicts do not in general have an international character. Rather, they take place in the territory of one state and often governments from other, mainly neighbouring, states support either insurgent forces or the governmental authorities of the state involved in internal conflict. With regard to the legal provisions covering non-international conflicts they are defined by the common Art. 3 contained in the four 1949 Geneva Conventions, which binds both the governmental national authorities and insurgent forces. The Additional Protocol II relating to the Protection of Victims of Non-International Armed Conflicts of 1977[38] also provides some additional obligations. Its aim was to bolster the strength

[37] Four Geneva Conventions (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287, 135, 85, 31, and the Additional Protocol Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3.

[38] Additional Protocol Relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609.

of Art. 3; however it has a narrow scope as it is applicable only when insurgent forces formally control a part of a state's territory.[39]

The four Geneva Conventions, the two Protocols, and the Hague Conventions of 1899 and 1907 are sources of customary IHL applicable to all countries. Unlike human rights treaties, which often have a monitoring body to which individuals and states can submit complaints, IHL relies much more on informal procedures. The Geneva Conventions and their Additional Protocols require the state parties to them to adopt a number of measures in order to assure their compliance with these treaties. Some of these measures have to be taken in peacetime, others in the course of an armed conflict.[40] With regard to displaced persons, the Geneva Conventions and their Additional Protocols, which form the legal basis of contemporary IHL, contain only a few provisions referring to refugees or stateless persons, and none directly referring to IDPs. Hence it may seem that IHL has little concern for refugees and stateless persons, and none at all for IDPs. However, displaced persons, whatever the causes of their displacement, are generally civilians. As such, they are protected by the provisions relating to the protection of civilians in time of war.[41]

As mentioned above, IHL is applicable in situations of armed conflict, whether international or non-international. A more limited range of rules apply to internal armed conflicts and are laid down in the common Art. 3 of the four Geneva Conventions as well as in Additional Protocol II. It prohibits "at any time and in any place whatsoever" specific acts against persons taking no active part in hostilities, including members of armed forces who have laid down their arms, or who have become sick, wounded, or detained. These acts encompass include violence to life and person, including murder, mutilation, cruel treatment, torture, carrying out of executions without judgment, taking of hostages, and outrages upon personal dignity such as humiliating and degrading treatment. Protected persons must be treated humanely at all times. By its terms, common Art. 3 explicitly protects persons during an internal armed conflict, such as a civil war. However, it is now well established that it also applies to international conflicts. The ICJ, the International Criminal Tribunal for the Former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR) all consider the protections identified by Art. 3 to apply to international conflicts. Art. 3 is also considered to be a part of customary international law. This means that countries are bound to follow the means of protection laid down in this article. In the Nicaragua and the Corfu Channel cases, the ICJ found that the provisions of common Art. 3 "constitute a minimum yardstick" in any armed conflict because they can be seen as the "elementary considerations of humanity."[42] Furthermore, Art. 3 provides protection to persons not taking an active part in the hostilities by prescribing

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[39] S. Carnes, *International Humanitarian Law*, Study Guides, Human Rights Education Associates (HREA), 2002.

[40] *Ibidem*.

[41] Mooney, *supra* note 26, pp. 10-17.

[42] ICJ, *Corfu Channel Case (UK v. Albania)* (Merits) [1949] ICJ Rep. 4; ICJ, *Nicaragua case (Nicaragua v. United States of America)* (Merits) [1986] ICJ Rep. 14.

their humane treatment in all circumstances, without any adverse distinction based on race, colour, religion or faith, birth, wealth, sex, or any other similar criteria.[43]

IHL does not, however, cover internal tensions or disturbances such as isolated acts of violence. This law applies only once a conflict has begun, and then equally to all sides regardless of who started the fighting. However, internal displacement occurs also in this former type of armed tension, and IHL does not guarantee protection for IDPs under these circumstances. On the other hand, when internal displacement occurs in situations of armed conflict, whether inter-state or domestic in character, IHL comes into effect. Many provisions of IHL reflect and reinforce protections provided for under IHRL, because a number of human rights guarantees may be significantly limited or even derogated in situations of armed conflict. As some authors state, the protection provided by IHL in these circumstances is particularly valuable. Moreover, IHL contains norms clearly prohibiting displacement, which is not the case in IHRL. In addition, whereas IHRL is generally binding only on states and their agents, IHL specifically applies not only to states but also to insurgent forces.[44]

The above-mentioned analysis bring us back to the main question, i.e.: how does IHL protect internally displaced persons? First, it protects the entire civilian population against indiscriminate violence during armed conflict.[45] In particular, it stipulates that attacks must be limited strictly to combatants and military objectives, namely to "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."[46] IHL provides protection for IDPs in situations of armed conflict, whether internal or international. This protection is not accorded to them on the basis of their special status of as internally displaced persons though. Instead, IDPs are protected by humanitarian legal norms only because they are civilians involved in armed conflict taking place in their state of origin. Taking into account that the phenomenon of internal displacement often is correlated with times of conflict, the 1949 Geneva Conventions and their Additional Protocols were an important source for the UN Guiding Principles. However, only the forced displacement of civilians for illegitimate reasons is prohibited under IHL and can be prosecuted as a war crime. Pursuant to the provisions of Art. 17(1) of Additional Protocol II, the displacement of the civilian population is not prohibited "if the security of the civilians involved or imperative military reasons so demand." Illegitimate reasons are those which are not indicated by the exceptions in Additional Protocol II.

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[43] I. M. Rafiqul, *The Sudanese Darfur Crisis and Internally Displaced Persons in International Law: The Least Protection for the Most Vulnerable*, 18(2) International Journal of Refugee Law 354 (2006).

[44] Mooney, *supra* note 26, pp. 10-18.

[45] *See* the Additional Protocol (I) Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3, Arts. 51.2, 4 and 5; Additional Protocol (II) Relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609, Art. 13.3.

[46] Protocol I (1977), Art. 52.2.

2.3. Analogies to the framework of international refugee law

IRL consists of the rules defining the legal status and treatment of refugees who, fearing persecution, are outside of their state of nationality and are unable to avail themselves of its protection. This system of international law is not directly applicable to the situation of IDPs who remain, by definition, within the borders of their state of nationality. However, IRL can be applied as a point of reference and used by analogy for the establishment and application of its standards to internally displaced persons as well. People who are forced to flee their homes and cross an international border come under the protection of the 1951 Refugee Convention, its 1967 Protocol,[47] or the 1969 Organization of African Union Convention governing the Specific Aspects of Refugee Problems in Africa. Some scholars argue that the focus of the international community today should be on "forced displacement", while avoiding making a rigid distinction between IDPs and refugees, as such a distinction overlooks a practical interconnectedness between these two groups of displaced people.

Refugee status entitles individuals to certain rights and international protection, while internal displacement does not create an international legal status because this category of displaced persons is still under the jurisdiction of their own government and may not claim any rights additional to those shared by their compatriots. In accordance with the opinion of W. Kälin,[48] despite the fact that IDPs are often forced to leave their homes and thus find themselves in refugee-like situations, IRL is nevertheless not directly applicable to them, because international law defines refugees as persons who have fled across an international border and are in need of international protection by virtue of their being abroad and having no access to the protection provided by their national authorities. However, by analogy IRL may be somewhat useful in proposing rules and establishing guidelines to protect the needs of IDPs. Several UN documents, such as the Guidelines on the Protection of Refugee Women[49] or the Guidelines on Protection and Care of Refugee Children[50] have inspired some of the UN Guiding Principles. Nevertheless, one must also take into account the fact that by definition refugees are not citizens of the host country, whereas IDPs remain in their state of origin and are usually citizens of that state. As many of the norms and guidelines relating to the status of refugees guarantee refugees equal treatment only with *aliens* in the country of refuge, an analogous application of these provisions would deprive many IDPs of the rights they have as citizens of their own country and would in fact be disadvantageous for them.[51]

Nonetheless, reference to IRL by analogy may be highly relevant for developing the standards for the protection of persons in refugee-like situations in circumstances

[47] The 1967 Protocol is attached to United Nations General Assembly Resolution 2198 (XXI) of 16 December 1967.

[48] W. Kälin, *Guiding Principles on Internal Displacement: Annotations*, 2nd ed., The American Society of International Law & Brookings Institution, Washington DC: 2008.

[49] UNHCR, *Guidelines on the Protection of Refugee Women*, Geneva: 1991.

[50] UNHCR, *Refugee Children: Guidelines on Protection and Care*, Geneva: 1994.

[51] Kälin, *supra* note 48.

that are not specifically covered by the frameworks of IHRL or IHL. The principle of *non-refoulement* is a prime example. This term is defined in Art. 33 of the 1951 Refugee Convention as providing protection for refugees against forced return to their home countries in a situation where they would be at risk of persecution or physical harm. IDPs, being often called "would-be-refugees", are thus entitled to seek asylum from persecution in another country and thereby to benefit from the protection of IRL (Art. 14(1) of UDHR). In addition, IRL might be directly relevant to IDPs if they attempt to cross a border but are prevented from doing so because of procedural, technical or geographical circumstances. Thus, the principle of *non-refoulement* may have a special importance for IDPs in given situations.

3. SHARING RESPONSIBILITY IN THE PROTECTION OF IDPS

The general assumption underlying this section is based on the notion that, despite the fact that the protection of IDPs should primarily be the responsibility of their state of origin, when the national state fails to fulfill its obligations towards its citizens and persons within its jurisdiction, the international community should be obliged to intervene. Oftentimes, national humanitarian responses to IDP crises are marked by failures of one kind or another. In these cases, when individuals are in need of protection and assistance and a state of origin is unable or unwilling to protect its own citizens, the role of the international community in supporting the protection of basic rights and ensuring that basic needs are provided has proven both imperative and pivotal.[52]

Many governments have shown a lack of political will to address the root causes of conflict and displacement, and to find durable solutions for the internally displaced. This is most evident when the national authorities themselves play a role in exploiting and arousing conflicts for political or economic gain, and in using forced displacement as a war strategy. However, even in countries with more developed governments the national authorities have sometimes found it difficult to tackle the often politically-sensitive underlying causes of displacement and to promote durable solutions following international standards. In addition, when international standards run counter to national laws and policies a conflict of laws emerges. For example, in the Russian Federation the principles of freedom of movement and voluntary return in safety and dignity have clashed with the government's interest in resolving the IDP problem by putting pressure on the displaced to return to Chechnya despite persistent security concerns.[53] Furthermore, many governments remain reluctant to allow international involvement in situations of internal displacement. The governments of Burma, Bangladesh, Pakistan

[52] *See* UNHCR, Informal Consultative Meeting, *The Protection of Internally Displaced Persons and the role of UNHCR*, 27 February 2007, available at: http://www.refworld.org/docid/45ddc5c04.html (accessed 30 April 2015).

[53] Internal Displacement Monitoring Center, *An Uncertain Future: The Challenges of Return and Reintegration for Internally Displaced Persons in the North Caucasus*, Geneva: 2006.

and India, for example, have used the claim of state sovereignty to reject international offers for protection and assistance in addressing situations of internal displacement. The opposition of states of origin to international interference is by no means limited to the continent of Asia. For instance, the governments of Sudan, Rwanda, Zimbabwe and Eritrea have all kept foreign engagement in IDP situations to a minimum, even though they are unable or unwilling to provide sufficient protection themselves.[54]

As a general rule, the responsibility to provide adequate protection for citizens rests on the relevant states of origin and their national authorities. Their role should be to establish comprehensive policies enabling governmental bodies to guarantee the basic needs and rights of vulnerable persons. However, in practice the states concerned very often lack the political will, capacities or sufficient resources to provide such support to their populations. In such cases, the intervention of the international community could serve as a supplementary tool. In these situations, the negligence or failure of the national state to provide proper protection to individuals in need makes the involvement of the international community in ensuring the basic rights and needs of vulnerable persons seemingly self-explanatory. However, in light of the serious international consequences of such interventions, it is important to note that they should always be legally justified and not based only on moral and ethical premises. They should rather identify their origin in the obligation to protect human rights in cases of an evident breach of legal rules and requirements. International actors have certain responsibilities towards persons in need of international protection, and these obligations are defined in the numerous international legal acts. Peacekeeping missions can serve as one example of an intervention based on the collective accountability of the international community. They are exceptionally launched on the basis of a specific decision of the UN Security Council pursuant to its prerogative defined in the Chapter VII of the UN Charter.[55] In this context it is worth noting, as argued by F. Francioni, that the development of IHL through the Geneva Conventions of 1949 and their Additional Protocols of 1977 constructed a system of balancing military force and respect for human dignity in the conduct of hostilities. This balancing dilemma is particularly visible with respect to *jus ad bellum,* that is, the right of a state, a group of states or an international organization to resort to military force in another society for compelling humanitarian reasons. Such situations present the dilemma where the ban on the use of force and the protection of human rights collide, and no clear international consensus has yet been reached in this regard.[56]

In recent years some innovations have appeared in both the doctrine and state practices related to attaching to the concept of state sovereignty a category of responsibility

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[54] Internal Displacement Monitoring Center, *Internal Displacement: Global Overview of Trends and Developments in 2009*, Geneva: 2010.

[55] United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

[56] F. Francioni, *Balancing the prohibition of force with the need to protect human rights: A methodological approach*, [in:] E. Cannizzaro, P. Palchetti (eds.), *Customary International Law on the Use of Force: A Methodological Approach*, Martinus Nijhoff, Leiden: 2005, pp. 269-92.

towards its citizens. It is argued that in cases in which states view their functioning as autonomous and independent actors, they should guarantee their citizens full protection of all granted rights and needs. Further, when the national system of protection fails to guarantee good governance to its population, the rejection of external assistance can easily create a humanitarian crisis. As some scholars argue, the system of human rights protection can no longer be considered an individual competence of national authorities. Syria serves as a current example, where the government refuses to allow humanitarian assistance to IDPs by international organisations in the absence of the specific consent of national authorities. This is an issue that is blocking the current peace negotiations supported by the United Nations. There are more than 7.6 million IDPs in Syria (half of whom are children) who were forced to leave their homes and livelihoods due to internal uprisings and domestic conflict in the course of 2014. At present, Syria is experiencing one of the world's largest and the most tragic and pressing internal displacement crisis. Hundreds of thousands of men, women and children have lost their homes and have moved throughout the country. Strikingly, no acknowledgement of this has yet been made by the Syrian authorities. As a consequence there is a limited, even non-existent, role of international organisations in providing assistance and support to IDPs and other groups of vulnerable people in Syria. The Special Rapporteur on the Human Rights of IDPs tried to compel the relevant national authorities of Syria to give unlimited access to humanitarian, refugee and human rights organizations to assist IDPs. However, many Syrian regions (e.g., rural Damascus) still suffer from a lack of any humanitarian aid, whether international or national. The need for food, water and medical services is of particular and urgent importance.[57] In general, while international organisations can be of support in providing protection to the internally displaced, they cannot serve as a substitute for national governments and their responsibilities. In the case of Ukraine, its national authorities tried to develop some mechanism to provide assistance to the displaced Ukrainian citizens due to the recent disturbances in the country. In this regard, the Ukrainian government adopted Resolution 509 in October 2014,[58] which introduced a registration system for IDPs. In accordance with its provisions, the local service departments are responsible for implementing the registration procedure and for paying benefits to IDPs. Furthermore, also in October 2014 the Verkhovna Rada of Ukraine (the Supreme Council of Ukraine) ratified the Law of Ukraine "On ensuring of rights and freedoms of internally displaced persons",[59] stipulating numerous legal provisions on the protection of IDPs, including: the right to return, prevention of displacement, non-discrimination aspects, etc. However, due to the existing deficiencies related to the establishment of a common

[57] State of play as of December 2014, based on figures provided by the Office for the Coordination of Humanitarian Affairs (OCHA).

[58] The Cabinet of Ministers of Ukraine Resolution 509 on registration of internally displaced persons from the temporarily occupied territory of Ukraine and anti-terrorist operation area, as of 1 October 2014.

[59] The Law of Ukraine "On ensuring of rights and freedoms of internally displaced persons", ratified by the Verkhovna Rada of Ukraine on 20 October 2014, No. 1706-VII.

definition of an IDP as well as to some limitations in governmental capacity, the implementation of the existing legal provisions remains insufficient. There are two different defintions of IDPs stipulated by the provisions of the Resolution 509 and the Law "On ensuring of rights and freedoms of internally displaced persons". Pursuant to Art. 1(1) of the latter, an IDP is a citizen of Ukraine, permanently residing in Ukraine, that was forced to or voluntarily left one's residence place as a result of or in order to avoid the negative impact of armed conflict, temporary occupation, situations of general violence, mass violations of human rights and disasters of natural or human-made origin. In this context, it is important to notice that this constraint, i.e. the limitation of the Law's applicability only to citizens of the country of origin, is not provided in the UN Guiding Principles on Internal Displacement. This is also not envisaged in the provisions of the Resolution 509, as its Art. 1 stipulates that the registration certificate is a document issued not only to citizens of Ukraine, but also to foreigners and stateless persons permanently residing on the territory of Ukraine, IDPs from the temporarily occupied territory and anti-terrorist operation areas. These discrepancies in the existing defintions create some misunderstandings in the proper distribution of assistance to IDPs and in deciding who should be covered by this governmentally-guaranteed protection. Furthermore, some deficiencies exist with respect to the lack of an adequate procedure regarding reunification of families. Art. 11 of the Law "On ensuring of rights and freedoms of internally displaced persons" stipulates the obligation of the central executive body responsible for implementation of state migration policy to facilitate the reunification of families of IDPs through providing such persons with information regarding the factual residence of their family members. This provision is highly insufficient as it does not fully guarantee the right to family unity defined in the international legal instruments. Also, the very important right of all displaced persons to be properly compensated for any dispossession of their property is not comprehensively addressed by the newly adopted Ukrainian law. Analysing the existing legal framework, it seems that the national authorities of Ukraine still need to improve their implementation of the Law "On ensuring of rights and freedoms of internally displaced persons" to bring it into alignment with the international procedures defined, in particular, by the UN Guiding Principles on Internal Displacement.

