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Karolina Wierczyńska, Łukasz Gruszczyński

EDITORIAL

The new volume (XXXIX) of the Polish Yearbook of International Law is finally out. As you can see, we continue our editorial policy of giving priority to those issues of international law that are particularly important for Central and Eastern Europe.

The first half of 2020, i.e. when we were preparing the current volume, was a very difficult time. Undoubtedly the world has found itself in the middle of a global multi-dimensional crisis. This crisis, caused by the outbreak of Covid-19, is probably one of the biggest challenges that humanity has experienced in the last few decades. We still cannot predict how it will impact the national and global economies, health systems, politics, and law. Neither do we know how we should respond to it. Perhaps Yuval Noah Harari was right when he noted that: "In this time of crisis, we face two particularly important choices. The first is between totalitarian surveillance and citizen empowerment. The second is between nationalist isolation and global solidarity."[1] If this assessment is correct, these choices will obviously determine the shape of public international law in the forthcoming future, both at the general level as well within its specific branches. So what should be the response to a global economic crisis? Do we want to come back to the previous status quo? Or rather build a new more sustainable system? How can we protect human rights and at the same time ensure the effective management of public health? How can we provide humanitarian help while ensuring the protection of local and national communities? We expect that researchers will be able to identify many specific scientific problems and analyse them in greater depth. Hopefully this will already be visible in the next volume of PYIL.

The year 2020 was also difficult because we lost some important members of our academic community. In particular two excellent professors of international law who for many years have acted as Editors-in-Chief of the Polish Yearbook of International Law passed away. We dedicate the memoir article to professor Andrzej Wasilkowski (by Jerzy Menkes) and we decided to pay a tribute to professor Janusz Symonides by reserving a part of the next volume to him and his research achievements (for details see our call for papers).

The next issue will also be special because it will be a jubilee number; the 40th volume of the Yearbook marks the long journey that the journal has made over last 50 years. We are truly proud that we have been able to take part in this journey for more

[1] Y.N. Harari, *The World after Coronavirus*, Financial Times, 4 May 2020.

than a decade now, and we also thank our Readers for being with us. In this context, we would like to call the attention of our Readers to the forthcoming special volume of the Netherlands Yearbook of International Law, which will be dedicated to International Law Yearbooks published in different parts of the globe. The volume will also feature a text on PYIL.[2]

As far as the current volume is concerned, its first section, entitled "General Articles", includes three texts that deal with classical problems of international law: the right to self-determination; sources of general international law; and the status of unrecognized entities (by Peter Hilpold, Przemysław Saganek and Anna Czaplińska respectively). They are followed by a very interesting article that looks at the international law traditions at the Saint Volodymyr Imperial University of Kyiv (by Kostiantyn Savchuk). As usual, texts relating to international and European human rights law are strongly present in the volume. This group particularly includes articles analysing the problems posed by the restitution of property taken during WWII and by the Communist regime (by Aleksandra Mężykowska), memory laws (by Anna Wójcik), and the law and cases dealing with the excessive length of proceedings (by Elżbieta Morawska). Wojciech Burek's text also falls into this category, although the author looks at the protection of national minorities by their kin-states more broadly, by including in his analysis other sources of international law. The section ends with three articles dealing with international economic law. On the one hand Konstantina Georgaki, Thomas-Nektarios and Łukasz Kułaga take a look at the Achmea judgment and discuss its legal consequences for the protection of investors' rights within the EU. On the other hand, Tatsiana Mikhaliova offers an insightful overview of the legal system established by the Eurasian Economic Union.

The second section (i.e. "Polish practice") this time contains only one text. This limited selection is however offset by the quality of the presented research. Dawid Miąsik and Monika Szwarc analyze the problem of the interpretation and effectiveness of EU directives in the national courts by examining in detail the judgement in a preliminary ruling proceeding initiated by the Polish court (*C-545/17 Pawlak*). The last part of the volume includes four reviews. Patrycja Grzebyk discusses the recent book by Marco Sassòli; Przemysław Saganek examines the latest edited work of Łukasz Gruszczyński; Marcin Kałduński takes a look at two books by Antonio Augusto Cançado Trindade; while Yu Lu and Maciej Żenkiewicz provide a comprehensive review of another edited volume by Julien Chaisse.

Last but not least, we are delighted to inform you that PYIL has been recently accepted for inclusion in Scopus. The indexing process should be completed by the end of this year. This decision formally reaffirms the scientific quality of the Yearbook and creates new opportunities for its further development.

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[2] L. Gruszczynski, K. Wierczyńska, *Polish Yearbook of International Law: A History of Constant Change and Adaptation*, 50 Netherlands Yearbook of International Law (2019, forthcoming).

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*Jerzy Menkes**

RECOLLECTION OF MEMORIES: ANDRZEJ WASILKOWSKI 1932-2020

Abstract: *On 1 March 2020, Professor Andrzej Wasilkowski died. In his research, Professor Wasilkowski undertook issues which were co-creating the mainstreams of legal debates all over the world. He was an author of valuable publications on the relationship between international law and Polish domestic law. Professor Wasilkowski was also a director of the Institute of Law Studies of the Polish Academy of Sciences and the head of the Legal Advisory Committee of the Minister of Foreign Affairs.*

Keywords: ad memoriam, Mutual Economic Assistance Council, public international law, Wasilkowski

INTRODUCTION

On 1 March 2020, Professor Andrzej Wasilkowski passed away. Andrzej Wasilkowski studied at the Faculty of Law of Warsaw University, where in 1960 he received the title of Master's in law. Quickly, already in 1963, the same University awarded him a doctoral degree. The supervisor of the doctoral dissertation, entitled "State's membership in international organizations. Shaping of modern community and international organizations", was Judge Manfred Lachs. Both the supervisor and the doctoral thesis exerted a substantial impact on Wasilkowski's professional life.

Professor Waskilkowski combined scientific research with legal practice. He remained faithful to the chosen issues throughout his entire professional life. He earned his habilitation in 1969, following the awarded habilitation thesis ("Recommendations from the Council for Mutual Economic Aid"). In 1975, he was granted the academic title of an associate professor.

What connected the method of a legal argument between the Student – Andrzej Wasilkowski – and the Mentor – Manfred Lachs – was the conciseness of their arguments. In fact, their publications consist only of conclusions, which distinguishes them from the majority of others. The message to the reader remains unstated: you know

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what I know, so let's compare our conclusions; let's exchange them. Most of scientific publications from the field of international law (and not only) are addressed to potentially broad audiences. This type of reader, unfortunately, was not Wasilkowski's target group. I say "unfortunately" because the knowledge – foundations, on which his arguments were based, were worth publishing. They might serve as Ariadne's thread, which would lead many people to valuable knowledge. An excellent Polish writer, Antoni Słonimski, used to say: "I do not like exchanging views. I always lose." I suppose that Andrzej Wasilkowski would reply, silently, that there are no free lunches. He demanded knowledge from the reader, which was the Charon's obol for reading; unfortunately many people had no obol, which limited the reception of his works.

Professor Wasilkowski, in his research, undertook issues which were co-creating the mainstreams of legal debates all over the world. He extended the studies on international organizations aimed at economic integration. He was an author of valuable publications on the relations of international law with Polish domestic law. He also made a contribution to the creation of space law.

After receiving his doctoral degree, he found employment in the Institute of Law Studies of the Polish Academy of Sciences, where he worked until his retirement. In 1991-1996 he served as a director of the Institute. For many years he was also the head of the Legal Advisory Committee of the Minister of Foreign Affairs, and a member of the Legislative Council (the government's consultation body). In addition, he was a member of the editorial staff of various legal periodicals, scientific councils, and academic bodies.