In general, there are many deficiencies in the capacity of national and regional authorities ability to manage and guarantee the necessary basic assistance and aid to IDPs. The existing national legal frameworks should be in line with the standards defined by the IHL and IHRL, in particular with respect to the guarantees related to the distinction between combatants and civilians, the latter including displaced persons. Furthermore, taking into consideration that internal and international conflicts are the major causes of internal displacement crises, several possible consequences of such activities (e.g., occupation of a territory inhabited by an internally displaced population) should be noted and dealt with. Pursuant to international legal rules and regulations the occupying power is obliged to respect the provisions of the IHL and IHRL on the basis of the primary responsibility put on national authorities for the protection of IDPs.

In the above context, and with reference to the concept of a shared responsibility and the solidarity principle, the temporary protection offered by the EU legislation to displaced populations, particulary those coming to Europe from Syria and Ukraine, could be a significant example of a way to provide proper assistance to displaced people desperately in need of prompt international protection. Already in 2001 the European Council issued the so-called "Temporary Protection Directive" (2001/55/EC)[60] with the purpose to provide a legal framework and minimum standards for responses to the mass displacement of persons who are unable to return to their country of origin for a variety of reasons. Mass flows of refugees fleeing from the territory of the former Yugoslavia at that time provoked the EU to find a more comprehensive response and prompt solutions. One of the most significant developments introduced by the Directive is its wide scope of application, as it is applicable not only to displaced persons located in the EU territory, but also it includes provisions permitting the entry into Europe of those persons who are outside its territory. Its Art. 2(d) introduces the definition of "mass influx", which means the arrival in the EU of a large number of displaced persons who come from a specific country or geographical area, whether their arrival in the EU is spontaneous or aided, for example, through an evacuation programme. Furthermore, its Art. 8(3) states that the Member States shall, if necessary, provide persons admitted into their territory for the purposes of temporary protection with every facility for obtaining the necessary visas, including transit visas. In this context, formalities must be reduced to a minimum because of the urgency of the situation. Visas should be either free of charge or their cost reduced to a minimum.

As regards the procedure for granting the temporary protection, it should be initiated by the European Council by prior identification of a group of displaced persons in need of prompt assistance due to an ongoing crisis in their country of origin. As a next step, the EU Member States participating in the procedure should allow legal entry into their territory to the people from the previously designated group(s). The displaced people benefiting from this kind of protection would be allowed to stay in the territory of a receiving Member State for a period of one year. This period could be renewed in case no improvement in the country of origin has been observed, while in case of a positive development in the country of origin the people concerned could safely return to their homes. The most important element in the whole procedure is its non-complex structure, as it does not require determination of the status of the displaced person, which involves a much more difficult process. It should also be emphasised here that the temporary protection mechanism should be supported by or simultaneously launched with resettlement programmes and humanitarian admission projects.

However, despite the effort of the EU legislator the Temporary Protection Directive has never been activated and the question arises whether, in the context of the

[60] Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof, [2006] OJ L 212/12-212/23 .

current internal displacement crises in Syria and Ukraine, the implementation of its provisions might be the most adequate and reasonable solution for providing *ad hoc* protection for the most vulnerable displaced persons trying to reach EU territory. The urgency of the issue as demonstrated above constitutes a strong impetus, motivation and recommendation to the EU to improve the existing legal ways to reach its territory.

CONCLUSIONS

The general aim of the present article has been to examine the international legal measures guaranteeing protection for internally displaced populations worldwide. A thorough examination of the internal displacement issue makes it crystal clear that this represents one of the most difficult humanitarian challenges for the international community today. The article represents an attempt to offer a concise elaboration of the challenges related to international protection in situations of internal displacement. The existing international legal frameworks for the protection of IDPs have been examined, including some real-life examples of the constraints related to the protection of IDPs, i.e. displacements in Syria and Ukraine. Providing protection for IDPs remains one of the most complex challenges in the world of sovereign states, and in the article I have presented some of the myriad facets pertaining to the international protection of IDPs viewed from the normative perspective.

The practice shows that the currently available legal provisions are too often not respected by either the states of origin or the international community. An examination of the current state of play with respect to internal displacement worldwide makes it apparent that IDPs can no longer be protected exclusively by their state of origin. In cases of an incapacity or failure of that state, the promotion and protection of IDPs' human rights should become an international concern and be covered by the shared competences of the international community. Unfortunately, the current political reality does not reflect this seemingly self-explanatory premise. In spite of the fact that numerous obligations directly or indirectly influencing the situation of IDPs have already been defined in several international legal instruments, these are widely not respected by the majority of aligned states. Millions of civilians have been involuntarily caught up in various conflicts against their will, and due to the fact they have not crossed an internationally recognized border they are not provided with the level of legal protection guaranteed to refugees who have left their home states. Despite some innovations in this area, like the adoption of the UN Guiding Principles on Internal Displacement, there remain numerous constraints and lacunae in the existing system of protection. The recognised and highly descriptive definition of an "internally displaced person" set forth in the UN Guiding Principles on Internal Displacement serves as an example of the currently existing gaps, together with a lack of a special status in international law for this category of displaced persons.

The level of international awareness of the internal displacement issue is rapidly growing, but there is little evidence that this awareness has been translated into improvements in the living conditions of the global IDP population. Taking the number of IDPs as a key indicator of the effectiveness of the international response, it may be fairly argued that the international community has failed, both in preventing new crises that cause displacement as well as in creating the conditions for their safe return, rehabilitation and other durable solutions. In the European reality, the introduction of a temporary protection mechanism could constitute both a significant remedy and the EU's response to the most alarming current displacement crises, in particular in Syria and Ukraine. The introduction of such a mechanism could visibly promote the sharing of responsibilities in the EU and would potentially guarantee protection to many more displaced persons. What distinguishes IDPs and should make them a matter of concern to the international community is the coercion that impels their movement, their subjection to human rights abuses emanating from their displacement, and most importantly, their lack of protection by the national authorities of their own countries. Clear definitions of IDPs and their rights could help to identify those people who should be of special concern to the international community, raise awareness of their plight, and facilitate the work of governments and private organizations seeking to increase protection and assistance for IDPs.[61] As individuals who have not left their own country, IDPs are entitled to the full range of human rights applicable in their state of origin. The challenge seems to be in identification of these guarantees and the concepts implicit in existing international law that respond to the special needs of IDPs. The reality clearly demonstrates that the international law system does not serve to prevent internal displacement. This fact results from the incomplete nature of the protection machinery, in particular the deficiencies of the legal system as regards the implementation and enforcement of states' obligations under international law.

Unlike refugees, IDPs do not benefit from a specific international system of law exclusively devoted to ensuring their protection and rights. No specific and international legally binding convention protects their rights. The above-mentioned Kampala Convention, while a significant step toward providing guarantees for IDPs and formulating legal obligations for states, is still only a regional legal instrument.

As regards the notion of responsibility for the protection of IDPs, the UN Guiding Principles on Internal Displacement explicitly mention the rights of IDPs and the obligations of governments toward these populations. Principle 3 states that national authorities have a primary duty and responsibility to provide protection and humanitarian assistance to IDPs within their jurisdiction. However, the desired and/or required international response is still not clearly set forth in the international legal documents with respect to the international community's adequate reaction in the face of situations where the national authorities are not able to protect their IDPs, especially when they are a primary cause of their displacement.

[61] F. Bugnion, *Humanitarian Law and the Protection of Refugees*, International Committee of the Red Cross, Geneva: 2005, pp. 2-3.

Finally, it seems clear that the creation of a separate legal instrument with an international and binding scope, comparable to the 1951 Refugee Convention, could be a first step toward improving the existing situation. It should be emphasized once again that in situations where the relationship between state and citizen has broken down, international humanitarian protection could and should help compensate for the absence of national protection and provide affected populations with a degree of security which they would otherwise lack. In this connection, the grounds for international involvement, mainly via the establishment of international legal instruments identifying the protection standards for IDPs, lie primarily in the breach of contract between the internally displaced citizens and a state that cannot meet its obligations toward them.

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THE OPINION BY THE LEGAL ADVISORY COMMITTEE TO THE MINISTER OF FOREIGN AFFAIRS OF THE REPUBLIC OF POLAND ON THE ANNEXATION OF THE CRIMEAN PENINSULA TO THE RUSSIAN FEDERATION IN LIGHT OF INTERNATIONAL LAW

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adopted the following Opinion:

Abstract: *In light of international law, the incorporation of the Crimean Peninsula (Crimea), which forms part of Ukraine's territory, into the Russian Federation qualifies as annexation, i.e. the illegal acquisition of the territory of another state by the threat or use of force. In this respect, Crimea remains an occupied territory under international law. The annexation of Crimea by the Russian Federation has violated many treaties and fundamental principles of international law, namely the principle of territorial integrity of states, non-intervention into the domestic affairs of another state, and the prohibition of the threat or use of force against another state. Consequently, the Russian Federation has violated Ukraine's rights which enjoy international protection. Moreover, due to the special legal status of the principles of international law that have been violated, the Russian Federation has breached its commitments under law to the entire international community. This community has an international legal obligation not to recognize the illegal situation created by the illegal use of force in the form of armed aggression, and its consequences.*

I. Incorporation of Crimea into the Russian Federation is an annexation

1. As a result of the collapse of the Union of Soviet Socialist Republics, the Crimean Peninsula (Crimea), which had been part of the Ukrainian Socialist Soviet Republic since 1954, became part of the newly founded Ukrainian State, Ukraine, in 1991. Crimea was granted the legal status of an Autonomous Republic of Crimea in Ukraine. The city of Sevastopol preserved its separate legal status.

Ukraine's territorial integrity was directly reaffirmed by the Budapest Memorandum on Security Assurances of 1994 which was adopted in connection with Ukraine's accession to the Treaty on the Non-Proliferation of Nuclear Weapons of 1968. In the Memorandum, the United States of America, the United Kingdom, and the Russian Federation reaffirmed their "commitment to refrain from the threat or the use of force against the territorial integrity or independence of Ukraine and also that none of the weapons in their possession will be used against Ukraine, unless in an act of self-defense or otherwise consistent with the United Nations Charter" (paragraph 2 of the Memorandum).

2. Under Russia's pressure, a referendum was conducted in Crimea on 16 March 2014 that was not recognized by the authorities of Ukraine. The majority of voters in Crimea allegedly voted to secede from Ukraine and to join the Russian Federation. On 17 March 2014, the Crimean authorities which Ukraine did not recognize (since the Parliament of the Autonomous Republic of Crimea was dissolved by Ukraine's Supreme Council on 15 March 2014), proclaimed a state called the Republic of Crimea following a declaration of independence on 11 March 2014. They also applied to the authorities of the Russian Federation to incorporate the Republic of Crimea into the Russian Federation. On 18 March 2014, an agreement was signed between the Russian Federation and Crimea (Agreement

on the Accession of the Republic of Crimea to the Russian Federation) which provides for the accession of Crimea and the city of Sevastopol to the Russian Federation.

3. As a result of the above developments, the Russian Federation incorporated the territory of Crimea. This incorporation should be qualified as annexation, i.e., the illegal acquisition of the territory of another state by the threat or use of force. This conclusively transpires from the fact that the Russian Federation has breached a number of norms of international law, including principles of international law which constitute universally applied norms that are the bedrock of the international legal order.

By annexing Crimea, the Russian Federation has violated the principle of non-intervention into the domestic affairs of another state, the prohibition to threaten or use force, and the prohibition to violate the territorial integrity of another state. These principles are enshrined in the UN Charter of 1945 and form part of customary international law. By its annexation of Crimea done in violation of the prohibition of the use of force Russia has committed aggression, thus breaching a peremptory norm of general international law (*ius cogens*).

4. In light of the above, declaring actions taken by the Russian Federation to constitute illegal use of force against Ukraine, i.e., an act of aggression, conclusively determines the legal qualification of the incorporation of Crimea into the Russian Federation as an annexation.

Moreover, some acts by the authorities of the Russian Federation dating before 18 March 2014, as well as the subsequent and persistent conduct of that state involving demands for concrete settlement of the status of Crimea, other regions of Ukraine, or in a wider sense – the adoption of specific decisions regarding the political system, in and of themselves constitute a violation of the principle of non-intervention into the domestic affairs of a sovereign subject of international law; thus they violate the status of Ukraine as a sovereign state that is protected under international law.

II. Actions by the Russian Federation directed at Ukraine are an act of aggression

5. Actions by the Russian Federation taken at the end of February and in the first half of March 2014 using armed forces deployed in the territory of Ukraine qualify as acts of direct aggression against Ukraine pursuant to UN General Assembly Resolution no. 3314 of 1974 which is now regarded as customary law. It defines an act of aggression as "the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations Charter." (Article 1 of the Annex).

According to Article 3 of the Annex to the Resolution, the following qualify as acts of aggression: "the blockade of the ports or coasts of a State by the armed forces of another State" (subparagraph c) and "the use of armed forces of one State 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 or any extension of their presence in such territory beyond the termination of the agreement" (subparagraph e). The above definitions correspond exactly to the activities undertaken by Russia vis-à-vis Ukraine. It is also indisputable that the activities undertaken by the Russian Federation constituted a violation of the Ukrainian-Russian agreement on the status and conditions of stationing of the Black Sea Fleet of the Russian Federation in the territory of Ukraine dated 28 May 1997.

6. The Russian Federation also bears responsibility for the so-called act of indirect aggression. Pursuant to Article 3(g) of the annex to Resolution no. 3314, an act of aggression is "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein." Consequently, the Russian Federation bears responsibility for actions carried out in Crimea from the end of February 2014 by armed irregulars called "Crimea's self-defense units" or the so-called "green men".

Armed activities carried out by the above-mentioned irregulars, whose legal qualification is that they are non-state actors, can be attributed to the Russian Federation in line with the principles of attribution of responsibility to a state for actions carried out by non-state actors as defined in the Articles on Responsibility of States for Internationally Wrongful Acts adopted in 2001 by the UN International Law Commission which are generally recognized as reflecting applicable customary law. Pursuant to Article 8 of the Articles, the activity of a person or group of persons is considered an act of State under international law, provided such person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct. The responsibility of the Russian Federation for the activity of irregulars is now undisputed in light of a public statement made by the President of the Russian Federation, Vladimir Putin, during a teleconference in Moscow on 17 March 2014. Therein he admitted that these groups were formed out of the soldiers of the Russian Federation's armed forces - which qualifies their activity as activity carried out by the Russian Federation itself. Moreover, pursuant to Article 11 of the Articles, a State bears international responsibility for an activity that it acknowledges and adopts as its own.

III. Protection of the rights of citizens does not provide a legal justification for the acts directed by the Russian Federation at Ukraine

7. Russia illegally used force against Ukraine in Crimea. These operations cannot be considered, as Russia tries to argue, as armed activities carried out in order to defend one's own citizens.

Essentially, the use of force in order to protect one's own citizens boils down to the right of a state to engage in armed operations in the territory of another state in defense of its own citizens. This is not a universally recognized right. There is position which finds some support in the doctrine and practice of states that the use of force in order to protect one's own citizens constitutes a type of self-defense, or an additional exception from the prohibition of the use of force in customary law. However, irrespective of the above, it is necessary to demonstrate in each situation a real and serious threat to the lives of the citizens. The state where such intervention takes place must be responsible for the wrongful acts or otherwise refuse or be unable to ensure adequate protection. Concurrently, it should be demonstrated that peaceful measures have turned out to be insufficient or unfeasible.

It has become evident that none of these premises have been fulfilled in relation to the situation of the citizens of the Russian Federation in Crimea, as well as those in other parts of Ukraine. We should also bear in mind that from the perspective of international law Russian domestic legal regulations providing for the obligation to protect Russia's citizens abroad are irrelevant.

The use of force in order to protect one's own citizens does not apply to people who are not citizens of a specific state but only share a common ethnicity, language, or culture with such state. Consequently, the Russian Federation's justification of its use of armed force for the protection of Russian-speaking population outside its borders, including the Russian minority in Ukraine, finds no legal ground in modern international law.

The same is true for the emerging doctrine of responsibility to protect as developed in modern international law – which evidently does not apply to the situation in Ukraine. The doctrine imposes a responsibility on the international community to take collective action if the state fails to fulfil its obligation to protect the population inhabiting its territory against the most serious international crimes (war crimes, crimes against humanity, genocide).

It must be emphasized that Ukraine has not committed any serious violations against the population inhabiting its territory; specifically with regard to Crimea.

IV. Intervention by invitation provides no legal grounds to operations by the Russian Federation against Ukraine

8. Russia cannot make a legal case for its operations against Ukraine on the grounds of so-called intervention by invitation. Such intervention may be regarded as the legal use of armed force, provided that armed force is used with the consent of the authorities of the state on whose territory another state is engaged in military operations. Intervention by invitation does not lead to a violation of the prohibition of the use of armed force because armed operations of one state are undertaken with the consent of the other state and as such do not violate its sovereignty. The admissibility of intervention by invitation relies on a freely and unequivocally expressed invitation by legal and

internationally recognized supreme authorities of a state in which the intervention is to take place. Such authorities also have to exercise effective control over the state. Invocation by the intervening state of invitation by local, autonomous, or other lower-level government authorities is inadmissible.