The second stream of Andrzej Wasilkowski's professional activity was journalism. When he was seventeen, he started to write in a biweekly entitled *Pokolenie.* He publicized successively in the weekly *Dookoła Świata* and the daily *Życie Warszawy* (in which he was, among others, a deputy editor). Each of these titles was important in the social and intellectual life in Poland; *Życie Warszawy* was a daily not affiliated with by the Polish United Worker's Party (PZPR) – the ruling party; the other two took their readers to life spaces different than those determined by politics.

While Andrzej Wasilkowski separated these streams of activities, at the same time in his style of writing reactions to the expectations of newspapers' readers can be noticed. He presented his legal arguments linearly – consequently pursuing the objective and avoiding digressions and empty words. Curiosity about the world and its people prompted him to sail as a seaman.

Andrzej Wasilkowski was one of the last professors of international law in Poland born before 1945. He was, on the one hand, a representative of a group of specialists in the field of international law joined by a common space/time of life and work in Poland – then being a part of the Eastern bloc. On the other hand, he was different from the members of this group. What decided about the coherence of the "group", and at the same time decided about what was happening in Poland in the period 1945-1990, was that there was no established school of international law declaring its identity (either distinct from "schools" in the world, or indicating an affiliation to some

other one) with regard to the method of researching international law. Polish lawyers specializing in international law (meaning those who did not emigrate from Poland) neither described the method which they used, nor expressed their opinion on the appropriate method in international law.[1] Lawyers in Poland co-creating the doctrine of international law were the "great silent" ones in a rich and multi-threaded debate ongoing all over the world, in which all the foremost scholars spoke and took part. Such a debate, a conscious and articulated methodological reflection was a factor enabling the creation of schools and the development of doctrine in the world. Lack of such debate – lack of a conscious and articulated methodological reflection was a factor preventing the creation of schools in Poland. And this was a conscious choice. The authority of the communist party in the sphere of ideology decided that the only accepted method of researching international law was the Marxist method. However, this method, in the only version approved by the states of the Eastern bloc, namely the version of Wyszyński,[2] was unusable for scientific research, since it was not a scientific method. Owing to the scientific honesty of the group members, the door to the science of international law in Poland was closed for the followers of "Lysenko's science" in international law. Going down this road would be deadly for the study of international law in Poland. This is demonstrated by the destructive influence that Józef Kukułka publication, entitled *Współpraca polityczna państw wspólnoty socjalistycznej* [The Political Cooperation of the Socialist Community Countries] (Warsaw 1976) and the research method promoted in it, had on the environment of those involved in political science. However, silence about the legal method also had its drawbacks. With regard to the applied research method of international law in Poland, dogmatism prevailed. The only accepted method was positivism in its extreme version of Hans Kelsen's normativism.[3] This dogmatism, because it was undeclared, did not allow for any exceptions. This is illustrated by the case of an allegation raised in 1988 against the doctoral dissertation on responsibility and liability for ecological damages; where the reviewer claimed that within the framework of international law, norms which are not law (yet) cannot be examined. Another common feature of the group members was avoiding, in research, the issue of plurilateral relations of the states of the Eastern bloc. Professor Wasilkowski, as the rest in this group, did not speak about the legal method. However, he was different from the majority of the members since in his research, he often used methods other than positivism.

There was concluded and executed an "unwritten agreement" between the authority and lawyers – specialists in international law. Lawyers "committed themselves" – to not comment on the philosophy and methods of international law; to not formulate negative

[1] In works published before 1956, only papers of communist creators and leaders were quoted (because it was obligatory).

[2] Soviet General Prosecutor, public prosecutor in the Stalinist trials, after Stalin's death – USSR ambassador to the United Nations. For the presentation of this method, *see* A.J. Wyszyński, *Zagadnienia prawa i polityki międzynarodowej* [Issues of international law and politics], Książka i Wiedza, Warszawa: 1951.

[3] Obviously, Hans Kelsen was not quoted, since his method was regarded as a "bourgeois method."

conclusions resulting from the international law analysis of the practice of the Eastern bloc; to not to express positive opinions on the relations within the Western hemisphere and the activities of the West in the world; and to not criticize the publications of scholars from the Eastern bloc and Polish lawyers who were under the umbrella of the authorities. These were taboo subjects.

The authorities, in exchange for the adherence to these rules, allowed international law to be researched in accordance with the "rules of art" and to publish the results of research (this freedom to publish was only partial in relation to textbooks). Lawyers in Poland had unlimited administrative access to foreign scientific publications (in other countries of the Eastern bloc, this access was strictly limited); it was possible to refer to world literature in footnotes; and there was no obligation to recall Marx, Engels, Lenin and the secretaries general of the ruling party, etc. The authorities did not demand: that certain contents (stupidity) must be written; to declare support for "socialist practice and law"; to attack those considered "enemies"; and last but not least to defend the Polish western border (Polish *raison d'être* seen as being threatened by Germany). Under the dictates of the authorities, the ordered content was written by volunteers (in exchange for privileges distributed by the authorities).

As a result, in Poland in 1949-1990 there was no established "socialist-class international law" (but there was established "socialist-class criminal law and procedure"). In the Polish doctrine of international law there are no very visible spots, i.e. publications about which one wishes to forget. However, the price paid by lawyers was not only the resignation from methodological reflection. It was also an absolute pro-state attitude towards the research in the field of international law. Starting as early as from 1918, in the reflections on Poland's statehood, relations with neighbours, internal relations etc., there prevailed the principle of speaking with a single voice. This principle, created in the interwar period, was maintained by the participants in the transactions after World War II.[4] Lawyers quoted the norm "ius postliminii" as the basis of recognizing Poland's continuity – beyond the partitions.[5] Lawyers unambiguously supported the position of the Polish government in disputes with Germany before the Permanent Court of International Justice (PCIJ) and demonstrated reluctance toward "minority treaties." Generally, in the legal environment there prevailed the perception of Germany

[4] This is illustrated by the case of a judge of the Permanent Court of International Justice – Michał Rostworowski. He was not reported in 1935 by the Polish government in the composition of the Polish national group in the Permanent Court of Arbitration. In his case a "black legend" was created of someone not eager enough represent Poland's interests. For more details on the consequences of such an attitude; *see* S.E. Nahlik, *Rostworowski Michał Jan (1864-1940),* in: *Polski słownik biograficzny* [Polish bibliographical dictionary], vol. XXXII, Wydawnictwo Ossolineum, Wrocław: 1989-1991, p. 224.

[5] S. Hubert, *Odbudowa państwa polskiego jako problem prawa narodów* [Rebuilding the Polish State as a problem of the law of nations], Drukarnia Artystyczna K. Kopytowski, Warszawa: 1934, and S. Hubert, *Przywrócenie władzy państwowej (ius postliminii). Rozwój doktryny w teorii i praktyce prawa narodów do początków wieku XIX* [Restoration of state authority (ius postliminii). Development of the doctrine in the theory and practice of the law of nations until beginning of the 19th century], Zakład Prawa Politycznego i Prawa Narodów Uniwersytetu Jana Kazimierza, Lwów: 1936.

as a threat to Poland's statehood, an attitude determined by the political programme of national democracy from the 1920s and 1930s[6] and with regard to Germany, and transformed into reality after 1945. In scientific publications legal heresies emerged – which defended themselves by referring to the Polish national interest.[7]

Wasilkowski was different from other members of this group. Professor Wasilkowski did not participate in the above-mentioned *concertatio*. Can conclusions be drawn from this silence? Even if so, definitely not in the framework set by the rules of researching the history of science. Nevertheless, it seems to me as a person knowing Andrzej Wasilkowski that this silence was decided by "the gene of discreteness", and a critical – from the socialist position – attitude to the governing practice in Poland.