9. In light of the above, the appeal on 1 March 2014 by prime minister of the Autonomous Republic of Crimea to the authorities of the Russian Federation to "ensure peace and public order in Crimea" remains ineffective under international law and as such does not provide sufficient legal grounds for the Russian Federation's engagement in armed activities in Crimea.

The construction of intervention by invitation is also inapplicable with regard to the alleged appeal by Ukraine's former president Viktor Yanukovych. Firstly, it is unclear in what form and scope such an appeal was made. Even though it was invoked by the Russian representative to the United Nations at the extraordinary UN Security Council meeting on 3 March 2014, it has never been made public. Secondly – without making a legal assessment of the changes of Ukraine's supreme authorities pursuant to the constitutional law of that state made in mid-March 2014 – Viktor Yanukovych was not empowered to issue a legally effective invitation to the authorities of the Russian Federation to use armed force because at that time he no longer exercised effective power in Ukraine and remained outside its borders inside Russia. Thirdly, under no circumstances, the use of armed force at the invitation of the authorities of another state can lead to the intervening state taking control over part of the territory of the state in which it has intervened and to the annexation of its territory.

10. The Russian Federation has committed an act of aggression in Crimea against Ukraine and thus has violated the fundamental principles of international law, including its peremptory norms. The legal qualification of the operations by the Russian Federation in Crimea as aggression and, consequently, recognition of the incorporation of Crimea to the Russian Federation as an act of annexation have been confirmed by the positions taken by many states and international organizations - including the Council of Europe's Parliamentary Assembly's resolutions no. 1990 (2014) dated 10 April 2014, or the European Parliament resolution no. 2014/2627 dated 13 April 2014.

V. The right to self-determination and secession are not legal grounds for separating Crimea from Ukraine

11. Representatives of the authorities of the Russian Federation, including its President and foreign minister, are trying to justify the illegal annexation of Crimea to the Russian Federation as secession done pursuant to the right of nations to self-determination. This justification holds no ground in modern international law.

In the process of decolonization, the content of the principle of self-determination of nations was the right of peoples inhabiting a colonial territory to freely determine its political status going as far as creating its own state. Outside the colonial context, the content of the principle of self-determination is different because it is applied to events that occur within the boundaries of states whose status as sovereign territorial entities is protected by another principle – the principle of territorial integrity. No act of international law provides grounds, outside the colonial context, for a unilateral secession as an element of the principle of self-determination of nations. Secession by a national community inhabiting a multinational state is, as a rule, legally admissible only with the consent of the authorities of the state (take, for example, the secessions of Montenegro and South Sudan). States established as a result of peaceful secession enjoy universal recognition by members of the international community and eventually become members of the United Nations themselves.

12. The lack of consent of the pre-existing state for secession of a part of the territory inhabited by a nation that invokes the right to self-determination raises legal controversy. To a large extent, the scope of such controversy depends on whether a third state is involved in a secessionist movement within a multinational state. The involvement of a third state undermines the legality of secessionist operations because it violates the principles of non-interference and territorial integrity. This has been expressly confirmed by the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations of 24 October 1970, which, in the final paragraph regarding the principles of equal rights and self-determination of peoples, reaffirms the duty of each and every state "to refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country." From the standpoint of international law, territorial entities created with the support of third states are not states, but so-called *de facto* regimes. If armed force was used or was threatened to be used against a state-territorial sovereign, then, under international law, these regimes are occupied territories (e.g. the so-called Republic of Northern Cyprus, South Ossetia, Abkhazia, and Crimea).

13. The forced annexation of Crimea by Russia cannot be justified on the basis of the right of self-determination in view of the lack of Ukraine's consent allowing for Crimea to secede from Ukraine and due to the Russian Federation's military engagement in Ukraine's territorial disintegration. The secessionist movement in Crimea was openly supported by the Russian Federation, which has violated fundamental principles of general international law: the prohibition of the threat or use of force, the prohibition to intervene into the internal affairs of another state, and the prohibition to violate the territorial integrity of another state. The Russian Federation was also directly involved in the referendum on the status of Crimea. An unequivocal legal assessment of this referendum was provided by the UN Resolution of 27 March 2014, on the territorial

integrity of Ukraine, which in subparagraph 5 states that the referendum conducted on 16 March 2014, in the Autonomous Republic of Crimea and in the city of Sevastopol has no validity and therefore cannot constitute grounds for changing the status of the Autonomous Republic of Crimea and the city of Sevastopol.

14. Actions by the Russian Federation that violate well-grounded principles of general international law do not allow for qualifying Crimea's forced separation from Ukraine as the exercise of the right of nations to self-determination. From the viewpoint of international law, what happened in Crimea was an annexation, i.e. the illegal acquisition of part of a territory to which another state holds a legal title. This is the current qualification of the international legal status of Crimea.

VI. Crimea – territory occupied by Russian Federation

15. The unlawfulness of acts committed by the Russian Federation in Crimea leading to Ukraine's loss of effective territorial control over the Peninsula gives rise to the conclusion that, under international law, Crimea remains an integral part of Ukraine's territory under Russian occupation.

16. The situation that occurred in March 2014 in the Autonomous Republic of Crimea and in the city of Sevastopol fully corresponds to the provision of Chapter III ("Occupied Territories") Title III of the Fourth Convention relative to the Protection of Civilian Persons in Time of War adopted in Geneva on 12 August 1949, and Chapter III of the Regulation concerning the laws and customs of war on land annexed to the IV Convention adopted in The Hague on 18 October 1907. In light of these regulations, a territory is considered occupied if it is under effective control of foreign armed forces, while its occupation starts with "the authority of the legitimate power having in fact passed into the hands of the occupant" (Article 43 of the Hague Regulations).

War-time occupation exists irrespective of the issue of the legality of the use of force and irrespective of the proclamation of martial law, the occurrence of armed resistance and the declaration of the occupation itself. Two factors constitute war-time occupation: 1) effective military and administrative control over the territory of another state; 2) the lack of consent of the territorial head to the presence of armed forces in its territory.

In view of the lack of legal grounds that would justify the presence and operations of armed forces of the Russian Federation in Crimea as part of intervention by invitation and the defense of one's own citizens, in accordance with international law Crimea is currently under the occupation of Russia.

17. The above qualification leads to far-reaching legal consequences. Firstly, the occupation of Crimea, as any war-time occupation, is a transitory condition which, in

itself, does not change the legal title to the occupied territory (*ex factis ius non oritur*). Secondly, the status of Crimea's occupation determines an unequivocal assessment of subsequent operations by the Russian Federation. International law prohibits the occupant to change, on account of the transitory nature of the occupation, the legal status of the occupied territory. Primarily, it prohibits its incorporation, and demands that the occupant observes the applicable law in the occupied territory and to preserve the status quo in such territory. Legal regulations issued by the occupant are only to serve the purpose of administering the occupied territory. The operations by the Russian Federation in Crimea, the final stage of which became the annexation of the Peninsula, unequivocally represent a serious breach of established norms of international law. Being completely illegal, they do not change the status of Crimea which, in light of international law, remains an integral part of Ukraine under occupation of the Russian Federation.

VII. Duties of members of the international community in the face of annexation of Crimea

18. The operations by the Russian Federation directed at Ukraine in Crimea are a breach of peremptory norms of international law (*iuris cogentis*) resulting in legal obligations *erga omnes*. The position of members of the international community vis-à-vis these breaches is clearly determined by law: they are under both negative and positive obligations.

19. The fundamental negative obligation is the prohibition to recognise factual situations that occurred as a result of a breach of peremptory norms. Modern international customary law imposes an obligation on states not to recognise illegal situations. This institution goes back to the so called Stimson Doctrine expressed by the US government in connection with the annexation of Manchuria. After WW II it found its confirmation in the practice of the main bodies of the United Nations in the form of a position expressed by the Security Council on South Rhodesia, the Republic of North Cyprus or the Serbian Republic, and most recently in the form of the above-mentioned UN General Assembly Resolution of 27 March 2014, on the territorial integrity of Ukraine.

20. The customary nature of the obligation not to recognise illegal situations was reaffirmed and specified more precisely in the Articles on Responsibility of States for Internationally Wrongful Acts of 2001. Article 41(2) of this Act reaffirms the prohibition to recognise as lawful a situation created by a serious breach of an obligation arising under a peremptory norm of general international law, as well as a prohibition to render aid or assistance in maintaining that situation.

21. In view of the Russian Federation's flagrant violation of its obligations arising under peremptory norms of general international law, states have a duty not to recognize

the annexation of Crimea. Recognition of Crimea as part of the Russian Federation would be in itself a violation of international law, being a form of support for a state that breaches peremptory norms and an attempt to legalize an unlawful situation. Any recognition of illegal situations, of which the annexation of Crimea is one, by itself results in an international responsibility on the part of the recognizing state. The duty not to recognize the annexation of Crimea is reaffirmed by point 2 of the UN General Assembly resolution of 27 March 2014, on the territorial integrity of Ukraine; it calls on states to refrain from actions that would undermine Ukraine's national unity and territorial integrity, including an adjustment of its borders.

22. With respect to positive obligations, Article 41(1) of Articles on Responsibility of States for Internationally Wrongful Acts of 2001 provides that States shall cooperate to bring to an end through lawful means any serious breach by a State of an obligation arising under a peremptory norm of general international law. One such measure available to members of the international community and capable of putting an end to serious violations of international law, such as the annexation of Crimea, is a collective condemnation of the violations in international organizations (for example, UN General Assembly Resolution of 27 March 2014, Council of Europe's Parliamentary Assembly's Resolution of 10 April 2014, European Parliament's Resolution of 13 April 2014). Another measure is to support Ukraine's legal measures in international organizations and bodies responsible for the settlement of international disputes. These actions could ultimately lead to a cessation of unlawful situation and, consequently, to regaining effective control by Ukraine over its territory of Crimea.

Both negative and positive obligations may also result from bilateral international agreements, as exemplified by the Treaty between the Republic of Poland and Ukraine on Good Neighborliness, Friendly Relations and Cooperation of 18 May 1992. Pursuant to its Article 4(3) "In the event of armed attack by a third country or third countries on one of the Parties, the other Party shall refrain from any form of military assistance or political support to such country or countries during the armed conflict and shall act to settle this conflict in accordance with the principles and procedures of the United Nations Charter and the documents of the Conference of Security and Co-operation in Europe."

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TREATY INTERPRETATION BY THE POLISH ADMINISTRATIVE COURTS: A CASE STUDY OF THE INTERPRETATION OF THE 1972 PRAGUE CONVENTION

Abstract:
This article analyses the practice of the Polish administrative courts with respect to application of the Vienna Convention on the Law of Treaties, based on a case study of the judgment of the Voivodship Administrative Court in Warsaw of 6 May 2014 (case no. II SA/Wa 117/14), which concerned the recognition of distance learning degrees awarded by Ukrainian universities pursuant to the 1972 Prague Convention. It is argued herein that the reasoning of the court suffers from four major drawbacks: 1) it is at variance with the text, object and purpose of the Prague Convention; 2) it does not take into account the practice in the application of that treaty; 3) it misinterprets the silence of the preparatory work to the Prague Convention on certain issues; and 4) it is inconsistent with international judicial decisions as regards the interpretation of the "special meaning" of one of the terms used in the Convention.

Keywords: 1972 Prague Convention, Polish practice in international law, VCLT, Vienna Convention on the Law of Treaties.

INTRODUCTION

The problem of treaty interpretation has undoubtedly always been one of the most pertinent issues of treaty law, if not even international law as a whole. Still, the way in which the national courts interpret treaties and, above all, their consistency with the international jurisprudence on the matter, has not been given proper attention until recently.[1] The following article aims to help fill this gap through an analysis of

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[1] With a few notable exceptions (*e.g.* the works of L. de Naurois, *Les traités internationaux devant les juridictions nationales*, Librairie du Recueil Sirey, Paris: 1934, and R. Falk, *The Role of Domestic Courts in the International Legal Order*, Syracuse University Press, Syracuse: 1964) there were very few serious studies on the subject until the 1980s and 1990s.

the jurisprudence of the Polish administrative courts regarding the interpretation of the 1972 Prague Convention, concluded between the States of the former Soviet bloc and dealing with the mutual recognition of academic degrees. Particular attention will be paid to the most recent judgment on the issue, delivered by the Voivodship Administrative Court in Warsaw on 6 May 2014.[2] Some earlier decisions on this issue will also be referred to.[3] It is argued herein that, at least with regard to the recognition of the degrees pursuant to the Prague Convention, the Polish administrative courts applied the rules of treaty interpretation laid down in the Vienna Convention on the Law of Treaties (VCLT) incorrectly, by unjustifiably favouring extra-textual factors over the text of the treaty itself, disregarding the practice in the application of the treaty, misinterpreting the silence in the preparatory work to the treaty on certain matters, and failing to ensure compliance with international judicial decisions concerning assessment of the existence of the "special meaning" of a term contained in a treaty.

The applicant in the case decided by the Voivodship Administrative Court in Warsaw on 6 May 2014 was a former part-time student enrolled in a course at a Ukrainian university which was offering courses in Poland through distance learning. She appealed against a decision of the Polish Minister of Science and Higher Education denying the issuance of a certificate recognising the equivalence of the degree from the Ukrainian university she graduated from to a corresponding Polish degree. After examining the case, the Court dismissed the application. The judges observed that, according to Polish law, a graduate degree obtained abroad may be considered equivalent to one granted in Poland either pursuant to a treaty or, in the absence of an applicable treaty, by way of a special procedure for the recognition of professional qualifications provided for in national law. The Court identified two international agreements applicable in the case at hand:[4]

1. the Convention concerning the validation and reciprocal equivalence of diplomas issued by institutions of intermediate, specialized intermediate and higher education and documents attesting to scientific and teaching qualifications,[5]

[2] Judgment of the Voivodship Administrative Court (Wojewódzki Sąd Administracyjny) in Warsaw of 6 May 2014, II SA/Wa 117/14.

[3] In particular the judgment of the Supreme Administrative Court (Naczelny Sąd Administracyjny) of 23 April 2004, OSK 179/04, which may be seen as a landmark case in this respect and was extensively quoted by the Voivodship Administrative Court in the case under discussion.

[4] The judges rightly pointed out that, although at the time of deciding the case both treaties were no longer binding since Poland had denounced them, with effect from 6 August 2004 and 25 September 2005 respectively (see the reply of the under-secretary of state for Education and Science to the parliamentary question no. 1130 on the withdrawal by the Republic of Poland of the Prague Convention and the Warsaw Agreement, dated 8 March 2006, available at: http://orka2.sejm.gov.pl/IZ5.nsf/main/48003C97 (accessed 20 April 2015), they were nevertheless applicable in the case because they were in force when the contested decision had been adopted.

[5] The treaty in question does not have an official English title. The one given above appears in several documents, including UNESCO, *Preparation of a Preliminary Draft Convention on the Recognition of Studies, Diplomas and Degrees in Higher Education in Asia and Oceania, Information note by the Director-General*, ED-80/WS/168 Rev., Paris, 26 January 1981, p. 6, available at: http://unesdoc.unesco.org/

signed in Prague on 7 June 1972[6] (the Prague Convention or the 1972 Convention); and

2. the Agreement between Poland and the USSR on the equivalency of documentation on education, learned degrees and titles awarded in Poland and the USSR,[7] signed in Warsaw on 10 May 1974[8] (the Warsaw Agreement, or the 1974 Agreement).[9]

Surprisingly, the Court did not find it necessary to examine the actual provisions of either of the treaties. Instead it noted – most unexpectedly – that the evidence before it demonstrated "a fact which was crucial to decide the case", namely, that the course the applicant had completed was a distance learning one, because she lived in the territory of one State and studied in another State. According to the judges, this fact alone confirmed that the decision of the Minister who refused to issue the certificate of equivalence at the request of the applicant was right, since neither the Prague Convention nor the Warsaw Agreement was applicable to distance education.

Quoting extensively from an earlier judgment of the Supreme Administrative Court of Poland of 23 April 2004 in a very similar case (case no. OSK 179/04),[10] the Court took the view that the fact that the 1972 Convention had been drafted more than 30 years earlier, under different political and economic conditions, must obviously affect the interpretation of its provisions. There were no references to any future, anticipated forms of education, including distance learning, in the text of the Convention itself. Nor was there any confirmation of any intention expressed by the negotiating States to recognise distance learning degrees, as the preparatory work was silent on this issue. It could not be therefore assumed, the Court argued, that the parties to the Prague Convention[11] wished to recognise the equivalence of the documents certifying successful completion of higher education based on unplanned, let alone unexpected,

images/0004/000431/043180Eb.pdf (accessed 20 April 2015), and UNESCO, *Preliminary Report by the Director-General on the Preparation of a Regional Convention on the Recognition of Studies, Diplomas and Degrees in Higher Education in Asia and the Pacific*, ED-81/WS/88, Paris, 16 November 1981, p. 6, available at: http://unesdoc.unesco.org/images/0004/000466/ 046617EB.pdf (accessed 20 April 2015).

[6] Konwencja o wzajemnym uznawaniu równoważności dokumentów ukończenia szkół średnich, szkół średnich zawodowych i szkół wyższych, a także dokumentów o nadawaniu stopni i tytułów naukowych, O.J. 1975, No. 5, item 28.

[7] The English translation of the title of the treaty is taken from: G. Ginsburgs (ed.), *A Calendar of Soviet Treaties: 1974-1980*, Martinus Nijhoff, Dordrecht: 1987, p. 492.