Another difference concerned the subjects of his research. Professor Wasilkowski distinguished himself both by the subjects that he addressed, as well as those he did not. For many years he conducted studies on "socialist integration", on the Mutual Economic Assistance Council (MEAC). In Poland, the specialists in the field of international law got swiftly interested in organizations of integration. In discussions accompanying the beginnings of the European Coal and Steel Community (ECSC) in Poland, Judge Lachs and Professor Berezowski swiftly indicated the novelty and essence of the European integration project. A group of lawyers was shaped examining the (Western) European integration. Simultaneously, research on the MEAC was undertaken. However, the specificity of MEAC – an institution which was firstly a response to the Marshall Plan, and then to the ECSC and CEE as well as Euratom – was the decisive factor in concluding that European integration project was incomparable with the socialist integration. MEAC – the socialist integration – corresponded to the CEE integration as the socialist democracy corresponded to democracy.[8] And this difference laid at the very essence of the incomparable institutions. However, MEAC was an element of relations between Eastern bloc countries. Therefore it needed to be researched. However, with regard to its essence, namely the fact that it was a something like a unicorn, it could be researched using instruments of magic and described in the language of magic, namely *newspeak*[9] practiced in the Eastern bloc countries, or using the language and methods of international law. In the latter case, a lawyer would claim that if states declared – with the use of an instrument of international law, which is an international agreement – creation of an international organization and equipped it with competences to realize its designated functions, then one should say: "call it what it is." And Professor Wasilkowski used to do that. Wasilkowski believed that MEAC was

[6] A party operating in the interwar period.

[7] Therefore I allow for the possibility to defend the "scientific" view of Klafkowski, who in 1979 (sic!) authoritatively claimed that international organizations are not the subject of international law; A. Klafkowski, *Prawo międzynarodowe publiczne* [Public international law], PWN, Warszawa: 1979, pp. 133-137. The problem was not Klafkowski's preposterous views, but the fact that the state's authority granted the book the status of a quasi-official coursebook, thus contributing to the spread of the author's views.

[8] Or currently the illiberal democracy.

[9] The term coined by Orwell; G. Orwell, *Nineteen eighty-four*, Plume, New York: 2003. I do not quote any specific publications, since they had no scientific value (from the perspective of international law).

not an international organization since – according to him – "creating (an international organization – note of J.M.) requires a certain minimum of voluntarism of entities of international law joining their forces."[10] In historical and comparative studies on the ways of organizing larger communities, Wasilkowski differentiated (as fundamental) between two methods: subordination (imperial) and cooperation (coordinating). He indicated the functioning of organizations – tracing the forerunners of the modern ones back to ancient Greece, and their lack in ancient Rome. In the first case, it was possible due to ensuring a minimum of (formal) equality; while in the latter, i.e. for Rome, the imperial method was sufficient. Professor Wasilkowski's monograph, entitled *Socjalistyczna integracja gospodarcza. Zarys problematyki prawnej* [Socialist economic integration. Outline of the legal issues] (Warszawa: 1975) outlived MEAC, it defends itself in scientific workshops and methods. In this work Professor Wasilkowski indicated how a specialist in international law researches organizations of economic integration – which criteria an institution has to meet in order to become an international organization of integration. The unspoken conclusions of the legal research of MEAC is that MEAC and the rest do not constitute a homogenous model of an international organization of integration.

Research dedicated to international organizations was generalized by Andrzej Wasilkowski in a co-written coursebook. This publication was the result of multi-year studies and discussions, it was a real opus magnum of Professor Wasilkowski's. He included in it the effects of his reflections and many new views. At the same time, he revealed an essential trait of his scientific personality; Andrzej Wasilkowski perceived the world from the perspective of political realism, but at the same time he was a believing idealist and this is reflected in his publications, i.e. that what the world is like does not mean that it must remain like this. This hope was fully expressed in his remarks *International Law: how far is it changing?* published in the Festschrift honouring his Teacher – Judge Lachs.[11] Despite the title, in the text he did not focus on law and its changes, but on the international community making the international law, changing the international law, and changing itself under the international law. The starting point was a precise description of the generation and evolution of the international community. The key to the choice of challenges, which he indicated the community faced, was the desire of compensatory justice – Andrzej Wasilkowski perceived evil in inequalities. He closed his remarks with a declaration of belief in the international community's ability to change the law, so that this law could change the international community. Simultaneously, this interesting text confirms the said truth: "there are no free lunches." Combining the conciseness of his arguments with his resignation from declaring the method, as well as not using legal positivism (either in Hart's or Kelsen's version), led to a text in which the reader could easily get lost. Hardly anyone

[10] *See* J. Menkes, A. Wasilkowski, *Organizacje międzynarodowe. Prawo instytucjonalne* [International organizations. Institutional law], PWN, Warszawa: 2017, p. 89.

[11] J. Makarczyk (ed.), *Essays in International Law in Honour of Judge Manfred Lachs*, Martinus Nijhoff Publishers, The Hague: 1984, pp. 307-311.

knows whether Wasilkowski presents conclusions derived from his research of the law or "dreams." I am convinced that, on one hand, researching the law limited to legal positivism leaves many questions (which cannot be avoided while perceiving the "law in action"), while on the other hand researching the law without legal positivism deprives this research of the character of legal research – it takes us into a stream of reflections around moral postulates.

At the meeting point of his functional analysis of international institutions and the normative content of UN provisions regulating the use of force, there is an article by Wasilkowski entitled *Kilka uwag o kwestii użycia siły we współczesnym prawie międzynarodowym* [Several remarks about the issue of the use of force in contemporary international law].[12] Also in this case the starting point of Professor Wasilkowski's considerations is the international reality of using force. He accepts the formal rationalization of its use in international relations and is aware of the fact that force is often (the only) tool for managing a conflict. Wasilkowski makes a difficult choice; aware of the contemporary alternative: force as one of the instruments of conflict management or its rejection as an evidence of weakness – an inability to manage a conflict without using this instrument, and he has the courage to speak against the rejection of force. His argument – embedded in the stream of realism – seems even cynical. I cannot accept the perspective through which Andrzej Wasilkowski perceives the international relations and law regulating them; a closer (or maybe close) perspective for me is that of Theodor Meron.[13] I often have an impression that Dostoyevsky, rejecting the sacrifice of a child's tear in favour of the idea, defended both the child and the idea, as well as that his opponents are effective as the perpetrators of the child's tears, but less effective as defenders of the idea – value. In Wasilkowski's argument faithfully reflecting the reality, I miss, on one hand, an explicit axiological reflection, while on the other hand it is present there. Professor Wasilkowski clearly opts for using (or returning to use) the term "reprisal" against the neologism "countermeasure." He recognizes the new term as rebranding and disapproves of it. The foundation of Wasilkowski's axiology is, thus, demanding the truth and disapproval of *newspeak*.

Professor Wasilkowski many times carried out considerations on *sovereignty*, but from a different perspective. In the article entitled *Suwerenność w prawie międzynarodowym i w prawie europejskim* [Sovereignty in international law and in European law][14] the starting point of his reflection is recognition of the cognitive dissonance between *sovereignty* in action and *sovereignty* in "common thinking" (p. 11). And again Wasilkowski,

[12] J. Menkes (ed.), *Prawo międzynarodowe – problemy i wyzwania. Księga pamiątkowa Profesor Renaty Sonnenfeld-Tomporek* [International law – problems and challanges. Commemorative book of Professor Renata Sonnenfeld-Tomporek], Wydawnictwo WSHiP, Warszawa: 2006, pp. 528-539.

[13] T. Meron, *The Humanization of International Law*, Brill, Leiden-Boston: 2006.

[14] J. Kolasa, A. Kozłowski (eds.), *Prawo międzynarodowe publiczne a prawo europejskie. Konferencja Katedr prawa międzynarodowego Karpacz, 15-18 maja 2002* [Public international law and European law. The conference of the chairs of international law. Karpacz, 15-18 May 2002], Wydawnictwo Uniwersytetu Wrocławskiego, Wrocław: 2003, pp. 11-24.

while declaring himself as a defender of the states' right to *sovereignty*, researches the reality which they determine: extending the range of the regulation of international law to the fields covered (in the past) by the state's authority in connection with the process of institutionalization of the international community. Neither advocating nor (maintaining) *sovereignty*, nor giving primacy to other values, he claims that recognizing sovereignty as a foundation of the international order is incompatible with the concept of the primacy of human rights. And as in his other works, Professor Wasilkowski rejects "only" the lack of logic of arguments, and demands coherence of thinking.

The common sense (sense based on knowledge) of Andrzej Wasilkowski's legal perception of the new reality will be sorely missed.

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*Peter Hilpold**

KRZYSZTOF SKUBISZEWSKI AND THE RIGHT TO SELF-DETERMINATION: PAST AND FUTURE

Abstract: *In 1995, Professor Krzysztof Skubiszewski added a Dissenting Opinion to the East Timor Judgment, wherein the ICJ declined jurisdiction in a proceeding started by Portugal against Australia for its having concluded the East Timor Gap treaty with Indonesia, in blatant violation of the East Timorese's right to self-determination. Ad-hoc Judge Skubiszewski posited that the Court should have accepted jurisdiction and he presented a series of convincing arguments for this proposition.*
In 2019 the ICJ rendered an Opinion in the Chagos Islands case. The fact that the ICJ accepted jurisdiction in this case demonstrates that an impressive development has taken place since 1995, one whereby many of Professor Skubiszewki's requests have been implemented. At the same time however, the Chagos Opinion is not fully satisfying as it neglects, to a considerable extent, the human rights issue. This contribution shows that Skubiszewski's Dissenting Opinion would have provided guidance also for these questions and that it remains as topical today as it was in 1995.

Keywords: Chagos Islands, East Timor, human rights, ICJ, International Court of Justice, self-determination, Skubiszewski

INTRODUCTION

It is a great honour for me to have been invited to this cycle of lectures commemorating the great Polish international lawyer Krzysztof Skubiszewski. I never met him personally, but I remember when I read his Dissenting Opinion in the *East Timor* case[1] back in 1995, which was rather at the beginning of my career,[2] that I was fascinated by the intellectual strength of his considerations, by their academic depth, by their persuasiveness, and not least of all by their inspiring humanity. In many ways, Krzysztof

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[1] ICJ, *East Timor (Portugal v. Australia)*, Judgment, 30 June 1995, ICJ Rep 1995, p. 90.

[2] *See* P. Hilpold, *Der Osttimor-Fall*, Peter Lang, Frankfurt a. M.: 1996.

Skubiszewski anticipated what would later become fundamental mainstays of the human rights discussion in general and basic orientations in the field of self-determination in particular.

Of course, it is never possible to prove the long-term consequences of academic arguments with absolute assurance, but several considerations can be taken for granted here:

- Prof. Skubiszewski's Dissenting Opinion was much appreciated both in academia and in practice. It was widely cited and it opened a new perspective on the *East Timor* question.
- The ICJ Judgment in the *East Timor* case was commended for its *obiter dicta*, but at the same time much criticized for the pronouncements in its operative part. Prof. Skubiszewski's Dissenting Opinion, had it been adopted by the International Court of Justice (ICJ), would have provided the way out of this dilemma.
- Since 1995 the question of self-determination has continued to divide the international state community. In a series of highly delicate advisory cases (*Wall Opinion* of 2004,[3] *Kosovo Opinion* of 2010,[4] and now the *Chagos Islands Opinion* of 2019[5]) the ICJ would have had at its disposal an "easy way out" by denying the propriety of issuing an opinion. In all of these cases however the Court decided not to exercise its discretion to renounce its jurisdiction. While the underlying reasoning might not have been fully convincing in each of these situations,[6] in the most recent case – the *Chagos Islands* case – the stance taken by the Court was the most determined one. Prof. Skubiszewski's philosophy of self-determination, so masterly elaborated in his Dissenting Opinion in the *East Timor* case, seems to have influenced the *Chagos Islands* Opinion to a considerable extent. What in 1995 had been nothing more than a pious hope had become firm reality in 2019: Respect for self-determination is so important for the United Nations that the ICJ can accept jurisdiction for answering questions to the General Assembly even if at the backdrop there is a contentious case the parties are not willing to submit to the ICJ. In 1995 the ICJ had emphatically declared the right to self-determination to be an *erga omnes* obligation – but in an *obiter dictum* and without practical consequences. In 2019 this concept was filled with substance and life.

It can therefore be said that within a quarter of a century a revolutionary development had come full circle, with Professor Skubiszewski's Dissenting Opinion as the

[3] ICJ, *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Rep 1994, p. 136.

[4] ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 22 July 2010, ICJ Rep 2010, p. 403

[5] ICJ, *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, Advisory Opinion, 25 February 2019, ICJ Rep 2019.

[6] In this regard, the *Kosovo* Opinion was particularly debatable. *See* P. Hilpold, *The International Court of Justice's Advisory Opinion on Kosovo: Perspectives of a Delicate Question*, 14 Austrian Review of International and European Law 259 (2009 (2013)), p. 278.

starting point, anticipating with a visionary perspective what later would become, at least to a large extent, a common accepted standard.

At the same time however, it has to be noted that Professor Skubiszewski's Dissenting Opinion goes far beyond the issue of self-determination in the classical sense. These aspects are a mere starting point. As is well known, the meaning of self-determination is still open to discussion and many issues of self-determination are intertwined with questions of international politics. Often questions of self-determination conflict with human rights issues. As will be shown, Professor Skubiszewski developed a vision that offers a key that could solve this conundrum. His Dissenting Opinion anticipated many of the subsequent developments and it remains as timely today as it was at the moment of its publication. In particular it refers to the relevance of human rights, which open up a new perspective for the interpretation of concepts like self-determination.[7]

1. THE EAST TIMOR CASE

But let's start first with the *East Timor* case itself. What were the particularities of this case that prompted Professor Skubiszewski to develop his far-sighted perspective on self-determination? For over two decades, *East Timor* had been a challenge to the conscience of mankind, a place of outrageous violations of human rights, casting blame not so much on the usual suspects of human rights abusers (which in the 1970s were much more numerous than these days) but, embarrassingly enough, on some of the most outspoken human rights champions within the international state community.[8]

East Timor had been colonized by the Portuguese since the sixteenth century. When, after 1945, colonialism came under rising criticism and pressure within the UN system, Portugal tried for a long period to resist this pressure both by force against resistance movements as well as through legislative measures that would formally transform the legal status of these territories from colonies into parts of the metropolitan territory.

The UN, however, continued its policy unswervingly. When Portugal itself was thrown into turmoil because of the "Carnation Revolution" of 25 April 1974, peoples

[7] On the relevance of human rights in general for modern day international law and in particular in relation to the writings by Professor Skubiszewski, *see* Ch. Tomuschat, *Individual and Collective Identity: Factual Givens and their Legal Reflection in International Law. Words in Commemoration of Krzysztof Skubiszewski*, 37 Polish Yearbook of International Law 11 (2017).