[8] Porozumienie między Rządem Polskiej Rzeczypospolitej Ludowej i Rządem Związku Socjalistycznych Republik Radzieckich o równoważności dokumentów o wykształceniu, stopniach i tytułach naukowych, wydawanych w PRL i ZSRR, O.J. 1975, No. 4, item 14.

[9] Both remained in force between Poland and Ukraine based on the special agreement concluded between both countries on 18 May 1992 (available at: http://www.nauka.gov.pl/g2/oryginal/2013_05/4c4458c25787b157aa9cb7891e79ed54.pdf, accessed 20 April 2015).

[10] Judgment of the Supreme Administrative Court of 23 April 2004.

[11] The Supreme Administrative Court consistently used the word *sygnatariusze* (signatories) while referring to the parties of the Convention. Although deplorable and at variance with the Vienna Convention on the Law of Treaties, this practice is quite common among the Polish judiciary and will not be discussed any further. All references to "the signatories" will be adjusted to "the parties".

new educational methods, including cross-border distance learning. Consequently, the parties could not be regarded as bound by the Convention with respect to these degrees. The Voivodship Administrative Court concluded that the decision of the Minister of Science and Higher Education to refuse recognition of the applicant's degree was correct.

The reasons for the 2014 judgment of the Voivodship Administrative Court reveal a fundamental misunderstanding of the rules of interpretation of international treaties. Particularly striking is the way in which Arts. 31 and 32 of the VCLT were applied. Ideally, both provisions should have served as a starting point for the whole analysis and as guidelines on how to approach the problem. However, as will be demonstrated below, in the case at hand their role was reduced to a fig leaf to cover the deficiencies in the reasoning of the court.

1. THE TEXT AS A POINT OF DEPARTURE

According to Art. 31.1 of the VCLT, the main provision of the Convention regarding treaty interpretation, "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[12] The wording of this provision clearly puts the emphasis on the text of the treaty under interpretation as the primary source of obligations between the parties, not their intentions or other extra-textual factors. "The ordinary meaning" of the terms of the treaty should be determined in the context in which such terms occur and in the light of the object and purpose of the treaty itself, having due regard to the principle of good faith. As put forward by the late Judge Fitzmaurice, "the primary question is not what the parties intended by the text, but what the text itself means: whatever it clearly means on an ordinary and natural construction of its terms, such will be deemed to be what the parties intended." This is because "the treaty was, after all, drafted precisely in order to give expression to the intentions of the parties, and must be presumed to do so."[13] The VLCT's approach, based above all on the principle of objectivity, is deeply rooted in customary law and international practice.[14] The basic

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[12] Vienna Convention on the Law of Treaties (adopted 27 January 1980, entered into force 27 January 1980) 1155 UNTS 331.

[13] G. Fitzmaurice, *The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and Other Treaty Points*, 33 British Yearbook of International Law 203 (1957), p. 205; H. Waldock, *Third Report on the Law of Treaties*, 2 Yearbook of the International Law Commission 4 (1964), A/CN.4/167 and Add. 1-3, p. 56. Note that G. Fitzmaurice and H. Waldock were the last two Special Rapporteurs of the International Law Commission charged with the task of drafting the VCLT.

[14] *See e.g.* PCIJ, *Access to, or Anchorage in, the Port of Danzig of Polish War Vessels, Advisory Opinion*, PCIJ Rep. 1931, Series AB, No. 42, p. 144; *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory, Advisory Opinion*, PCIJ Rep., Series AB, No. 44, p. 29 and 40; ICJ, *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, ICJ Rep. 1994, p. 6 ff., para. 41, Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, 12

rationale for this approach is the need to ensure global consistency in the interpretation, by various international subjects and bodies, of treaties concluded by different parties. Placing the main emphasis on the text of a treaty or other text-related objectified criteria not only facilitates the settlement of disputes by international courts and tribunals,[15] it also considerably simplifies the application of the treaty on a daily basis by the organs and agents of the parties to the treaty.[16]

In the judgment in question, the Voivodship Administrative Court blatantly disregarded the letter and spirit of Art. 31. Neither the 1972 Prague Convention nor the 1974 Warsaw Agreement invoked in the case under consideration provided any grounds for refusal to recognise any degree based on the way in which the underlying education was delivered. On the contrary, both treaties were drafted in very general terms and the notions used could cover all kinds of university degrees and various forms of higher education. Art. 1.2 of the Prague Convention provided that the parties to the Convention agreed to recognize "all documents certifying successful completion of higher education (at a university, technical university or in a university institute) allowing their holders to hold a degree." Art. 1.4 of the Warsaw Agreement confirmed the equivalence of "a diploma issued after graduation from an institution of higher education in USSR [Ukraine]", provided that it entitled the holder to pursue further doctoral studies.

It is likely that the explanation for the peculiarity of the reasoning of the Voivodship Administrative Court in the case at hand lies in the Court's misreading of the passage just quoted. The judges might have interpreted the notion of "graduation from an institution of higher education in USSR [Ukraine]" as requiring the student to pursue his or her education (i.e. participate in classes) within the territory of Ukraine. However, there are no grounds for supposing that the provision in question implied any such obligation. What it basically provided was that in order to be recognized, a degree had to be awarded by a university or a similar institution based in Ukraine. The context in which it appeared did not indicate that any exception for certain modes of education was intended or could be made.

Nor can any confirmation for the conclusions of the Court that distance learning was excluded from the scope of 1974 Agreement be found in the object and purpose of

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October 1998, para. 114; Inter-American Court of Human Rights, *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) of the American Convention on Human Rights)*, Advisory Opinion, OC-3/83, September 8, 1983, IACHR Rep. 1983, Series A, No. 3, para. 50.

[15] This aspect has been rightly noticed by K. J. Vandevelde, *Treaty Interpretation from a Negotiator's Perspective*, 21 Vanderbilt Journal of Transnational Law 281 (1998), p. 294, who, however, fervently criticizes the approach taken by the international courts in this regard, arguing that it is the actual intent of the parties which should be given the greatest consideration, not that of an objective third party.

[16] Such organs or agents are usually not in a position to undertake a thorough analysis of the preparatory work of the treaty or other extra-textual factors which may indicate the intention of the parties to the treaty. The principle of primacy of the text significantly raises the probability that in most cases the conclusions reached by them will be coherent with those of the specialized organs, like ministries of foreign affairs, or international courts and organs.

this treaty.[17] The title of the Agreement referred only to the “learned degrees and titles awarded in Poland and the USSR [Ukraine]”, once again confirming that the only factors which mattered in the process of certification of equivalence were whether a given document entitled the holder to an academic degree, and whether the institution which awarded that document was located in either of these two States. The sole aim of the Agreement, expressly stated in a very short preamble, was the “furtherance of cooperation [of the parties] in the field of science, education and professional training”, which cannot be considered as precluding recognition of distance learning degrees, but rather the contrary. The same applies to the Prague Convention, the aims of which were the “deepening and broadening of cooperation in the field of science and education” and the “furtherance of socio-economic cooperation” between the parties.

2. THE PRACTICE OF THE PARTIES

Art. 31.3 of the VCLT provides that the interpretation of a treaty should also take into account, *inter alia*, “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.” A study of the practice of the Polish organs regarding the application of the Prague Convention and Warsaw Agreement with respect to the degrees awarded in Ukraine once again raises doubts about the findings of the Voivodship Administrative Court in the case under review.

A short description of this practice can be found in a letter of the Minister of Science and Higher Education to the Speaker of the Senate of 20 February 2012, detailing past practices.[18] As is apparent from that letter, at the beginning of the 2000s the Minister denied recognition of the degrees of the university the applicant studied at because it was determined that the courses were offered in violation of the Polish higher education law. The persons who were refused certificates of recognition lodged complaints with the Voivodship Administrative Court in Warsaw and the Supreme Administrative Court. Both Courts held that there was insufficient evidence to conclude that the degrees awarded did not qualify for recognition under the provisions of the Prague Convention. They pointed out that the Minister was allowed to examine only whether a given document was genuine and whether it “entitled the holder to hold a degree”, not how it was obtained.[19] In accordance with these rulings, the Minister issued more

[17] If the object and purpose of a treaty is not expressly stated in a general clause, it should be determined, above all, by having recourse to the title of the treaty and its preamble, *see* O. Dörr, K. Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary*, Springer, Heidelberg: 2012, p. 546, and M. E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Brill, Leiden: 2009, p. 428.

[18] Letter of the Minister of Science and Higher Education Barbara Kudrycka to the Speaker of the Senate Bogdan Borusewicz, 20 February 2012, Ref. No.: MNiSW-DNS-WUW-185-20358-2/MK/12, available at: http://www.senat.gov.pl/gfx/senat/userfiles/_public/k8/dokumenty/stenogram/oswiadczenia/konopka/0401o.pdf (accessed 20 April 2015).

[19] *See e.g.* Judgment of the Supreme Administrative Court (Naczelny Sąd Administracyjny) of 3 January 2003, I SA 1883/02.

than 200 certificates to the applicants. In mid-2006,[20] through an exchange of letters with its Ukrainian counterpart, the Minister became aware that by offering the courses in Poland without a required licence the university in question also violated the Ukrainian law concerning the provision of educational services abroad, and that the degrees awarded by it were invalid. From that time on, the Minister began once again to refuse to issue the certificates of recognition. This time the administrative courts did not question the correctness of her actions.

The foregoing version of events is not, however, fully corroborated by the judgments referred to in the letter. An analysis of them points rather to late 2004 as the date on which both courts began to refuse to recognise the equivalence of the degrees in question.[21] Moreover, it demonstrates that the decisions issued between 2004 and 2006, unlike the post-2006 ones, did not address the issue of the violation of Ukrainian law at all and focused only on the lack of compliance with the Polish law.[22] Lastly, it shows that in parallel with the 2004 change, the courts suddenly began to advance the argument that the Prague Convention did not contain any references to future developments in the field of education and therefore must be interpreted as excluding the recognition of distance learning degrees, which did not exist at the time when the treaty was concluded. This unexpected, dramatic shift in the interpretation of the treaty in question was further confirmed, according to the decisions, by a study of the preparatory work of the Convention, which did not indicate that it was the intention of the parties that distance learning or other future degrees should be covered by the scope of the Convention.

It is highly probable that the change in practice which occurred in late 2004 was in fact motivated by a wish to ensure full compliance with the *acquis communautaire* of the European Union (EU), which Poland joined on 1 May 2004. Many concerns were voiced at the time that the recognition of degrees pursuant to the Prague Convention would be incompatible with EU law. Also, there was a growing discontent in the academic community that the education standards in many post-Soviet states, including Ukraine, were much lower than in Poland, and that many people took advantage of that situation by studying abroad and then seeking recognition of their degrees in

[20] In fact the courts started to question the equivalence of these degrees in late 2004; see below.

[21] The distance-learning degrees were recognised in, *inter alia*, judgments of the Supreme Administrative Court (Naczelny Sąd Administracyjny) of 3 January 2003, I SA 1881/02 and I SA 1883/02. Probably the first judgment refusing to recognise such degrees was the one issued on 23 April 2004, OSK 177/04.

[22] *E.g.* judgments of the Supreme Administrative Court (Naczelny Sąd Administracyjny) of 23 April 2004, OSK 177/04, OSK 178/04 and OSK 179/04, judgment of the Supreme Administrative Court (Naczelny Sąd Administracyjny) of 3 November 2004, OSK 181/04. Compare the post-2006 decisions: e.g. judgment of the Voivodship Administrative Court (Wojewódzki Sąd Administracyjny) in Warsaw of 13 December 2007, I SA/Wa 1616/07 and judgment of the Supreme Administrative Court (Naczelny Sąd Administracyjny) of 18 July 2008, OSK 491/08 or judgment of the Supreme Administrative Court (Naczelny Sąd Administracyjny) of 12 December 2008, OSK 538/08, as well as the judgment being discussed in the present article, which referred to the violations of the Ukrainian law as well, albeit marginally.

Poland.[23] These concerns later led to the denouncement of the Prague Convention and the Warsaw Agreement by the Polish government.[24] It seems that the Polish administrative courts, aware of the minor importance that Ukraine attached to the issue, took these considerations into account under the pretext of reassessment of the applicable rules of international law.

Hence the practice of Polish courts relating to the recognition of the degrees awarded by the university of the applicant should be divided not into two, but into three different periods. In the first period, up to 2004, the courts recognised the degrees pursuant to the Prague Convention and Warsaw Agreement and underlined that the violations of Polish higher education law had no bearing on the cases. In the period between 2004 and 2006 the violations of the Polish higher education law were accepted as legitimate grounds for denial of recognition,[25] with the lack of references to distance learning education in the text of the Prague Convention being a subsidiary but important argument.[26] Finally, after 2006, the courts included the violations of the Ukrainian law as an additional ground justifying their refusal to recognise the degrees in question.

Surprisingly, all these developments met with no response from Ukraine. On the basis of information in the judgments and in the 2012 letter referred to above, the most plausible explanation of this inaction is that initially the Ukrainian side tacitly approved the practice of recognition of the degrees as perfectly compatible with the agreements between Poland and Ukraine. Later, when it became aware that the university of the applicant offered courses in Poland in violation of Ukrainian law, and that the Polish courts refused to recognise the degrees awarded following completion of these courses, it had no tangible interest in questioning the interpretation adopted by the Polish side, particularly as the cases concerned only Polish citizens and the Prague Convention was no longer in force between Poland and Ukraine. Thus, even though the underlying rationale of the decisions of the courts was wrong, the Ukrainian side remained indifferent since the decisions suited its interests.

Still, it clearly follows from the above analysis of the Polish administrative and judicial practice regarding the interpretation of the Prague Convention and Warsaw Agree-

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[23] *See* Letter of the Minister of Science and Higher Education Barbara Kudrycka, *supra* note 18, and the Polish government's justification for the request to denounce the Prague Convention, 10 July 2003, available at: http://orka.sejm.gov.pl/Druki4ka.nsf/wgdruku/1775/$file/1775.pdf (accessed 20 April 2015).

[24] *See* the Polish government's justification for the request to denounce the Prague Convention, *supra* note 23, and the reply of the under-secretary of state for Education and Science to the parliamentary question no. 1130, *supra* note 4. These arguments appeared also in the judgments issued before the Prague Convention and the Warsaw Agreement were denounced, listed above.

[25] According to the wording of the provisions of the Prague Convention and the Warsaw Agreement, only the "documents certifying successful completion of higher education" or "diplomas" could be recognized. In the absence of any guidelines on how to assess whether a document was eligible for recognition or not provided for in the treaties, decisive importance must attach to the law of the State in which it was issued. It was therefore only the Ukrainian law which was of relevance in the case, not Polish law.

[26] It needs to be underlined that the Convention and Agreement remained unchanged until their denunciation in August 2004 and September 2005 respectively.

ment that at least for some time both treaties were considered as sufficient grounds for the recognition of the distance learning degrees awarded by the university of the applicant. Consequently, they should not be interpreted as precluding the recognition of the Ukrainian degrees based on how the latter were obtained. If that were the case, the courts would not have accepted them at any time. Their earlier acceptance of them can be understood as a confirmation that the distance learning format was not excluded from the scope of the 1972 Convention and the 1974 Agreement.

3. THE ROLE OF THE PREPARATORY WORK

As already pointed out, in the case in question and in other similar cases decided since 2004, the Polish administrative courts referred to the preparatory work of the Prague Convention in order to prove that the parties did not intend to recognise the degrees awarded following the completion of courses taught via distance learning or any other forms of education which did not exist at the time of the conclusion of the Convention. Although perhaps plausible at first sight, this argument is unconvincing.

According to the Art. 32 of the VCLT, if the interpreter of a treaty wishes to confirm the meaning of a certain provision of the treaty resulting from the application of Art. 31, or if the interpretation of a treaty leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable, recourse may be had to the preparatory work of the treaty and the circumstances of its conclusion as a supplementary means of interpretation. There is a serious disagreement among scholars whether this provision establishes a formal hierarchy of the means and methods of interpretation. The majority argues that the recourse to the preparatory work is allowed only in cases when the application of Art. 31 proves unsatisfactory,[27] while others assert that Art. 32 does not preclude the recourse to the preparatory work even if the meaning of the text seems clear.[28]

What is undisputed by all authors, however, is that the study of the preparatory work and the circumstances of the conclusion of the treaty cannot simply replace the analysis of its text. Regrettably, this is in essence what happened in the case in question, since after identifying the treaties applicable in the case, the court did not consider it

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[27] *E.g.* R. Bernhardt, *Interpretation and Implied (Tacit) Modification of Treaties*, 27 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 491 (1967), pp. 495-96; Dörr & Schmalenbach, *supra* note 17, pp. 571-72; U. Linderfalk, *Is the Hierarchical Structure of Articles 31 and 32 of the Vienna Convention Real or Not – Interpreting the Rules of Interpretation?*, 54(1) Netherlands International Law Review 133 (2007), pp. 136, 153-54; Fitzmaurice, *supra* note 13, p. 211; G. Schwarzenberger, *Myths and Realities of Treaty Interpretation*, 9(1) Vanderbilt Journal of International Law 1 (1968-9).