[8] For a detailed account of the *East Timor* case, *see* Hilpold (*Der Osttimor-Fall*), *supra* note 1, and R.S. Clark, *The „Decolonization" of East Timor and the United Nations Norms on Self-Determination and Aggression*, 7 The Yale Journal of World Public Order 2 (1980); C.M. Chinkin, *East Timor Moves into the World Court*, 4 European Journal of International Law 206 (1993); M.C. Maffei, *The Case of East Timor before the International Court of Justice – Some Tentative Comments*, 4 European Journal of International Law 223 (1993); A. Zimmermann, *Die Zuständigkeit des Internationalen Gerichtshofs zur Entscheidung über Ansprüche gegen am Verfahren nicht beteiligte Staaten – Anmerkungen aus Anlaß der Entscheidung des IGH im Streitfall zwischen Portugal und Australien betreffend Ost-Timor*, 55(4) Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 1051 (1995); K. Oellers-Frahm, *Rechtsfragen IGH: Portugal gegen Australien, in Sachen Osttimor*, 44(2) Vereinte Nationen 66 (1996), pp. 67-69.

under Portuguese colonial power realised that their time had come to claim their right to self-determination. While most of these people succeeded in this attempt, for the people of East Timor – who had not previously been engaged in a war of liberation – the situation changed from bad to worse and a real ordeal began. In fact, neighbouring Indonesia seized the opportunity of the power vacuum in its immediate neighbourhood and invaded East Timor on 7 December 1975. This outrageous and clearly illegal act cost the lives of over 100,000 people and even more people were driven from their homes. The international protest against and condemnation of this blatant violation of international law was stern and uncompromising, not only by single states but also by the UN General Assembly and by the Security Council.[9] In the aftermath, however, *realpolitik* soon set in, and in particular Western countries tried to come to terms with Indonesia, which was viewed as an important ally in their fight against the spread of communism. As a consequence, support for the cause of the East Timorese people within the UN institutions dwindled from year to year. Interestingly, much of the credit for the fact that the case of East Timor did not totally disappear from the international headlines goes to Portugal, a state which turned from a backward, brutal colonial state in the times before 1975 into a steadfast and upright advocate of the East Timorese people's rights in the period afterwards. As East Timor's decolonization process had not been brought to its natural end, Portugal continued to declare herself as this territory's "administering Power", and intended to ensure that the people of East Timor could complete the process of self-determination interrupted by Indonesia's invasion. This claim was recognized and supported by the UN[10] and by most states individually, though support for Portugal's mission was often hesitant and not very outspoken.[11]

After a massacre committed by Indonesian forces in 1991 in East Timor's capital Dili caused international outrage, world-wide attention to this people's cause flared up again, but Portugal had few options aside from political protest to turn this new solidarity into concrete action, as Indonesia had not accepted compulsory jurisdiction

[9] Starting with UN SC Resolution 384 (1975) and GA Resolution 3485 (XXX) and including a series of resolutions in the following years.

[10] *See, inter alia*, GA Resolution 35/27 (1980). On the whole, two resolutions of the Security Council and eight resolutions of the General Assembly supported the right to self-determination by East Timor. As to the Security Council, *see* resolutions 384 (1975) of 22 December 1975 and 389 (1976) of 22 April 1976, and as to the General Assembly, *see* resolutions 3485 (XXX) of 12 December 1975, 31/53 of 1 December 1976, 32/34 of 28 November 1977, 33/39 of 13 December 1978, 34/40 of 21 November 1979, 35/27 of 11 November 1980, 36/50 of 24 November 1981 and 37/30 of 23 November 1982. What is conspicuous in this list is the fact that support for the case of East Timor seemed to diminish over time, a sign that even for a right such as self-determination within the colonial context, a right uncontested in principle, broad and active support cannot automatically be taken for granted, especially not over a longer period of time.

[11] The most problematic attitudes were taken by Australia and the United States – the former being interested in good economic and political relations with its immediate neighbor, and the latter being above all interested in strengthening its ally Indonesia and preventing further expansion of communist influence in the Pacific. Australia accepted the incorporation of East Timor as part of Indonesia *de facto* on 20 January 1978 (ICJ, *East Timor (Portugal v. Australia)*, Judgment, 30 June 1995, ICJ Rep 1995, p. 90, para. 17).

by the ICJ according to Art. 36(2) of the ICJ Statute and was, not surprisingly, unwilling to accept ICJ jurisdiction on an ad hoc basis in the East Timor case, which Indonesia considered as an internal affair.

Around the same time, a window of opportunity for Portugal to bring the East Timor issue before an international court had opened up in 1989 when Australia and Indonesia signed the so-called "Timor Gap Treaty", regulating the exploration and exploitation of the petroleum resources of parts of East Timor's continental shelf, to which both Australia and Indonesia had presented claims in the past.

In Portugal's view this treaty violated the East Timorese peoples' right to self-determination, as these resources pertained to East Timor while the revenue from these exploitation activities was not intended to go to the East Timorese. As Portugal was not involved in the negotiation of the Timor Gap Treaty, she regarded her rights as an administrative power to have been violated and intended therefore to act on behalf of the people of East Timor as part of her decolonization duties.

Being barred from acting against Indonesia because there was no jurisdiction against such a defendant, Portugal brought her claims against Australia. If any substantive value was to be given to the concept of *erga omnes* obligations, the ICJ should have accepted jurisdiction. As it turned out, in 1995 it was too early for such an endeavour: the ICJ preferred to fully uphold the principle of consent for the establishment of the ICJ's jurisdiction.

The ICJ took recourse to the so-called "Monetary-Gold principle";[12] i.e. that the Court could not rule on this case because to do so the Court would necessarily pass judgment concerning Indonesia's rights and obligations, which would be the "very subject-matter of such a judgment", and therefore Indonesia was to be considered a "necessary part" of such a proceeding.[13] As Indonesia had not given its consent to be involved, this whole endeavour was doomed from the beginning to fail on procedural grounds.

With great elegance, Krzysztof Skubiszewski laid open the weaknesses of the arguments presented by parties of the proceeding and of the judgment delivered by the Court.

2. KRZYSZTOF SKUBISZEWSKI'S DISSENTING OPINION IN THE *EAST TIMOR* CASE

Krzysztof Skubiszewski came to sit on the bench in this proceeding rather late in time. As there was no Portuguese judge on the bench (neither was there an Australian one), Portugal (like Australia) had the right to choose a judge ad hoc according to Art. 31(3) of the ICJ Statute.

[12] Developed in ICJ, *Case of the monetary gold removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, Preliminary Question, Judgment, 15 June 1954, ICJ Rep 1954, p. 19.

[13] ICJ, *East Timor*, para. 34.

In 1991 Portugal choose Antonio de Arruda Ferrer-Correia, but in 1994 he retired from this position and therefore he had to be replaced swiftly. The fact that Portugal did not choose a Portuguese national testifies to Professor Skubiszewski's extraordinary academic standing. Within a very short period of time he not only managed to become fully acquainted with this complex case but, as his Dissenting Opinion demonstrates, he developed a far more detailed and dogmatically challenging picture than the majority in the Court.

Professor Skubiszewski's Dissenting Opinion was more than just a masterfully written piece of dogmatic reasoning in international law. It was also conceived in a politically astute way, as Skubiszewski tried to provide evidence that the admittedly very progressive and innovative ideas developed in his Dissenting Opinion in reality coincided to a large extent with the basic philosophy propounded by his colleagues on the bench. He thereby managed to gently remind them of the missed opportunity to implement their visions in a case where humanitarian issues of enormous gravity were at stake.[14]

In this context Professor Skubiszewski, contrary to the majority of the Court, argued strongly against declining jurisdiction. He set out his argument that such a step was necessary not only on the basis of the rules governing jurisdiction and/or admissibility, but also "in accordance with the demands of justice,"[15] thereby introducing an argument based on natural law. And so he set out the following:

> A few years ago President Bedjaoui wrote that "it is through an awareness of the lines of force of [international] society, and of their articulations, that we can gain a better understanding … of [international law's] possible future conquests." In the opinion of the President the present phase of international law is that of a transition "[f]rom a law of co-ordination to a law of finalities." And the learned commentator states that "one of the essential finalities" is development, "true development, of a kind which will restore dignity to [the] peoples [of 'new States'] and put an end to relationships of domination."[16]

These references to previous statements by the ICJ President contain a series of strong pleas in favour of a new orientation in international law towards the restoration of the dignity of peoples by the termination of foreign domination. Thus traditional thinking in terms of an international law of coordination should be abandoned in favour of a "law of finalities."

At first sight this could be interpreted as an invitation to the Court to act courageously precisely in order to overcome the situations of injustice so strongly denounced by the ICJ's President. In fact, there could be no doubt that the situation in East Timor was one of foreign domination that impeded development and severely violated the

[14] *See also* S.R.S. Bedi, *The Development of Human Rights Law by the Judges of the International Court of Justice*, Hart Publishing, Oxford – Portland (Oregon): 2007, pp. 194ss.