[28] *E.g.* S. M. Schwebel, *May Preparatory Work Be Used to Correct Rather than Confirm the "Clear" Meaning of a Treaty Provision?*, [in:] J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century: Essays in Honour of Krzysztof Skubiszewski*, Kluwer Law International, The Hague: 1996, pp. 543-47, J. G. Merrills, *Two Approaches to Treaty Interpretation*, Australian Yearbook of International Law 55 (1968-9), pp. 60-64, S. E. Nahlik, *Kodeks prawa traktatów* [The code of treaty law], PWN, Warszawa: 1976, pp. 206-207.

necessary to assess whether it was possible to apply their provisions to all degrees awarded by the Ukrainian institutions of higher education. Instead, it focused straightaway on the analysis of the circumstances of the conclusion of the Prague Convention and its preparatory work. In this regard, it observed that the socio-political and economic circumstances prevailing at the time of the conclusion of the Prague Convention were entirely different compared to the ones prevailing at the time the case was decided, and that this fact must have an impact on the interpretation of the provisions of the Convention. The Court's argument went as follows: since there were no indications in the text of the Treaty that it would also cover future forms of education, and since the preparatory work did not give any clear indication in this respect, it could not be presumed that the parties to the Convention wished to recognise the equivalence of the degrees awarded after completion of courses taught using new forms of education, including cross-border distance learning. As a consequence, the parties could not be regarded as bound by the Convention in relation to these degrees.

The most disturbing feature of the above part of the reasoning of the court is the fact that its conclusions regarding the scope of obligations of the parties to the Convention actually lacked any sound legal basis. Under international law, unless a treaty specifically provides otherwise, questions of the validity and binding force of a treaty are exclusively governed by the VCLT.[29] As the Prague Convention was silent on these issues, the only law applicable in this regard was the VCLT, with Art. 62 seeming to be the most relevant. According to this provision, a party to a treaty may invoke a fundamental change of circumstances as a ground for terminating, withdrawing from or suspending the operation of a treaty, if there is a fundamental change in the circumstances which constituted an essential basis of the consent of the parties to be bound by a treaty, the change was not foreseen by the parties at the time of the conclusion of the treaty, and it leads to a radical transformation of the extent of obligations still to be performed.[30]

A comparison between these requirements and the part of the reasoning of the court presented in the current chapter suggests that in the view of the judges two of the abovementioned conditions were certainly met: the parties to the Prague Convention agreed to be bound by that treaty only under certain circumstances, and did not foresee that the latter would change between the time of the conclusion of the treaty and the time of its application in the case at hand. However, supposing the court really wished to invoke the fundamental change of circumstances to the case, its final conclusion – that despite the subsequent radical change of the said circumstances (i.e. the development of entirely new methods of cross-border education), the actual scope of the obligations of the parties to the Convention remained the same (i.e. limited to the degrees taught using the methods of education existing at the time of the conclusion of the Convention) – should have been different. In fact, the court should have argued the opposite, i.e. that

[29] *See* the Preamble and Part V of the VCLT, particularly Art. 42.

[30] Although accepted as a general rule, the principle *rebus sic stantibus* remains highly controversial and is often seen as potentially threatening the stability of treaties (*e.g.* Dörr & Schmalenbach, *supra* note 17, p. 947). It must therefore always be applied with great care.

due to technical progress and new educational trends the actual scope of the obligations of the parties indeed substantially changed (which, arguably, was the case).

Alternatively, it could be argued that the court was aware that the extent of the obligations of the parties had become radically transformed, but for some reason (*e.g.* a mental leap) it did not acknowledge that in the judgment. In such a case, all the conditions of the fundamental change of circumstances would have been met, and the conclusion of the court that the obligations of the parties to the Prague Convention remained unaltered could be regarded as a desperate remedy in reaction to that change. However, in the light of other remarks made by the court in the case, which expressly questioned the possibility of extension of the scope of the Prague Convention to distance learning degrees and the like, such an argument cannot be sustained.

Even assuming that all the conditions necessary to invoke the fundamental change of circumstances were incurred and fulfilled in the case, neither the Voivodship Administrative Court nor the Supreme Administrative Court would be in a position to question the binding force of the Convention in relation to the distance learning degrees on the basis of such a change. This is because the VCLT expressly stipulates that in order to invoke a ground for terminating a treaty, withdrawing from it or suspending its operation, a party, meaning a State, needs to follow the special procedure provided for in Art. 65, which was not followed in the case in question. Moreover, in line with Art. 44 of the VCLT, the change of circumstances should rather be raised with respect to the Prague Convention as a whole, not to one of its provisions or even one of the possible interpretations of a specific provision, as happened in the case.[31]

4. THE SPECIAL MEANING OF A TERM

The analysis of the text of the Prague Convention and the circumstances of its conclusion, undertaken by the court in the case at hand, is also disturbing for another reason, namely the importance attached to the silence – both of the text of the Convention and in the preparatory work – on the effects of future educational changes. As will be demonstrated below, the conclusions made by the court in this regard were not particularly convincing.

The reason why the silence argument may be considered controversial is because it was used in order to reinterpret the meaning of a term contained in the Prague Convention – "all documents certifying successful completion of higher education (…)

[31] Art. 65 of the VLCT stipulates that a party must notify all other parties of its claim and carry out the measure it has proposed only after the expiry of a period not shorter than three months, provided that no party has raised any objection. If an objection is raised, both parties are bound to seek a solution through peaceful means of settling disputes. Art. 44 of the VCLT provides that "A ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty recognized in the present Convention may be invoked only with respect to the whole treaty, except as provided in the following paragraphs in article 60" – and although it provides for exceptions when certain conditions are fulfilled, in the light of the reasoning of the court these conditions were not met.

allowing their holders to hold a degree" – in such a way as to exclude from the scope of that term the degrees which were awarded after completion of the courses taught via distance learning or any other form of education which did not exist at the time of conclusion of the Prague Convention. Thus, by reference to an extra-textual factor, the court rejected the ordinary meaning of the term in question in favour of a different one, unrelated to the text of the treaty.

According to Art. 31.4 of the VCLT, "A special meaning shall be given to a term if it is established that the parties so intended." The wording of this provision does not prejudge how the intention of the parties shall be determined. Therefore, it does not explicitly exclude the possibility of inferring conclusions from the silence of a treaty or in its preparatory work on specific issues.[32] Seen in this light, the court's claim that neither the text of the Convention nor the preparatory work indicated the wish of the parties that the scope of that treaty cover any future forms of education, including distance learning, and that the degrees awarded after completion of education in such forms were not eligible for recognition, may at first sight appear legitimate, or at least possibly so.

However, the judgment offers no explanation why the court's interpretation should be preferred over any other one. This is important, since it is an established principle that when invoking the "special meaning" of a term, the burden of proof lies on the claimant.[33] In fact, on the basis of the same text and preparatory work it may equally as well be argued that the parties to the Prague Convention deliberately disregarded the issue of possible future changes in the field of education because they did not consider them important enough to affect the recognition of degrees pursuant to the Convention. Since any diploma meeting the broad definition provided in the treaty[34] would be eligible for recognition, there was no need to reflect on the possible future changes in the forms of education. After all, as has already been observed, the parties to the Convention explicitly intended to deepen and broaden their cooperation in the field of science and education, and must have been aware that over the passage of time this field would inevitably evolve.

The interpretation presented above is at least as legitimate to the one adopted by the court in the case at hand because there is no principle in international law that in cases of doubt, one must prefer the meaning which impairs State sovereignty less (*in dubio mitius*).[35] It is the interpretation which best reflects the intention of the parties to

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[32] R. Gardiner, *Treaty Interpretation*, Oxford University Press, Oxford: 2008, pp. 334-36. *E.g.* ICJ, *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, ICJ Rep. 2003, p. 16 ff., para. 29.

[33] *See* ICJ, *Western Sahara*, Advisory Opinion, ICJ Rep. 1975, p. 12 ff., paras. 116-18, *Admission of a State to the United Nations (Charter, Art. 4)*, Advisory Opinion, ICJ Rep. 1948, p. 57 ff., pp. 62-63. *See also* Dörr & Schmalenbach, *supra* note 17, p. 569; A. Wyrozumska, *Umowy międzynarodowe. Teoria i praktyka* [International agreements. Theory and practice], Wydawnictwo Prawo i Praktyka Gospodarcza, Warszawa: 2006, p. 340.

[34] Namely, a document certifying successful completion of higher education allowing its holder to hold a degree; see above.

[35] *Iron Rhine ("Ijzeren Rijn") Railway (Belgium v. Netherlands)*, Award of the Arbitral Tribunal presided by Judge R. Higgins, The Hague, 24 May 2005, available at: www.pca-cpa.org/showfile.asp?fil_id=376 (accessed 20 April 2015), para. 53. *See also* H. Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 British Yearbook of International Law 48 (1949), pp. 59 and

the treaty at the time of its conclusion which prevails.[36] However, in cases when there is no clear-cut answer as to which interpretation is correct, instead of favouring one or the other one needs to return to the ordinary meaning of the term in question. This is a logical consequence of the requirement of Art. 31.4 that the intention of the parties must be established in order to give a special meaning to a term.

These conclusions are confirmed by an analysis of international judicial practice, with the advisory opinion of the Permanent International Court of Justice (PCIJ) in the *Night Work* case, the judgment of the International Court of Justice (ICJ) in the 2009 *Costa Rica v. Nicaragua* case and the decision of the WTO Appellate Body in the 1998 *US – Shrimp* case being particularly relevant.[37]

In the first of the above cases, the PCIJ was asked by the Council of the League of Nations, at the request of the Governing Body of the International Labour Organization (ILO), to clarify the meaning of Art. 3 of the 1919 Convention concerning the employment of women at night. According to that provision, women should not be employed "during the night in any public or private industrial undertaking, or in any branch thereof, other than an undertaking in which only members of the same family are employed."[38]

62; L. Crema, *Disappearance and New Sightings of Restrictive Interpretation(s)*, 21(3) European Journal of International Law 681 (2010), p. 687; *contra*, several cases cited by Crema, pp. 684-85.

[36] *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, ICJ Rep. 2009, p. 213 ff., para. 48.

[37] The three cases listed and discussed below are just examples of a more general trend. The jurisprudence of the European Court of Human Rights is particularly instructive in this regard. The Court insists that the provisions of the European Convention on Human Rights must be interpreted "in the light of present-day conditions" and in such a way that the rights under the Convention are "practical and effective". The Convention is considered "a living instrument". *See inter alia*, *Tyrer v. the United Kingdom* (App. no. 5856/72) Chamber, ECHR 25 April 1978, para. 183; *Marcx v. Belgium* (App. no. 6833/74) Plenary, ECHR 13 June 1979, para. 41; *Soering v. the United Kingdom* (App. no. 14038/88), Plenary, ECHR 7 July 1989, paras. 103-104; *Christine Goodwin v. the United Kingdom* (App. no. 28957/95), ECHR 11 July 2002, para. 74, all available at http://www.echr.coe.int. *See also, inter alia*, the cases before the 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, ICJ Rep. 1971, p. 16 ff., paras. 52-53, 55 and *Aegean Sea Continental Shelf*, Judgment, ICJ Rep. 1978, p. 3 ff., para. 77, and Report of the Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 13 April 2006, UN Doc. A/CN.4/L.682, para. 478; *see also* M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Brill, Leiden: 2009, pp. 444-45 and J. Arato, *Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences*, 9 The Law and Practice of International Courts and Tribunals 443 (2010), pp. 444-45 who argue that the ordinary meaning of a term may change over time. *Contra*, *South West Africa (Liberia v. South Africa), Second Phase*, Judgment, ICJ Rep. 1966, p. 6, para. 16, *Decision Regarding Delimitation of the Border between The State of Eritrea and The Federal Democratic Republic of Ethiopia*, Award of the Eritrea-Ethiopia Boundary Commission, 13 April 2002, pp. 21-22, available at: www.pca-cpa.org/showfile.asp?fil_id=121 (accessed 20 April 2015) and J. Sozański, *Współczesne prawo traktatów* [Contemporary treaty law], Polskie Wydawnictwo Prawnicze Iuris, Warszawa/Poznań: 2005, p. 104.

[38] Convention concerning Employment of Women during the Night, 28 November 1919, available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_ILO_CODE:C004 (accessed 20 April 2015).

In the course of the work of the ILO, it turned out that there was a great divergence of views between the members of the ILO as to whether or not Art. 3 was meant to apply to certain categories of women who were not engaged in manual work, for instance to those who held supervisory or management positions.

The PCIJ found that the wording of Art. 3 was clear, free from ambiguity and general enough to cover all categories of women contemplated by the question submitted to the Court. The terms of Art. 3 were perfectly consistent with the title of the convention, its preamble and other provisions, which referred to the employment of women in general, and not to certain groups of women.[39] The majority rejected the argument that the application of the Convention to women occupying senior or managerial positions was never considered by its parties because at the time of adoption of the Convention very few women held such positions and that, as a result, the Convention could not be regarded as covering them. In the opinion of the majority of the judges, this argument did not by itself justify ignoring the unambiguous text of the treaty: "The mere fact that, at the time when the Convention on Night Work of Women was concluded, certain facts or situations, which the terms of the Convention in their ordinary meaning are wide enough to cover, were not thought of, does not justify interpreting those of its provisions which are general in scope otherwise than in accordance with their terms."[40]

In the case concerning the *Dispute regarding navigational and related rights (Costa Rica v. Nicaragua)* of 2009, decided more than 70 years after the advisory opinion of the PCIJ in the *Night work* case, the court was dealing with the disagreement over the meaning of a term appearing in the Treaty of Limits (the Jerez-Cañas Treaty) concluded between Costa Rica and Nicaragua on 15 April 1858, which delimited the boundary between both parties. Although the treaty established Nicaragua's sovereign jurisdiction over the waters of the San Juan River, it recognized Costa Rica's navigational rights "con objetos de comercio" on the lower course of the river. The parties differed over, *inter alia*, whether the term in question encompassed only the transport of goods to be sold in commercial exchange (because, as claimed by Nicaragua, in 1858 the word "commerce" referred exclusively to the merchandise and did not extend to services) or whether it also included the transport of passengers, including tourists (as argued by Costa Rica).[41]

The Court noted that the term "comercio" was a generic term, "referring to a class of activity", and that the parties to the treaty must have been aware that its meaning

[39] PCIJ, *Interpretation of the Convention of 1919 Concerning Employment of Women during the Nigh*t, Advisory Opinion, PCIJ Rep. 1932, Series AB, No. 50, p. 373.

[40] *Ibidem*, p. 377. It is interesting to note that at a conference which met in May 1931, the parties to the Convention rejected a proposed amendment to the effect that the Convention would not apply to "persons holding a responsible position of management, who do not ordinarily perform manual work" (*see ibidem*, p. 371).

[41] *Dispute regarding Navigational and Related Rights*, paras. 58-59. Costa Rica went even further, trying to argue that the use of the river for purposes of navigation by certain Costa Rican public officials also fell within the scope of the term "comercio". This was, however, surely an over-interpretation, and was rightly rejected by the court.

was bound to evolve over time.[42] Hence, it was the meaning at the time the case was decided, not the original meaning of the notion, which had to be accepted for the purposes of applying the treaty in the case, and the question whether or not services fell under the category of "commerce" in the mid-nineteenth century was irrelevant. The court found that the transport of persons could be "commercial in nature" and that, accordingly, the right of free navigation of Costa Rica extended to both the transport of persons and goods as activities "for profit making purposes."[43]

Finally, in the *US – Shrimp* case the WTO Appellate Body was faced with the task of deciding whether sea turtles constituted "exhaustible natural resources" for the purposes of Art. XX(g) of the General Agreement on Tariffs and Trade. If so, the measure adopted by the United States to protect these turtles could fall under an exception provided for in that article and, as such, be compatible with the Agreement.[44] The Members of the Body held that even though Art. XX(g) had been drafted more than 50 years before, the term "natural resources" was a generic one and "not static in its content or reference but (…) by definition, evolutionary."[45] Therefore, it had to be interpreted in the light of "contemporary concerns of the community of nations about the protection and conservation of the environment"[46] and was not limited to the conservation of "mineral" or "non-living" resources, as argued by India, Malaysia, Pakistan and Thailand, which referred to the drafting history of Art. XX(g).[47] Consequently, sea turtles were found to be an "exhaustible natural resource" by the Appellate Body.

The three cases discussed above confirm that it is the text of a treaty which must be given priority in cases where the exact intention of the parties regarding the 'special meaning' of a term is unclear. As a result, if the meaning claimed by a party is narrower than the text of the treaty suggests, a high burden of proof is on the claimant to prove

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[42] *Ibidem*, para. 66. This was particularly the case, according to the Court, when the treaty had been entered into for a very long period or was "of continuing duration". Since the Prague Convention was concluded for an unlimited period (though providing for the possibility of denunciation), this remark also applies to the case reviewed by the Voivodship Administrative Court and discussed in the present article.

[43] *Ibidem*, paras. 70-71. As rightly observed by R. McCaig, *Further Evolution of the Evolutionary Approach to Treaty Interpretation*, 69(2) Cambridge Law Journal 250 (2010), p. 251, if followed strictly, the original meaning of the respective provision of the 1858 Treaty would equally lead to prohibition of the free navigation for the purposes of trade in cars, computers and x-ray machines, since they were invented after the treaty was signed.

[44] It should be noted that in order to be compatible with the Agreement, the measure in question also had to be applied by the United States in a manner which did not constitute arbitrary and unjustifiable discrimination between Members of the WTO. This was not the case, so in the end the US measure was found to be incompatible with the Agreement.

[45] Appellate Body Report, *US – Shrimp*, para. 130.

[46] *Ibidem*, para. 129.