[15] Dissenting Opinion of Skubiszewski (*East Timor*), para. 43.

[16] *Ibidem*, para. 44, citing M. Bedjaoui, *Achievements and Prospect*, Martinus Nijhoff, Dordrecht: 1991, General Introduction, pp. 1, 14 and 15, respectively.

dignity of the people of East Timor. On the other hand, it was also clear that this was not exactly the situation Mohammed Bedjaoui had in mind when he called for a transition to a "law of finalities." As is well known, the then-ICJ President was a prominent representative of the "Third World Approach of International Law", an exponent of the first generation of this movement. This movement was first of all interested in examining, discovering and branding "traditional" situations of colonialism, while the East Timor case was rather a situation of "neo-colonialization" where a people under colonial domination was suddenly oppressed by a former colonial people, Indonesia, while the erstwhile colonial power, Portugal, had become the most committed advocate of the East Timorese people's rights.

Thus the content of this new "law of finalities" had to be defined in a somewhat different way, outside the perspectives of the traditional law of decolonization in order to be useful for the East Timorese.

To this avail, the second reference cited by Professor Skubiszewski, a statement by Judge ad hoc Lauterpacht in the case concerning the Application of the *Convention on the Prevention and Punishment of the Crime of Genocide*, seemed particularly useful:

> the Court should [not] approach it with anything other than its traditional impartiality and firm adherence to legal standards. At the same time, the circumstances call for a high degree of understanding of, and sensitivity to, the situation and must exclude any narrow or overly technical approach to the problems involved. While the demands of legal principle cannot be ignored, it has to be recalled that the rigid maintenance of principle is not an end in itself but only an element – albeit one of the greatest importance – in the constructive application of law to the needs of the ultimate beneficiaries of the legal system, individuals no less than the political structures in which they are organized.[17]

This was an early plea to put the individual at the centre of attention, a tendency that is often also epitomized by the slogan "humanization of international law."[18] Krzysztof Skubiszewski asked the Court nothing less than to have regard, first of all, to the needs of the individual as the "ultimate beneficiary" of the international legal system when a constructive solution in a contentious case is called for. A closer examination reveals that this is a revolutionary thought which, from the outset, can neither be dismissed nor accepted in full. In fact, States may be legal fictions and the well-being of the individuals forming their citizens, or even their residents, may be the ultimate goal of their creation. And it is nonetheless true that the primary subjects of International Law are still States, and their acts cannot be challenged automatically with the accusation that these measures would be contrary to the interests of the individuals forming this State.

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[17] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Provisional Measures, ICJ Rep 1993, p. 408, para. 3

[18] For an early comprehensive study on this subject, *see* T. Meron, *The Humanization of International Law*, Brill/Martinus Nijhoff, Leiden/Boston: 2006. For a historical perspective on this development, *see* P. Hilpold, *R2P and Humanitarian Intervention in a Historical Perspective*, in: P. Hilpold (ed.), *The Responsibility to Protect*, Brill/Martinus Nijhoff, Leiden/Boston: 2015, pp. 60-122.

In the field of human rights, however, it is possible to put into question state behaviour before international courts and other controlling institutions.

And then there is the subject of self-determination, in relation to which the questions – What is its ultimate finality?; Who should be its ultimate beneficiary?; How are the rights of the individual related to those of the group?: and How should this right be balanced against possible countervailing rights such as state sovereignty? – are of pivotal importance.

Professor Skubiszewski argued for a bolder approach in this area, for tipping the balance in favour of the right of self-determination, interpreted as a right granted primarily for the benefit of the individual.

The Court was not prepared to follow him at that time, but neither did it want to definitively close the door to such an interpretation. Otherwise it would not have given so much conspicuous attention to the right to self-determination, accepting Portugal's qualification of this right as having an *erga omnes* character.[19] It further qualified this right as "one of the essential principles of contemporary international law",[20] only to declare immediately afterwards that "the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things."[21]

This statement is true, but at the same time it misses the essential points. What should be done in the case of a principle that is, according to the Court, at one hand of such an "essential" character, that is should apply *erga omnes* but which lacks, again according to the Court, sufficient specification as to its substantive content and which cannot be implemented if this would mean some sort of indirect reproach against a third party (in this case Indonesia) that has not accepted the Court's jurisdiction?[22]

Judge ad hoc Skubiszewski explained very well in his Dissenting Opinion that to speak of self-determination does have some minimum implications. He stated the following:

> I think that the Court can base itself on certain elementary assumptions: the interests of the people are enhanced when recourse is made to peaceful mechanisms, not to military intervention; when there is free choice, not incorporation into another State brought about essentially by the use of force; when the active participation of the people is guaranteed, in contradistinction to arrangements arrived at by some States alone with

[19] "In the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter and from United Nations practice, has an *erga omnes charac*ter, is irreproachable." ICJ, *East Timor*, para. 29.

[20] *Ibidem*.

[21] *Ibidem*.

[22] According to R. McCorquodale, *Group Rights*, in: Daniel Moeckli et al. (eds.), *International Human Rights Law*, Oxford University Press, Oxford: 2014, pp. 344-366 (350) the qualification of the right to self-determination as an obligation *erga omnes* signifies that this right "applies to peoples beyond the colonial context." This proposition is, however, not convincing, as the qualification as "*erga omnes*" refers to procedure and not to substance. It would be safer to say that reference to the "*erga omnes*" concept implies, first of all, that the right to colonial self-determination applies or is to be respected also outside the colonial context.

> the exclusion of the people and/or the United Nations Member who accepted "the sacred trust" under Chapter XI of the Charter.[23]

If any value was to be attributed to the right to self-determination outside a strictly traditionalist meaning according to which colonies have the right to freely choose their political status, the Court could have made further specifications along the lines indicated by Professor Skubiszewski without infringing Indonesia's sovereign rights in any form whatsoever.

It is further interesting to note that the Court decided to qualify the right to self-determination as an "essential principle of contemporary international law." It is difficult to understand what the Court meant by this term, as there is no *terminus technicus* of such a kind in International Law. Arguably, the Court wanted thereby to highlight not only the political relevance of this right but also its status as a legal norm. No explanation or further help is provided in this regard by the Court. Professor Skubiszewski did not shy away from addressing this issue squarely: He sees a close relationship between this concept with that of "jus cogens", a term the Court wanted to avoid, as it seems, at any cost. He demonstrates how the same judges sitting in the bench in this case had previously emphasized the importance of the right to self-determination in terms that would be very much relevant for the East Timorese in the present case. In academic writings, Judge Bedjaoui qualified it as "a primary principle from which other principles governing international society follow", as "part of jus cogens" to which the "international community could not remain indifferent to its respect."[24] And according to Judge Ranjeva "[t]he inviolability of the rights of peoples means that they have an imperative and absolute character that the whole international order must observe."[25]

It is true that these citations related to writings that were framed against the background of typical situations of colonial self-determination. But should the nature of a right be differently interpreted depending on the situation to which it applies? As will be seen below in the context of the discussion of the Chagos case, the ICJ continues to have difficulties in addressing the question whether a *jus cogens* character is to be attributed to the right to self-determination even in typical cases of colonial self-determination, as the consequences would probably be disruptive.

Even more so than the concept of self-determination, the true meaning of an *erga omnes* obligation remains in the dark, even though, paradoxically, this concept is so emphatically highlighted by the Court. In substance, however, Professor Skubiszewski makes it clear that recourse to this concept is not even necessary to establish jurisdiction. The Portuguese claims against Australia could have been heard by the Court in any case: It would have sufficed for the Court to make a finding on the unilateral acts of Australia

[23] ICJ, *East Timor*, para. 52.

[24] Dissenting Opinion of Skubiszewski (*East Timor*), para. 135, with reference M. Bedjaoui, in: J.-P. Cot and A. Pellet (eds.), 2nd ed. 1991, pp. 1082-1083.

[25] *Ibidem*, with reference to Raymond Ranjevy, *Peoples and National Liberation Movements*, in: M. Bejaoui (ed.), *International Law: Achievements and Prospects*, 1991, p. 105, para. 16.

with respect to the conclusion of the Timor Gap treaty,[26] as Australia was obliged to respect the East Timorese right to self-determination. Judge Skubiszewski also made clear that otherwise we run the risk of using the concept of *erga omnes* obligations in a totally counter-productive way, in a way that was surely not in the mind of those who first introduced it and afterwards forcefully advocated it.[27] If in the presence of an *erga omnes* obligation each party affected by such a right would be a necessary party of any controversy concerning such right "the Court would practically be barred from deciding whenever the application of the *erga omnes* rule" was at stake.[28] This whole approach would turn out – and in practice has turned out – such that the Court winds up protecting not the East Timorese, but Indonesia!

In his Dissenting Opinion Krzysztof Skubiszewski also dealt extensively with the obligation of non-recognition.[29] He pointed out that non-recognition would be an obvious corollary of the use of force by Indonesia against East Timor, an obligation that should apply also to Australia. In the end, however, he remained cautious in this regard as he had to admit that the Court had not been asked to adjudicate on non-recognition,[30] even though he felt that this question could not be circumvented.

Judge Skubiszewski obviously could not ignore that he was in the minority, even though he had received strong support by Judge Weeramantry in an equally formidable Dissenting Opinion. Nonetheless, Professor Skubiszewski's Dissenting Opinion is permeated by a spirit of optimism, which was perhaps characteristic of his nature. And in this sense, his Dissenting Opinion ended on a positive note that could anticipate in many senses what afterwards should become reality.

He wrote in para. 123:

> We were told, in connection with East Timor, that "the realities of the situation would not be changed by our opposition to what had occurred" (the position of the United States, quoted in Rejoinder, para. 47). For the time being, that may be true. Yet we all know of instances where there was opposition and various "realities" proved to be less resistant to change than Governments might have thought.[31]

As is well known, this is exactly what happened. Only four years later, after Indonesia had ended up in a deep economic and political crisis, East Timor was again under UN administration and the way was opened for a true process of self-determination,

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[26] *Ibidem*, para. 95.

[27] On the concept of *erga omnes* obligations *see* P. Picone, *Comunità internazionale e obblighi "erga omnes"*, (3th ed.), Jovene, Naples: 2013; P. Picone, *Gli obblighi erga omnes tra passato e futuro*, Questions of International Law 3 (2015), and C. Focarelli, *Le contromisure pacifiche collettive e la nozione di obblighi erga omnes*, 1 Rivista di diritto internazionale 52 (1993).

[28] *See* Dissenting Opinion of Skubiszewski (*East Timor*), para. 79.

[29] *Ibidem*, para. 122ss.

[30] *Ibidem*, para. 131.

[31] These statements resonate with much what in International law theory can be summarized by the concepts of "progress" or the "belief in progress." For more this concept, *see* R.A. Miller, R.M. Bratspies (eds.), *Progress in International Law*, Martinus Nijhoff, Leiden/Boston: 2008 and, fundamentally, M.O. Hudson, *Progress in International Organisation*, Stanford University Press, Stanford, CA: 1932.

eventually leading East Timor to independence. Thus it can be said that Krzysztof Skubiszewski had perspicaciously anticipated what would become reality in East Timor only shortly thereafter.

However, Skubiszewski's Dissenting Opinion goes far beyond the East Timor question, as it addresses the question of the nature of self-determination in a very innovative way, putting the individual at the centre of his interest. In this sense, Skubiszewski's vision still remains to be implemented.

At the same time we have to take note of the fact that Judge Skubiszewski's vision was a long-term one. In many ways his ideas were revolutionary and the recent *Chagos* Opinon by the ICJ offers a good opportunity for a stock-taking: What has been achieved in the quarter of century that has elapsed since the East Timor judgment, and which questions still remain open? What are the specific circumstances under which we should look to Professor Skubiszewski's Dissenting Opinion for advice on how to shape the right to self-determination further in such a way that it becomes even more attuned to the necessities of modern mankind?

To this avail let's now have a look at the *Chagos Islands* Opinion.

3. THE *CHAGOS ISLANDS* CASE

3.1. The origins of the *Chagos Islands* case

The *Chagos Islands* case is in one sense a "typical", "traditional" case of colonial self-determination which, however, presents very specific traits. They were in the end also decisive for this case and as a consequence the Chagos Islands were not affected by the wave of self-determination that brought independence to most colonies in the second half of the 20th century.

For a long time, between 1814 and 1965, the Chagos Archipelago was administered by the United Kingdom as a dependency of the colony of Mauritius.[32] As soon as it became clear that the traditional colonial empires could no longer be upheld and that colonies would have to be granted independence, fears arose among Western nations that the resulting power vacuum would be filled by the Communist states, with the Soviet Union in particular entering into these new free spaces.[33] The Chagos Islands posed a particularly delicate challenge as this archipelago lies rather detached from Mauritius in the midst of the Indian Ocean, thus being extremely attractive as a military base. The United Kingdom (UK) took recourse to a sophisticated stratagem in order to come up with its imperative international law duties in the field of decolonization while at the same time preserving its strategic interests in cooperation with the United States. It decided that Mauritius should be granted independence, but at the same time

[32] *Ibidem*, para. 28.

[33] *See* S. Allen, *Self-Determination, the Chagos Advisory Opinion and the Chagossians*, 69 International & Comparative Law Quarterly 203 (2020).

the British government required the Mauritian government to accept the detachment of the Chagos Islands, which became a new British colony – the "British Indian Ocean Territory" (BIOT) and which should remain with the UK. In the so-called "Lancaster House Agreement" of 1965 Mauritius had to agree to this UK plan as a factual precondition for being granted independence in 1968, a right which would have pertained to Mauritius anyway.[34] In 1966 the UK concluded a treaty with the US for a 50-years-rental by the latter of Diego Garcia, the largest island of the Chagos archipelago for military use.[35] This had as a consequence that the Chagossians – mostly descendants of Afro-Madagascar slaves who were brought to these formerly uninhabited islands in the 18th and 19th centuries by French and British settlers[36] – were forcibly removed in the years between 1968 and 1973.[37] They and their descendants are now living in extreme poverty on the island of Mauritius and in other countries.

Starting in the 1980s, and also as a result of mounting protests by Mauritius, it became more and more clear that the Mauritius/Chagos process of self-determination had not been completed lawfully.

The decisive step leading to a turning point was undertaken on 23 June 2017, when the UN General Assembly, with the strong support of the African Union, adopted resolution 71/292, requesting an advisory opinion from the Court on the "Legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965." This Opinion was eventually rendered on 25 February 2019, creating a considerable headache for the UK.

In fact, the ICJ stated in this case that the UK had not legally completed the decolonization process and that the continued administration of the Chagos Archipelago constituted a wrongful act. The Court stopped short of qualifying this situation a violation of *jus cogens*, but it referred to the *erga omnes* concept and asked all states to co-operate to ensure the completion of the decolonization process.

It qualified the right to self-determination as a "fundamental human right" but it left it to the General Assembly to look into the human rights situation of the Chagossians.

2.2. An analysis of the *Chagos* Advisory Opinion

Without doubt the *Chagos* Opinion was in a certain sense ground-breaking, as the ICJ was prepared to accept jurisdiction over a highly contentious case, while in the East Timor case it had refused to deal with a similar issue. By this Opinion, the right to self-determination was considerably strengthened on the international level, at least with regard to the colonial context.

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[34] *See* U. Demsar et al., *The Concept of Duress in the World of Decolonization*, 55 Questions of International Law 119 (2018), p. 119: "Mauritius was clearly under 'pressure' when the Lancaster House Agreement was concluded."