[47] *See* Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R, 15 May 1998, paras. 263-75. The debate during the conference focused on "raw materials", "products" and "minerals" but living resources were not explicitly excluded. (The same can be said about the future possible changes in the field of education in the course of the preparatory work to the Prague Convention in the case discussed in this work).

that the parties indeed intended to give such a meaning to a given term.[48] On the contrary, if the term is broad enough to cover the new proposed meaning, it is presumed that its scope includes this meaning as well, particularly if it is a generic term, i.e. one which refers to a class of objects.[49] Whether the term is generic or not depends on the intention of the parties, but since "the intention of the parties to give a term an evolutionary character is rarely, if ever, explicitly stated in a treaty",[50] it usually must be inferred from the language used by the parties.[51]

In the case discussed herein the Voivodship Administrative Court chose its own way of dealing with the problem and, instead of following the rules set out by the international judicial bodies, held that the meaning of a treaty term does not change over time and remains unaltered throughout its operation. This claim was, unfortunately, not supported by any substantial arguments, but only by a quote from Art. 31.1 and 32 of the VCLT. This is regrettable, although making a convincing case for this particular claim would have been a highly demanding task.

CONCLUSIONS

The analysis of the practice of the Polish administrative courts with regard to the application of the Prague Convention, and in particular the decision of the Voivodship Administrative Court in Warsaw of 6 May 2014, reveals that they were not unanimous in their views as to the interpretation of that treaty. What is surprising is that unlike in most other cases, the Polish administrative courts changed their view on the matter from a more to a less convincing one and began to use the silence of the text and the preparatory work to the Prague Convention with respect to future educational changes as an argument that the degrees obtained via distance learning were not eligible for recognition pursuant to the Convention.

As demonstrated above, this argument was unconvincing for several reasons. Most importantly, it ignored the wording of the text of the Prague Convention itself, which is drafted in general terms capable of covering all kinds of degrees. It also ignored the object and purpose of that treaty, which was aimed at "the deepening and broadening of

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48 This burden was met, for instance, by France in the Morocco case, see *Case concerning rights of nationals of the United States of America in Morocco*, Judgment, ICJ Rep. 1952, p. 176 ff., pp. 188-89.

49 Arato, *supra* note 37, p. 476, argues that "in terms of judging a treaty evolutive, the evidentiary standard is quite low" and indeed rightly so.

50 *Ibidem*, pp. 468-69.

51 According to the Conclusions of the work of the Study Group on the Fragmentation of International Law: *Difficulties arising from the Diversification and Expansion of International Law*, Report of the 58th Session of the ILC (2006), UN Doc. A/61/10, a concept in a treaty may be considered capable of evolving if: "(a) The concept is one which implies taking into account subsequent technical, economic or legal developments; (b) the concept sets up an obligation for further progressive development for the parties; or (c) the concept has a very general nature or is expressed in such general terms that it must take into account changing circumstances."

cooperation in the field of science and education". Instead of focusing on these critical factors, it placed way too much emphasis on the preparatory work and the circumstances of the conclusion of the treaty. Moreover, it applied the doctrine of fundamental change of circumstances in a manner which clearly deviated from the provisions of the VCLT with respect thereto. Finally, it attributed a "special meaning" to one of the terms found in the Prague Convention in a manner which is very difficult to reconcile with the international jurisprudence on the subject.

The assessment of the judgment in question and a number of similar decisions can therefore be only negative. It is probable that the dramatic change in the practice of recognising distance learning degrees, which occurred around 2004, was driven by the fear that the further application of the Prague Convention would result in Poland's non-compliance with EU law. If that indeed was the case, then the judicial expediency shown by the Polish administrative courts does not deserve praise.

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Lukasz Gruszczynski, Wouter Werner (eds.), ***Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation*****, Oxford University Press, Oxford: 2014, pp. 464**

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The reviewed book provides an in-depth analysis of the practice of major international courts and tribunals with respect to deference to national judgements. This practice appears when the courts and tribunals have to reconstruct and make an assessment of the scope and content of states' rights and duties, while leaving the states the freedom to appraise non-legal or legal elements in the process of ensuring their performance of international obligations. Two fundamental judicial doctrines are under consideration: the standard of review and the margin of appreciation. The former doctrine, taken from the US constitutional practice, expresses the right of the court or tribunal to reassess judgements made by national authorities and discloses the various possible levels of intrusiveness which they are permitted to undertake (ranging from *de novo* review through to substantial weight of the evidence, reasonableness and abuse of discretion, and up to a clearly erroneous standard). It has been distinguished from the burden of proof and standard of proof. The margin of appreciation doctrine, born in the European legal tradition, describes the different extent to which national legislative, executive, and judicial decision-makers are allowed to reflect diversity in their interpretation and application of, above all, human rights obligations. The two doctrines are perceived as "referring to the same thing, although in reverse fashion (i.e. a wide margin of appreciation equals a low standard of review, and vice versa)". Their judicial application and usefulness is determined by and depends on many different factors, investigated in detail in each of the chapters of the book.

The book is the result of the COST research project (International Law between Constitutionalisation and Fragmentation: the role of law in the post-national constellation) and two conferences organised in Seville and Lund within its framework. It encompasses 20 contributions arranged in five parts. The introduction, written by the editors of the book Lukasz Gruszczynski and Wouter Werner, offers preliminary remarks and some theoretical aims and considerations.

The first part of the book is entitled "General issues/comparative perspectives". It consists of four articles: 1) Judicial standards of review and administration of justice in trade and investment law and adjudication (Ernst-Ulrich Petersmann); 2) Deference and the use of the public policy exception in international courts (Ilona Cheyne); 3) Democracy and distrust in international law: The procedural democracy doctrine and the standard of review used by international courts and tribunals (Benedikt Pirker);

4) Good faith review (Andrei Mamolea). In the main these studies represent more a comparative than a general approach to the problem (with the exception of the text on the good faith). The authors compare in principle three international regimes: WTO law, EU law, and investment law.

The second part of the book concentrates on international investment law and WTO law. Here the reader can find four contributions on the following issues: 1) Beyond the standard of review: Deference criteria in WTO law and the case for a procedural approach (Michael Ioannidis); 2) The role of the standard of review and the importance of deference in investor-state arbitration (Caroline Henckels); 3) Treaty change, arbitral practice and the search for a balance: Standards of review and the margin of appreciation in international investment law (Erlend Leonhardsen); 4) Standard of review and scientific evidence in WTO law and international investment arbitration: Converging parallels? (Valentina Vadi and Lukasz Gruszczynski).

Part III is devoted to European Union law. It consists of three texts: 1) National procedural choices before the Court of Justice of the European Union (Pieter Van Cleynenbreugel); 2) Risk, precaution and scientific complexity before the Court of Justice of the European Union (Patrycja Dąbrowska-Kłosińska); 3) Standard of review for necessity and proportionality analysis in EU and WTO law: Why are differences in standards of review legitimate? (Alexia Herwig and Asja Serdarevic).

The fourth part of the publication concerns deference in the field of international human rights law, in particular in European and Inter-American law. It includes: 1) The European Court of Human Rights and standards of proof: An evidential approach toward the margin of appreciation (Mónika Ambrus); 2) Experts in hate speech cases: Towards a higher standard of proof in Strasbourg? (Uladzislau Belavusau); 3) The standard of equivalent protection as a standard of review (Veronika Bílková); and 4) Subsidiarity in the Americas: what room is there for deference in the Inter-American System? (Bernard Duhaime).

The last part (Part V) of the book refers to the practice of "other international courts". Among them are such important courts as: 1) the International Court of Justice (Standard of review and the margin of appreciation before the International Court of Justice by Chiara Ragni); The International Tribunal on the Law of the Sea (Standard of review and the International Tribunal on the Law of the Sea by Rosemary Rayfuse); 3) the International Criminal Court (Deference in the International Criminal Court practice concerning admissibility challenges lodged by States by Karolina Wierczyńska); and 4) Beyond hierarchy (Standards of review and complementarity in the International Criminal Court by Diane Bernard).

The variety of problems and the richness of the issues considered in the book are enormous. Their detailed examination is impossible in a short review. Nevertheless, some general observations can be made.

As can be observed, the book offers a wide panorama of the deferential practice of many international courts and tribunals. Their choice was not made randomly but consciously. The standard of review concept has been developed mostly in WTO law and investment arbitration, while the margin of appreciation appears throughout the judgements of the European Court of Human Rights. It is noteworthy that the deferential doctrines, and especially the formally conceptualized standard of review, is almost unknown to the jurisprudence of the International Court of Justice (the first case is the Whaling case) and to classical inter-state arbitration (see however the Abeyi arbitral awards). In some courts, like the International Criminal Court, the practice is not sufficiently developed to allow for formulating precise conclusions. The doctrine appears not only in contentious cases, but also in advisory opinions (in, *inter alia*, the ITLOS, 2011 advisory opinion on the activities in the Area).

In each of the studies the authors show that the judicial approaches are very different and that the practice lacks coherence. In addition, the standard of review appears as a procedural tool, while the margin of appreciation has a substantive nature. As a consequence there are can be no conclusions at the end of the monograph. The introductory remarks as well as the conclusions at the end of each particular contribution are unable to fill this lacuna. However, the authors realize that the judicial practice is not yet mature in this respect and that the theoretical reflections on deference by international tribunals are still in the preliminary stage.

Nevertheless some ideas on the content, functions and practical role of the analysed judicial doctrines can be developed in more general terms. One might wonder, for instance, why some international courts and tribunals use both formulas, while others rely on one of them only. This is the question which arises when dealing with deference (i.e. the problem of the substantive and procedural concepts of deference and whether the name of the doctrine is formally mentioned in the reasoning of a court; the issue of good faith review; the relations to similar concepts or doctrines, i.e. the margin of appreciation and States' discretion). The interesting problem is to what extent the doctrines of deference are really at stake. What expressions of the courts' activity are judicial tools in the examination of states' obligations, i.e. instruments invented and used by judges, and what are expressions of the courts' activity depending on the part of international – primary – obligations are under judicial review, for instance in the cases of reasonableness or equitableness? What expressions used by courts and tribunals can be identified as a standard of review or margin of appreciation, and why they can be qualified as such?

The essential issue is to determine the premises of application of deference doctrines and the role of objective (e.g. the existence of freedom of State action, result-oriented rules, scientific facts and data) and subjective (e.g. intent, consciousness, will of a State) elements. Another question is what are the limits/criteria of the use of the analysed doctrines, if any, and should they be accepted as legitimate? One can maintain that a *de novo* standard of review is doubtful because it implies that the international court is in fact the court of the last instance, but equally assert that the full deference standard is hardly acceptable. In some articles partial answers can be found in the concepts of sovereignty, the democratic nature of national authorities, respect for human/fundamental rights, due process, non-discrimination, expertise, etc.

The theoretical reflections can help determine of the place of the deference doctrine in the cases of both traditional (governing inter-state relations) and non-traditional (regulating transnational or even intra-national relations) international law. It could be interesting to see how the doctrines operate depending the nature and scope of international obligations (e.g. the duties of action or omission, of result and of means, and how the doctrines work when the international obligations do not leave any freedom for States, or when the State's duty is that of due diligence), or depending on the nature of national authorities (legislative, executive or judicial), the character and powers of different courts and tribunals (traditional courts and non-traditional, such as the ICC and arbitral tribunals), and on the interactions between them in the field of deference and so on. Though the jurisprudence of the international courts and tribunals is lacks coherence, the answers to these questions could lead to a soft theory of deference in international law.

The reviewed book is the outcome of the fruitful co-operation of many academics from diverse European and non-European research centres. Although it has some shortcomings, it contains a thorough and critical overview of the judicial practice of international courts and tribunals. The findings and suggestions formulated in the book can be valuable and useful for judges, and instructive for legal advisors, other practitioners, scholars and other persons interested in the practice of international dispute settlement with respect to the implementation of prescribed international obligations, and more generally conformity of states' activities with international law. However, they are presented not as ready-to-use precepts, but rather as points of reference for further reflection on the relatively recent and multifaceted phenomenon of judicial deference.

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Vesselin Popovski, Trudy Fraser (eds.), *The Security Council as Global Legislator*, Routledge, New York: 2014, pp. 328

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Since the adoption of Resolution 1373 (2001), the Security Council has often been referred to as a world legislator.[1] Put in a wider context, since the end of the Cold War a significant change can be observed in the position of the Council with respect to Chapter VII of the United Nations Charter. It is important to note that in the very beginning the Council did not make use of some of its powers. In fact, during the first 45 years of its existence the Council responded to a threat or breach to international peace and security only twice: in 1966 when it imposed economic sanctions on the regime in Southern Rhodesia, and again in 1977 when it used sanctions against the apartheid regime in South Africa. In the 1990s the situation changed dramatically and since that time the Council has not refrained itself from exercising its Chapter VII responsibilities in a broader way. In particular, the concept of a threat to peace has been significantly extended, gaining a new momentum after the attacks of 11 September 2001 and now also encompassing global threats such as international terrorism and the proliferation of weapons of mass destruction. Such threats may even have no clear temporal or geographical limitations. Although the Council had dealt in the past with abstract issues, such as the protection of children in armed conflicts[2] or AIDS,[3] it had never before described them as threats to international peace and security.[4] Resolution 1373 has thus been the first one purporting to create general and temporally undefined obligations that bind the members of the United Nations. It marks the beginning of a new stage in the Council taking the lead and carrying out primary responsibility for the maintenance of international peace and security.

The aim of the book under review is to shed some light on the Council's recent legislative activism. Its starting point was a research project carried out at the United Nations University on the global role of the Security Council acting as legislator. Thus as a preliminary matter it is of crucial importance to define "legislation". Legislative acts need to be unilateral in form. They create or modify some elements of a legal norm and,

[1] K. Dicke, *Weltgesetzgeber Sicherheitsrat*, 49 Vereinte Nationen 163 (2001); S. Talmon, *The Security Council as World Legislature*, 99 American Journal of International Law 175 (2005); E. Rosand, *The Security Council as "Global Legislator": Ultra Vires or Ultra Innovative*, 28 Fordham International Law Journal 542 (2005).

[2] *See* Security Council resolutions 1261 of 25 August 1999, 1265 of 17 September 1999 and 1539 of 22 April 2004.

[3] Security Council Resolution 1308 of 17 July 2000.

[4] *See generally* E. De Wet, *The Chapter VII Powers of the United Nations Security Council*, Hart Publishing, Oxford: 2004, pp. 133-77. A groundbreaking Resolution 2177 (2014) asserting that "the unprecedented extent of the Ebola outbreak in Africa constitutes a threat to international peace and security" was adopted by the Security Council on 18 September 2014, already after publication of the reviewed book.

finally, the legal norm is general in nature, i.e. it is directed to indeterminate addressees and capable of repeated application in time.[5] Normally international legislation is associated with the treaty-making processes. As a matter of fact, in terms of a process, it is the form of law-making by international organizations that comes closest to genuine legislation.[6]

Traditionally, international law doctrine has been skeptical about the legislative powers of the Security Council. As argued by Krzysztof Skubiszewski, its decisions under Chapter VII of the United Nations Charter, though binding, are not law-making because they are individualized and/or specific.[7] Only a few scholars recognize a legislative function of this organ. For instance, Keith Harper asserts that the Council's authority to determine threats to the peace implicitly confers on it the authority to act legislatively.[8] Other authors, on the contrary, speak only of "quasi-legislative" functions.[9] Even Hans Kelsen went only as far as to recognize that a Council decision might create new law for a concrete case.[10] However, recent practice shows that the more extensive, "truer" legislative function may, at least to some extent, also be performed by the Security Council.

As announced in the introductory chapter by one of the editors, Vesselin Popovski, the purpose of the book under review is threefold. First, the book seeks to locate the Council's new thematic developments in the context of international law; then it investigates the "thematic shift" – from primarily a global executive to a global legislator. Finally, the book aims at critical examination of the impact of this new behavior on international peace and security in general (page 4). Popovski then points out the irony of the Security Council being both extremely powerful and extremely weak at one and the same time. Despite the obviousness of such a statement, the analyses contained in the book revolve around these counter-playing elements. The authors adopt different stances, examining the political, institutional and, last but not least, legal factors which presently determine the powers of the Security Council.

The editors are aware of the vast literature on the Council's legislative powers, but note that nonetheless a comprehensive study is lacking with respect to the impact of this activity on the policies of member states and on international peace and security. The intention to fill this gap drove both the editors as well as the individual authors to contribute to "a useful foundational study for the assessment of the thematic resolutions

[5] E. Yemin, *Legislative Powers in the United Nations and Specialized Agencies*, Sijthoff, Leiden: 1969, p. 6.

[6] K. Skubiszewski, *International Legislation*, [in:] R. Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 2, North-Holland, Amsterdam: 1995, pp. 1255, 1261.

[7] *Ibidem*, p. 1260.

[8] K. Harper, *Does the United Nations Security Council have the competence to act as court and legislature?*, 27 New York University Journal of International Law & Politics 103 (1994), p. 149.

[9] *E.g.* J. W. Halderman, *The United Nations and the Rule of Law: Charter development through the handling of international disputes and situations*, Oceana Publications, Dobbs Ferry/NY: 1966, pp. 65, 70.

[10] H. Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems*, Fourth Printing, Preager, New York: 1964, p. 295.

and their legislative role in the international constitutional system" (page 11). By and large they succeeded in carrying out the task undertaken.

In his chapter, Anthony F. Lang considers the emergence of legislative behavior in the constitutional perspective and argues for balancing the powers within the United Nations. This latter point is also shared by Charles Samford, who makes the argument for a proper distribution and separation of powers. In doing so, the author refers to the famous ruling by Lord Coke that the king could not act as a judge or a legislator. Any comparison of the Council to a monarch is of course a fascinating juxtaposition. The reader (surely aware of many less subtle descriptions or comparisons applied to the Security Council) may be impressed by the insightfulness and balanced character of the argument made by the Samford, which at the same time prepares the reader for the following study by Hugh Breakley, who examines the resolutions of the Security Council in a systematic manner. He offers six dimensions that are crucial for analysis of the normative properties of Security Council resolutions, going well beyond the traditional approach which usually consists of merely underlining the binding and general character of the adopted acts. Particular attention in this regard is paid to "comprehensive legality", which places the outcome of normative activity in a wider context, thus making it possible to develop interrelations between the different sources of legal obligations. Such a position may be regarded as complementary to the following contribution, whereby Jan Wouters and Jed Odermatt concentrate on the extent of the legislative activity by the Security Council and consider its legal limitations. Finally they analyse in particular the possibility of judicial review by the International Court of Justice.

The second part of the book contains contributions on thematic resolutions, starting from non-proliferation of weapons of mass destruction. Resolution 1540 is subjected to a complex scrutiny by Olivia Bosch. The next chapter, by Monika Heupel, offers an examination of the Council's reactions to terrorism, and makes a telling argument on the progressive intrusiveness of the measures taken by the Council. The following contributions address the resolutions on piracy in Somalia (Peter Lehr), child soldiers (Noëlle Quénivet), elimination of discrimination against women in peace and security processes as well as of impunity of gender-based violence (Robert Zuber and Melina Lito), protection of civilians (Hugh Breakey) and environmental issues addressed by making reference to climate change (Trudy Fraser). The next two chapters address the Council's sometimes proactive approach towards international criminal justice, first dealing with the *ad hoc* tribunals (Martin J. Burke and Thomas G. Weiss) and then with the International Criminal Court (Vesselin Popovski). As rightly underlined by the latter author (and editor), the approach by the Security Council is highly selective, which provokes Popovski to argue for more consistency in the Security Council's actions toward the ICC and for its more constructive engagement.

The concluding chapter, authored by Trudy Fraser, sums up the contents of the book and offers some general remarks, rejecting the fears that the Security Council is assuming purely legislative functions, and discussing its future development.

Without doubt the book's careful and comprehensive analysis of the respective actions taken by the main political organ of the United Nations is timely and much needed. Surely Security Council legislation may be a powerful instrument in maintaining international peace and security, as pragmatically speaking it has the advantages of speed and of the general scope of validity of its decisions, which are binding on all states. Such "legislation" however also involves several serious problems, and these have been competently addressed by the authors who contributed to the book. Herein lies the greatest advantage of the book under review – its combining of different views, backgrounds and underlying assumptions. Naturally the contributions differ in many ways, including formally, but taken together they shed additional, useful insight which can aid in identifying new dimensions of the role presently played by the Security Council as "arbiter of international peace and security".

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Robert Kolb, *The International Court of Justice*, Hart Publishing, Oxford: 2013, pp. 1362

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Drawing on his own experience as an advocate before the Court, Professor Robert Kolb has written extensively on the International Court of Justice (the ICJ or the Court). The book under review is the translated and updated version of the French original (*La Cour internationale de justice*) published with Pedone in 2013. In addition, Professor Kolb also released *The Elgar Companion to the International Court of Justice* with Edward Elgar Publishing in 2014, addressed firstly to non-lawyers. The narrative of the latter book is therefore different from the one being reviewed. The *International Court of Justice* is both rich and demanding reading, aimed at a target audience with a legal background, which Professor Kolb himself frankly designated as "lawyers (or those aiming to become lawyers), especially international lawyers" (at p. vii). Definitely the readership is rightly defined, although the level of expertise expected of a reader differs from one part to another. In most cases the book's perspective seems aimed first and foremost at experienced lawyers. From time to time, however, the author delves into an elementary reasoning designated more for students of law who, as noted, are also mentioned among the target readership. This may constitute a kind of inconsistency, although such a technique might as well prove very efficient in terms of accommodating different categories of readers.

The present book provides a careful, meticulous examination of the main judicial organ of the United Nations, relying of course on its Statute and procedures, but confronting them with the practice of States, that of the United Nations and – last but not least – that of the very Court itself. Definitely, the book might be compared to and is certain to occupy a position similar to the most valuable traditional treatises on the ICJ, including the seminal masterpieces on the Permanent Court of International Justice (PCIJ) by Bustamante or Hudson and the classic multi-volume piece by the late Shabtai Rosenne (latest edition with the assistance of Yaël Ronen). Frequent reference is also made in the book to the *Commentary on the Statute of the Court*, edited jointly by Andreas Zimmermann, Christian Tomuschat, and Karin Oellers-Frahm, with a considerable contribution on the general principles of procedural law by Kolb himself.

Against this background a reader might be confused when confronted with the observations, mentioned in the initial paragraph of the book's Preface, that "hardly any monographs have been published in recent times" and to "the dearth of comprehensive texts". Luckily however, such a diagnosis, whether correct or not, led the author to undertake – with success – a project in which the book under review is the outcome. In the same breath one must also mention the impressive collection of essays *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence* by Hugh Thirlway, comprised of his contributions previously published in the British Yearbook of

International Law and released as a two-volume-set by Oxford University Press (OUP) in 2013, i.e. in parallel with the book under review. Taken together with a series of recent specific books on the ICJ (including, *inter alia*, a dissertation by Gleider I. Hernández *The International Court of Justice and the Judicial Function*, also published by OUP), one can legitimately wonder whether the evaluation provided by author in the opening part of the Preface still holds true.

This book covers probably the widest possible spectrum of issues connected with the ICJ. It starts with "Initial Observations on the Peaceful Resolution of International Disputes", giving the reader a broad point of reference and a more general starting point for the subsequent analyses. Then it discusses the origins of the ICJ. Attention is of course paid to the establishment of the ICJ's predecessor, the PCIJ, and the roots in the arbitration of international justice. The dissolving of the PCIJ is scrutinized particularly from the perspective of the transition to the ICJ. From an organisational point of view the main development consisted in integrating the Court into the United Nations machinery. Nevertheless, after examining the formal function of the ICJ as the principal judicial organ of the United Nations, Kolb also considers it from the perspective of an organ of public international law. Perhaps unexpectedly, the reader then encounters a kind of introduction to the other international jurisdictions based at The Hague, which in turn leads to elaboration of a definition of "international tribunal", demonstrating different approaches and advocating for a not-too-rigid application of the identified criteria.

Chapter III is devoted to the legal instruments governing the operation of the Court. The starting point of this analysis is of course the constitutional document, namely the Court's Statute. Subsequently attention is drawn to the procedural rules and then to practical considerations. They constitute an indispensable reference for any further examination.

In Chapter IV Kolb analyses the composition of the ICJ. When discussing the bench, his thoughts on *ad hoc* judges are especially worth mentioning. Some additional light is then shed on the questions surrounding the chambers, which particularly merit attention.

The central part of the treatise is the study of the contentious procedure. Inter-state disputes are scrutinized in Chapter V which – extending to over 500 pages – dominates over the other parts of the book. In a systematic manner the author considers seizing the Court, admissibility issues and jurisdiction, pronouncements of the Court (including the thoughtful consideration on the possibility of declaring *non liquet*), effects of the Court's judgments, their interpretation and revision. Somewhat surprisingly one then finds considerations on the implementation of the judgment. Of course the measures taken by the Security Council to enforce compliance with ICJ judgments are a fascinating issue, nevertheless this is a completely separate subject, going well beyond the adjudicative phase. Perhaps the reason for including the issue in the book was to tackle various other aspects of the relationship between the Court and the Council together. The last subchapters of Chapter V deal with the possibility of judicial review by the ICJ over the acts of the Council and the reverse mechanism of influence, i.e. the power of the Security Council to dis-seize the Court of a case in which it has jurisdiction and its possible competence to limit the freedom of the parties to have recourse to the Court.

In addition to Chapter V on the contentious procedure, there are also separate chapters on general principles applicable to contentious proceedings (Chapter VI) and on procedural aspects of contentious cases (Chapter VII). The former chapter gives insight into three issues: the scope and the application of a maxim *ne eat iudex ultra petita partium*, questions of evidence (in particular the burden of proof), and the specific injection of the principle of good faith into the realm of international dispute settlement by the Court, i.e. the duty of loyalty between the parties. With respect to the latter question Kolb derives extensively from his previous works on good faith, considering it also from different angles (including the ban on the abuse of process, the principle of estoppel, or the rule prohibiting profits from one's wrongdoing).

Interestingly, following the examination of the advisory jurisdiction of the Court (Chapter VIII), another chapter (IX) again deals with general principles, this time governing both functions of the ICJ. In particular, attention is drawn first to principle of equality between the parties, tackled from different perspectives: as a constitutional principle, as a synonym for reciprocity, and finally as a purely procedural principle. Then the reader is exposed to a splendid and innovative consideration of the proper administration of justice, a topic which until now has not received adequate examination in the scholarly literature.

Chapter X is devoted to the Court's jurisprudence and its general contribution to the development of international law. Kolb traces the trends by identifying specific features of the ICJ's judicial activity. The whole period of its operation is divided in several phases: after paying due regard to the PCIJ more light is shed on the development of jurisprudence by the ICJ. This eloquent and relatively concise overview is then accompanied by considerations concerning the precedential value of ICJ judgments, and subsequently by the Court's attempts to strike a balance between the two opposite poles of judicial policy, namely judicial activism and judicial restraint.

The following chapter deals with miscellaneous questions, which include such remote issues as publications, finances, immunities and privileges, extra-judicial activities and then the public's perception of the Court. The two last parts of this chapter merit special attention. For some (unknown) reasons the relations between the ICJ and other courts and tribunals attracted only minor, even cursory, attention in this otherwise elaborate analysis. One may of course claim that this is a separate issue that has already been sufficiently discussed elsewhere, but given the crucial importance of these issues, as evidenced also in the concluding chapter, it is hard to consider the mere identification of the problem in this chapter as satisfactory. The ICJ may, or perhaps even should, play a more active role in addressing the conflicts of jurisdictions or inconsistencies in jurisprudence. Whether appropriate or not, it is hard to conceive of any reaction towards the proliferation of international judiciary without ascribing at least some role to be carried out by the principal judicial organ of the United Nations.

The other problematical question concerns reform of the Court. This issue takes up merely six pages of the book, which seems like a very modest number, especially when juxtaposed with the other issues tackled by Kolb in previous parts. While the illustrative listing of different proposals offers a comprehensive overview of the issues perhaps in need of amendment, specific commentary (albeit short) has been provided only to the ideas to privatize the contentious procedure and to the attempts to broaden the circle of entities empowered to request an advisory opinion from the Court.

The book ends with a concluding chapter entitled: "The Future of International Justice". After assessing the Court as "one of the twentieth-century's great contributions to dispute resolution and to the emergence of institutionalised justice that can put flesh on the bones of a progressively consolidating corpus of international law" (at p. 1211), Kolb points to the limited (marginal) contribution of the Court to this general objective. Despite all the enthusiasm towards the International Court of Justice, he resists the temptation to use condescending language to suggest all too easy solutions. Instead, Kolb identifies several external and internal factors influencing the restoration of the role of law. Given the vagueness of some of the postulated changes (improvements in international law or strengthening both peace and the role of global organization), it is the internal level factors that are worth considering. Within the latter group Kolb mentions some of the obvious ones, like the quality of the Court's jurisprudence and services or its contribution in the diplomatic field, but he would also consider the "Court's activities as one element in the overall panoply of dispute settlement mechanisms." In this regard it is worth noting that *mode* shopping is now very often a question of *forum* shopping. Certainly it is also, as rightly observed by Kolb, the Court's capacity for innovation (including both the development of its constitutional function or acting as a court to which preliminary questions might be addressed) that could play a vital role in this regard. Most readers would probably subscribe to his assessment that such improvements are unlikely to occur in the nearest future, but this should not detract us from analysing these issues.

Annexed to the substantive part of the book are the Statute, the Rules and Practice directions. A Selected Bibliography is also provided, offering a concise list of monographs and articles separately for the ICJ and its predecessor. Hence the reader gets a full package for consideration of the role and operation of the Court. The comprehensive index provided at the end proves indispensable, especially for such an elaborate book.

In general, one should consider the treatise by Kolb as an authoritative source of reference, contributing much to the understanding of the International Court of Justice. Some questions of terminology may nevertheless arise. For example, the heading "Provisional measures of protection" does not find any basis in the Statute or the Rules of the Court. Sometimes the adjective "optional", when referring to the Court's jurisdiction, might cause some discomfort for those used to the optional clause providing for compulsory jurisdiction under Art. 36(2) of the Statute, an issue so perfectly analysed by Professor Renata Szafarz.

Several repetitions, albeit announced in the Preface, may confuse the reader, be they necessary or not. And despite the initial intention not to overwhelm the reader with too many footnotes, their number is indeed very large. As a result the extensive, over-reaching analysis is well-documented, but as a consequence the reader's determination to carry on with a full reading may decrease (as acknowledged by the author himself in the preface). Kolb is probably right in envisioning that his masterpiece (not his word) will be used mainly as a reference work, useful to consult for specific issues. This is not, however, the only possible option. The present reviewer happily belongs to the "hardy souls prepared to read the whole of the treatise" and can only recommend it.

The book under review delights the reader with its comprehensiveness and depth of legal analysis. One is impressed not so much by the wealth of information, but by the strict, meticulous way of analyzing different theoretical threads, always illustrated using the most accurate reference to the jurisprudence. Kolb's treatise combines theoretical expertise with practical sense. Therefore it will be of tremendous help for both academics and practitioners, not only those working in the field of public international law. This is definitely a "must have" for any legal library!

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Lilian Richieri Hanania (ed.), ***Cultural Diversity in International Law: The Effectiveness of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions*** **(series: Routledge Research in International Law), Routledge, London-New York: 2014, pp. xx + 322**

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Nearly ten years have passed since the adoption of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (CDCE).[1] Though this is still a new treaty within a broad range of international instruments designed to protect and safeguard cultural heritage, its conceptual framework and impact on other areas of law and policy makes it one of the most significant. In fact, the CDCE is often described as "a major step towards the emergence of an international cultural law."[2] It recognizes the distinctive nature of cultural activities, goods and services as vehicles of identity, values and meaning. Moreover, it advances the view that cultural activities, goods and services (embodying or conveying cultural expressions which result from the creativity of individuals, groups and societies) are not, irrespective of their important economic value, mere commodities or consumer goods that can be regarded only as objects of trade. Clearly, this latter aspect has created vivid controversies (sometimes described as a "clash of cultures") in terms of the interpretation of obligations under international trade agreements in relation to those stemming from the CDCE.[3] Thus, the core issues which arise in this regard relate to the practical outcomes of the CDCE regime in distinct areas and layers of international law, and its effectiveness at the global, regional and national levels.

The book under review, edited and co-authored by Lilian Richieri Hanania, offers a number of valuable insights into the practical operationalisation of cultural diversity in international law. Moreover, by offering a consistent practical perspective, it turns out to be one of the most interesting and innovative monographs within the vast scholarship concerning cultural diversity.

The book constitutes the result of a research project carried out in 2012-2013 under the auspices of the Institute of Comparative Law of the University Paris 1 – Panthéon-

[1] Adopted on 20 October 2005, entered into force on 18 March 2007, 2440 UNTS 311. To date this treaty binds 137 States Parties and one regional international organization: the European Union.

[2] I. Bernier & H. Ruiz Fabri, *Implementing the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions – Future Actions, Study carried out on behalf of the Government of Québec (2006)*, available at: http://www.diversite-culturelle.qc.ca/fileadmin/documents/pdf/unesco-anglais.pdf (accessed 30 April 2015).

[3] T. Voon, *UNESCO and the WTO: A Clash of Cultures?*, 55(3) International and Comparative Law Quarterly 635 (2006), pp. 16-17.

Sorbonne and the CNRS (*Centre national de la recherche scientifique*), gathering an international and multidisciplinary (law, political science and cultural management) team of experts from various professional backgrounds. It critically assesses selected aspects of the implementation of the CDCE and offers several analytical, well-substantiated conclusions on its effectiveness. The general introduction by Lilian Richieri Hanania and Hélène Ruiz Fabri intentionally avoids a more profound analysis of the historical background of international initiatives which led to the adoption of the CDCE. It also omits explanatory comments on individual provisions of the treaty. Instead, it offers a highly interesting conceptual framework concerning the application of the CDCE and its normative strength at the level of both treaty law and customary international law. This approach then shapes the entire structure of the book, which provides well-documented insights regarding the CDCE Parties' practice in terms of the implementation of this international instrument. In fact, the construction of the book is very clear, closely resembling a well-designed report. Accordingly, each of the nineteen chapters contains a separate section providing conclusions to the analysis carried out and offering several explicitly formulated recommendations on how to achieve the strengthening and better effectiveness of the CDCE in a particular area of international law or in a defined regional or national context.

The book is structured in two general parts, each divided into two subsections. The first part deals with the specificity of cultural goods and services in international law. Not surprisingly, the initial set of chapters refers to the impact of the CDCE on trade issues, thus exploring the "trade and culture" debate in relation to the WTO regime, the case law, and the operationalisation of the CDCE in the context of the negotiations of a Services Trade Restrictions Index at the OECD. The phenomenon of globalization constitutes both a challenge and threat to the protection and promotion of access to cultural diversity. This observation particularly refers to potential clashes between the objective of protecting cultural diversity and the efforts to liberalize and facilitate international trade and global economic development. In fact, the topics of culture and cultural heritage have long posed serious difficulties in international economic law, since cultural policies have been perceived as negative factors hampering international trade and investment.[4] Certain concessions have been available only under "cultural exception" clauses, giving effect to States' interests in limiting free trade in their culture in order to protect and promote their artists and other elements of their culture.[5] The inclusion of cultural heritage and cultural diversity in a broader human rights framework has given a new normative power to their protection and promotion. In this regard, a highly interesting and novel argument is advanced in the chapters by Steven van Uytsel and Fabio Morosini. Both authors convincingly develop and explain the idea of culture as a part of the WTO agreements. Their argumentation is founded on the concept of

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[4] V. Vadi, *Cultural Heritage in International Investment Law and Arbitration*, Cambridge University Press, New York: 2014, pp. 93 ff.

[5] *See generally*, J. Shi, *Free Trade and Cultural Diversity in International Law*, Hart Publishing, Oxford: 2013, pp. 139 ff. and 233 ff.

sustainable development, which has already enlarged the policy space for the environment and health within the WTO regime. They claim that today it also embraces the cultural dimension, and thus culture should not be seen as foreign to the WTO legal framework, nor as modifying or changing parts of the WTO agreements. Rather, the cultural concept of sustainable development should enlarge the Members' policy space within the WTO.

The next subsection uses a systematic approach to explore and approach the CDCE provisions, examining the impact of this treaty on selected fields of international law going beyond the "trade and culture debate" (e.g. intellectual property rights, social and labour issues, the creative economy, and new digital technologies). It also discusses the normative power of the CDCE Operational Guidelines and assesses their relevance and influence on the actual implementation of the CDCE in terms of follow-up actions and programmes. This subsection of the book describes a great variety of legal contexts affected by the CDCE. However, a systemic approach to the topic of cultural diversity would require a better contextualization of the CDCE regime within the broader legal framework of UNESCO standard-setting on one hand, and the exploration of the impact of the CDCE on the interpretation of human rights guarantees, on the other. As the UNGA noted in its 2000 resolution *Human rights and cultural diversity*,[6] joint respect for both cultural diversity and the cultural rights of all advances the enjoyment of all human rights and fosters "stable friendly relations among peoples and nations worldwide." Importantly, the protection of cultural diversity ("a source of exchange, innovation and creativity") and access to it are seen as vital for the long-term survival of humanity in a similar way "as biodiversity is for nature".[7] Hence, the diversity of living cultures enters into the domain of common goods, because "all cultures form part of the common heritage belonging to all mankind",[8] the protection of which lays in the general interest and constitutes an obligation of the international community as a whole.[9] It is argued that recognition of the importance of cultural pluralism, and the rejection of cultural hegemony, facilitate intercultural dialogue and understanding, which leads to the achievement of global acceptance of common interests, legal standards, and peace and security. Therefore the protection and promotion of cultural diversity appear to be crucial for the stability of the entire international legal system. Indeed, a wider analysis of the role played by the CDCE in the area of international cultural heritage law and human rights law would provide a truly comprehensive background for all the research outcomes presented in this volume.

[6] Adopted on 22 February 2000, UN Doc A/RES/54/160.

[7] Art. 1 of the Universal Declaration of Cultural Diversity, adopted by the General Conference of UNESCO on 2 November 2001, UNESCO Doc 31C/Resolution 25, Annex I.

[8] *See inter alia* Art. I(3) of the Declaration of Principles of International Cultural Co-operation, adopted by the General Conference of UNESCO on 4 November 1966, UNESCO Doc 14C/Resolution 8.1.

[9] *See also* A. F. Vrdoljak, *Human Rights and Cultural Heritage in International Law*, [in:] F. Lenzerini, A. F. Vrdoljak (eds.), *International Law for Common Goods: Normative Perspectives on Human Rights, Culture and Nature*, Hart Publishing, Oxford: 2014, pp. 168-72.

The second part of the book critically assesses the implementation of the CDCE beyond the specificity of cultural goods and services. Accordingly, it is designed to evaluate the application of the CDCE regime in relation to education and public awareness, the participation of civil society, integration of culture into the concept of sustainable development, and the place of cultural diversity within national policies and international and regional cultural cooperation. The first five contributions to this part of the book deal with the "horizontal implementation" of the CDCE regime in terms of reinforcing international cooperation in the field of culture (technical and financial assistance on the basis of the CDCE; networking opportunities in cultural policies and governance; cultural relations and cultural diplomacy examined and assessed based on the example of the Mediterranean region; and the EU experience with cultural cooperation protocols and agreements with third parties, analysed as an attempt to promote and implement the CDCE within the framework of bilateral trade negotiations). In turn, the second subsection of this part of the book focuses on the "vertical implementation" of the CDCE at the regional and national levels. The European practice is of particular relevance as the European Community was actively involved in drafting the CDCE and today the EU is the only non-State Party to this treaty. Thus, the CDCE has both intra- and extra-EU legal effects. The chapter by Magdalena Ličková skilfully explores the status of the CDCE within the EU legal and institutional framework and its judicial interpretation. Other contributions in this subsection explore the practice of implementation of the CDCE in the Mercosur, Brazil, Québec, and more generally in relation to Latin America in the context of new education acts (those of Bolivia, Chile, Ecuador, Honduras and Uruguay). Interestingly, the chapter by Piatã Stoklos Kignel provides critical insights into the methods by which the private sector may more strongly contribute to implementation of the CDCE. Perhaps what is missing in this part of the book is an analytical contribution exploring and/or classifying the arguments (political, economic, structural, cultural, scientific etc.) against the promotion of cultural diversity voiced at both international and national fora. Such a chapter could provide a better explanation of the choices made with respect to the particular case-studies included in the last subsection of the book.

The above observation also seems to be valid in relation to the findings provided in the general conclusion by Richieri Hanania. The editor of the book summarizes the obstacles and difficulties in the implementation of the CDCE which undermine its global effectiveness. She focuses mainly on the weaknesses existing within the convention itself (weakly binding wording of the CDCE provisions; ambiguity of the terminology used; and the misunderstanding of the core objective of the CDCE – that is, the recurring view that this instrument constitutes an additional barrier to trade liberalization while, in fact, it is designed to promote a more balanced exchange of cultural goods and services). More general problems of cultural and political opposition to this international instrument are only briefly signaled. While such an approach is fully understandable and legitimate in the context of the analyses conducted throughout the book, it would seem that shedding more light on other problems affecting the global effectiveness of the CDCE regime would be of great benefit for the entire analytical endeavour.

An important argument addressed by Richieri Hanania regards the postulate of comprehensive and coherent action on the part of the CDCE Parties for its full implementation. She argues that this can be achieved by the integration of culture into the concept of sustainable development. Moreover, she rightfully notes that the issue of cultural diversity relates not only to the "trade and culture" debate, but it also affects a vast range of areas of international law and policy. Thus, closer international cooperation and an increased coherence of the actions undertaken by states are crucial to bolstering the effectiveness of the CDCE. The prescriptive aspect of the book is also visible in the in-depth recommendations offered at the end of the concluding chapter, relating to: 1) strengthening the CDCE with respect to the "trade and culture" debate; 2) fostering the implementation of the CDCE objectives through a systemic approach; 3) promoting international cooperation through the CDCE; and 4) mainstreaming the CDCE into national and regional actions.

In conclusion, *Cultural Diversity in International Law: The Effectiveness of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions* is a novel and comprehensive analysis of the practical aspects regarding implementation of the CDCE. It broadens the horizons of the role of the CDCE beyond the realm of international trade and towards a variety of normative, institutional and geographical contexts. Moreover, by offering a wide range of well-analysed actual practices of the CDCE Parties, supplemented by a coherent set of recommendations, it becomes an important source of information and knowledge not only for legal scholars, but also for law practitioners and cultural policy makers worldwide.

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Ryan Goodman, Derek Jinks, *Socializing States: Promoting Human Rights through International Law*, Oxford University Press, New York: 2013, pp. 240 (incl. bibliography and index)

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Understanding how international law influences state behaviour and the modes of this influence in the area of human rights is a particularly challenging exercise. It is even more challenging when attempted at a high level of abstraction and with the ambition of improving "our understanding of how exactly the international legal regime can help to promote the adoption of fairer, more human forms of government" (p. 1).[1] International legal scholarship does not seem to be overly preoccupied with examining the social patterns of influence discernible within the international community with the same attention it attaches to issues of (non)compliance with international law and its legal consequences. Of course, analyzing how and why states might be induced and encouraged to comply with international human rights obligations might be considered an issue of primary interest to international relations theorists, but arguably it should also be of concern to international lawyers. Why do states follow (or not) norms of international human rights law, and what are the relevant social factors in this context? These are issues of general importance for every international law scholar or practitioner, especially since we hear all too often that international human rights law is far from being effective, or even that it has totally failed to meet its objectives.[2] Although the reviewed book does not offer any easy solutions to the problem of efficiency of human rights law, it does provide a vision of how states might feel encouraged to act in better compliance with their international legal obligations concerning human rights.

R. Goodman and D. Jinks distinguish three mechanisms that influence states to comply (or not) with their commitments: material inducement, persuasion, and acculturation. The authors pay particular attention to the latter, though they do not claim it is the most effective or important mechanism of influence. They assert that acculturation has been in fact neglected, often equated or confused with persuasion. According to the authors, acculturation should be perceived as "a general process by which actors adopt the beliefs and behavioral patterns of the surrounding culture" and as such "induces behavioral changes through pressures to assimilate – some imposed by other actors and some imposed by self" (p. 4). The other two mechanisms of influence, i.e. material inducement and persuasion, are supposedly better analyzed and understood than acculturation, which thus remains the main focus of the authors' book. Having said that, the authors aim at presenting a full picture of how states' behaviour is influenced by international society. They endeavour to explain the mechanisms of social

[1] Unless provided otherwise, all quotations and page numbers refer to the book under review.
[2] *Cf.* E. Posner, *The Twilight of Human Rights Law*, Oxford University Press, Oxford: 2014.

influence one by one, and engage in detailed research in order to offer conclusions on an integrated model of human rights design.

The book is divided into three parts. The first develops "A theory of influence" based on the above-mentioned three mechanisms. The authors observe that material inducement constitutes the most obvious mechanism of social influence by "increasing the benefits of conformity or the costs of nonconformity through material rewards and punishments" (p. 23). Indeed, economic incentives instantly come to mind when we identify motives behind states' behaviour, and in particular economic sanctions for noncompliance are an obvious example of this kind of influence. However, material inducement may have little to do with the real preferences and objectives of the "influenced" state. It is only when the latter are modified due to external influences that we may identify another mode of social influence, i.e. persuasion. This happens when "actors actively assess the content of a particular message and change their minds on the basis of the congruence of that information with their existing beliefs and values" (p. 24). However, most of the first part of the reviewed book discusses the third mechanism of social influence, i.e. acculturation. The authors strive to provide readers with a thoroughly elaborated model of acculturation, starting with an explanation of how the former is to be distinguished from persuasion. While both mechanisms are aimed at inducing a change in the states' "thinking" and behavioural patterns as a result of external social pressures, the difference lies in the motives that might lead the concerned state to comply. Goodman and Jinks explain that in case of persuasion it is the content of a norm that matters most, because the persuaded state has already accepted its validity or legitimacy. In the case of acculturation, it is not the relation of a state to the norm that shapes the influence, but rather the relation of a state to a reference group of other states. The authors claim that "acculturation occurs not as a result of the content of the relevant rule or norm but rather as a function of social structure" (p. 29). As such, acculturation may work tacitly when the relations between the state concerned and its international environment sufficiently encourage the former to be more like the others in the same group. No wonder then that the authors refer in this context to mimicry – a term present in social sciences but evidently derived from biology.

What is worth underlining is that the authors do not take for granted that the above-mentioned methods of social influence apply to states in the same way that they work on an individual level. In other words, the socialization of states is not to be assumed without blinking an eye. Instead of attempting to attest that a state may feel, believe or have preferences, the authors choose a more empirical approach and argue that evidence of state practice and macro-level phenomena do reflect influences on domestic policies and allow one to claim that states socialize. This sounds convincing, especially in that, according to Goodman and Jinks, state socialization is "a process grounded in the beliefs, conduct, and social relations of individuals" (p. 41). The authors expressly prefer not to dwell on the ontological status of the state and its personhood. This might be understandable in the context of their project, although it may also leave the reader with the impression that the status of states and their legal personality is somewhat vague or ambiguous, whereas in fact these issues are relatively well known and hardly controversial, at least within the sphere of public international law.

In any case, the authors undertake a detailed and impressive analysis of the empirical record to justify their claim for the significance of acculturation as a social mechanism in the international community. They provide ample examples, both from outside and inside of the human rights domain, such as environmental policy, public education, constitutional design and substantive rights protection. One of the thought-provoking issues raised by the authors in the "empirical part" of their book is whether acculturation may be convincingly proven by reference to regional or neighbouring state structures. Goodman and Jinks refer to a recent study of human rights compliance by Beth Simmons[3] to argue that the phenomenon of acculturation does exist in a regional context and should not be considered in global terms only (pp. 70-74). This regional dimension of acculturation could be a fascinating field of further study, especially when we consider how human rights protection has developed in regional systems and intergovernmental organizations. A notorious example from the European continent would be the last twenty five years of the functioning of the Council of Europe (CoE), which doubled its membership since 1989 and in which the acculturation-driven phenomena in the context of human rights are self-evident. Discussing this example in more detail would exceed the limits of this review, but let me just note that tracing acculturation linked with Council of Europe membership and the accompanying CoE human rights treaties could be a fascinating research objective. It would undoubtedly identify both shining examples of compliance based on acculturation, as well as regretful instances of paying lip service to human rights commitments by some member states.

As a matter of fact, the whole process of the enlargement of the Council of Europe after 1989 has been based on the assumption that the newly established, or re-established, democracies in Central and Eastern Europe (CEE) would benefit from the Western-oriented culture of human rights, democracy and the rule of law. Material inducement or persuasion was not decisive in this process. The CEE states were eager to accede to the CoE as they wanted to be "in the same club" and share the culture, values and human rights standards of that organization. Goodman and Jinks refer to the Council of Europe in their book, but only *en passant* while discussing the inclusiveness and restrictiveness of intergovernmental organizations (p. 91). By the way, I do not share the authors' view as to the restrictive rule adopted by the Council of Europe with respect to the admittance of new members or observers. While indeed some preconditions on CoE membership did exist and were even expanded in the 1990s and 2000s, the candidates for membership did not undergo any thorough scrutiny of their human rights performance. Free and democratic elections were always considered the most important requirement, with some further conditions added later (like ratification of the 1950 European Convention on the Protection of Human Rights and Fundamental

[3] *Cf.* B. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics*, Cambridge University Press, Cambridge: 2009.

Freedoms), but at least the first wave of the CoE enlargement after 1989 may hardly be considered as based on any restrictive rule. Some even claimed the organization had been too inclusive and many debates were held in late 1990s as to whether the accession of, e.g., the Russian Federation to the CoE in 1996 had not been premature. This perspective of twenty-five years since the first states from CEE joined the CoE provides a good background for studying the regional dimension of acculturation and allows for a tentative conclusion that most new CoE members did improve their human rights records because of the influences and pressures they experienced as members of the organization.

In Part II of the book the authors discuss the application of the influence mechanisms on the design of the international human rights regime. The problems raised in this part also include the afore-mentioned membership in international organizations, with particular focus on their inclusiveness or restrictiveness, the level of precision in defining state obligations, as well as methods of monitoring and enforcing compliance with substantive human rights norms. With respect to the latter issue the authors argue, for instance, that whereas publishing best practices proves negligible for the material inducement mechanism and only moderately effective in terms of persuasion, it is highly effective when taking into account the acculturation mechanism. More or less similar conclusions are drawn when criticizing "bad actors" for their human rights performance under review. More nuanced answers were offered when it comes to binding decisions and sanctions: they are claimed to be highly effective and essential for material inducement, but potentially counterproductive for other methods of social influence. The basic conclusion is that monitoring and reporting as mechanisms of human rights enforcement are considered effective for material inducement, but even more effective and important when examined as factors stimulating persuasion and acculturation.

The last part of the reviewed book deals with problems and prospects of state socialization. The authors go back to the question of how international human rights law might better harness the mechanisms of social influence to achieve its goals. Before addressing this question, a potential weakness in the theory of acculturation-based compliance is examined, notably whether acculturation may leave a gap between what states commit to and what they undertake in practice. The authors answer this concern by arguing that acculturation does not necessarily result in a split between what states declare and what they do. More often than not, acculturation does induce some form of internalization of international norms and commitments. And even if the gap between the states' declarations and practices persist, this does not lead to the conclusion that the acculturation process has been a total failure. The authors argue that acculturation sometimes assumes a long-term evolution and that improvement of domestic implementation requires patience. Managing the gap between commitments and practice is discussed in Chapter 8, whereas in Chapter 9 the authors aim at presenting the basic features of their integrated model of state socialization. They insist that the integrated model should "take acculturation seriously" and include positive and negative interactions between the various mechanisms of social influence, as well as identify conditions for their success. The model of state socialization set out by R. Goodman and D. Jinks could well serve as a valuable theoretical background in discussions about re-designing systems of protection of human rights with a view toward better state compliance.

In the last chapter of the book the authors take stock of their major empirical findings, sum up the normative applications (membership in international organizations, defining substantive obligations, juxtaposing implementation mechanisms with modes of social influence), and highlight the directions for future normative and empirical research related with their project. Without doubt the sophisticated model of social influence elaborated by the authors is inspiring and provokes further studies on a more operational level. For instance, it would be interesting to explore how the model corresponds with phenomena related to the execution of judgments of international courts in domestic legal orders. More specifically, with respect to the binding force of the judgments of the European Court of Human Rights a question arises: What kind of social pressures occur and acculturation-driven changes arise within the members states following the ECHR judgments?

Quite obviously the authors of the reviewed book had a more holistic and far-reaching concept in mind when they shared with readers their model of state socialization and modes of influence. Whatever their intentions, it appears that their remarkable study might trigger further research into the existing normative systems of human rights protection. This concerns both the UN and regional systems, since the phenomenon of acculturation seems to be ubiquitous.

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