[35] This treaty expired on 30 December 2016 and was extended then for a further twenty years period. *See* ICJ, *Chagos*, para. 51.

[36] *See* D. Taylor, *Slavery in the Chagos Archipelago*, Chagos News, No. 14, 2000, pp. 1-4.

[37] *See* Allen, *supra* note 33, p. 205.

If we return again to Professor Krzystof Skubiszewski's Dissenting Opinion of 1995 we cannot but be impressed by his sharp-minded anticipation of the developments to come over the following years and decades. If the Court of 1995 had adopted the criteria applied by the Court of 2019 presiding over the *Chagos* case one might dare to speculate that it might also have accepted jurisdiction. And we can generally only speculate as to the effects the East Timor case had on the *Chagos* case. Without doubt, the former helped the Court to become further acquainted with specific self-determination issues that present particular elements of complexity. Furthermore, the East Timor case generated a certain amount of disappointment and criticism, which the Court from then on wanted to avoid. In this sense it could be argued that in the *Chagos* proceeding the Court showed the way for bringing to a closure an endeavour, decolonization, the United Nations had been occupied with for decades.

Yet nonetheless, the *Chagos* case also makes clear that this task is not yet fully completed. What about the plight of the Chagossians? Should we really care about whose flag is waving on the Chagos Islands? Or should international law (and international courts) rather look, first of all, for ways to overcome the human suffering caused by colonization, be it in its colonial, post-colonial, or neo-colonial dimension?

Once again the Dissenting Opinion by Professor Skubiszewski demonstrates in a very lucid way what is still missing – we are still waiting for the interpretation of the right to self-determination in a fully human rights-based perspective.

It is striking that Prof. Skubiszewski in his Dissenting Opinion of 1995 pointed out that what really counts in any discussion about the right to self-determination are the actual wishes of the people, the individuals concerned.[38] In 1995 it was the wishes of the East Timorese that were disregarded, and in 2019 the interests of the Chagossians. Today, the search for a "law of finalities"[39] has become even more important than it was in 1995, and there can be no doubt that these "finalities" have to put the individual at the forefront. As it seems, in 2019 the ICJ was still not yet willing to take this decisive step forward. This might appear to be disappointing, but again we can refer to Professor Skubiszewski's Dissenting Opinion for a glimmer of hope.

It was mentioned above that Professor Skubiszewski wisely foresaw that often realities which might see immutable at one time can rapidly change if opposition becomes too strong.[40] And he added the following: "[e]ven in apparently hopeless situations respect for the law is called for. In such circumstances that respect should not mean taking an unrealistic posture. History gives us surprise."[41]

Krzysztof Skubiszewski did not explicitly state it, but with elegant understatement he managed to demonstrate that the majority on the bench had missed an extraordinary opportunity to translate theory into practice, to act in a way coherent with one's own proclaimed ideals, and to take an important step forward in the development of International Law.

[38] Dissenting Opinion of Skubiszewski (*East Timor*), para. 52.

[39] *Ibidem*, para. 44.

[40] *Ibidem*, para. 123.

[41] *Ibidem*, para. 133.

CONCLUSIONS

As we know, Professor Skubiszewski's vision with respect to East Timor came true when the East Timorese got the opportunity to exercise right to self-determination only a few years later. And there is hope that the same might happen with the Chagos Islands, where the East Timorese not a territorial claim by Mauritius should be seen as the pre-eminent objective to realize at least an improvement of the lot of the Chagossians as well as the attribution to them of a true right to self-determination wherever they are now living (as a consequence of the violation of their rights). If this takes place, it would also constitute a decisive contribution for the further development of the right to self-determination in accordance with the "present finalities" of international law as a legal order now firmly premised on respect for human rights.

Of course this would not mean a total re-definition of the right to self-determination as it was originally conceived by US President Woodrow Wilson towards the end of World War I. For the foreseeable future, the right to self-determination will most probably maintain a prevailingly collective connotation. Attempts to conceive an individual right to self-determination have obtained broad support in political philosophy, but it is not realistic to pretend their implementation may come any time soon, and perhaps such a development would not even be desirable. [42]

It appears to be utopian (or perhaps more accurately dystopian) to think that the individual will – aggregated into smaller or larger collectivities that can be formed and changed spontaneously – should be able to determine the shape of national boundaries. Most probably, such a rule would heighten instability and weaken the degree of protection that an individual can expect from the state of which he or she is a citizen or resides.[43]

What can be expected however, and what seems to be overdue, is a broadening of the perspective when it comes to assessing claims of self-determination and their implementation. In a certain sense, the legal theory on self-determination has remained

[42] Individualistic self-determination as a way to complete freedom might have considerable political appeal, but even on a psychological level it is doubtful whether such freedom is achievable, let alone desirable. *See* B. Schwartz, *Self-determination: The Tyranny of Freedom*, 55(1) American Psychologist 79 (2000). As to the difficult – and in many ways still unexplored – relationship between (mainly individualistic) human rights and the (mainly collective) right to self-determination, *see* A. Etinson, *Human Rights: Moral or Political?*, Oxford Scholarship Online 2018.

The individualistic perspective of self-determination is more known to political science than to legal theory. Unfortunately, however, political science and legal theory, when dealing with issues of self-determination, are mostly speaking on totally different levels and there is little communication between these levels and little reciprocal exchanges of knowledge. Christian Tomuschat has offered the following rather critical words about the philosophical approach to self-determination: "[…] most of these reflections remain to an astonishingly narrow framework of abstract ideas." *See* Ch. Tomuschat, *Secession and Self-determination*, in: M.G. Kohen (ed.), *Secession*, Cambridge University Press, Cambridge: 2006, pp. 23-45 (26).

[43] For more on this important function *see* Christian Tomuschat (*ibidem*) who espouses a balanced attribution of rights to individuals and states in international law in order to maximize the protection and the benefit of the individual.

stuck in the "state only" perspective typical for International Law prior to WWII.[44] The human rights aspect of self-determination should no longer be diminished, and certainly not neglected. Considering the right to self-determination purely as an instrument to regulate claims between existing or aspiring states omits the fact that in the meantime human rights constitute, next to states and international organizations as expressions of the traditional subjects of international law, the second pillar on which this whole legal order is grounded. In academia it is widely-discussed whether the individual should have – in the formation, interpretation and application of international law – at least some participatory rights, albeit to a lesser or narrower extent.[45] At least with regard to self-determination the participation of individuals seems to be essential if this concept is to have any meaning in the 21st century. Considering self-determination issues merely from a traditional, statist perspective may lead to interesting statements of principle, but at the same time runs the risk of missing out on pivotal aspects that undergird our international legal order of values or, to again couch it in the words of Professor Skubiszewski, of the new "International Law of finalities."[46]

[44] For more on this perspective, *see* A. Kjeldgaard-Pedersen, *The International Legal Personality of the Individual*, Oxford University Press, Oxford: 2018, pp. 17ss, citing inter alia Heinrich Triepel, Dionisio Anzilotti and Lassa Oppenheim. The latter wrote the following: "The conception of International Persons is derived from the conception of the Law of Nations. As this law is the body of rules which the civilized States consider legally binding in their intercourse, every State which belongs to the civilized States, and is, therefore, a member of the family of Nations, is an International Person. Sovereign States are exclusively International Persons – i.e. subjects of international law." (*see* L. Oppenheim, *International Law: A Treatise – Peace*, 1905, p. 44, cited according to Kjeldgaard-Pedersen, p. 17).

[45] *See* K. Parlett, *The Individual in the International Legal System: Continuity and Change in International Law*, Cambridge University Press, Cambridge: 2011, pp. 352ss, with further references.

[46] *See* W. Friedmann, who already in 1964 saw the necessity to head towards a "law of cooperation", in: *The Changing Structure of International Law*. For more on the new value-orientation in International Law, *see also* P. Hilpold, *Understanding Solidarity within EU Law: An Analysis of the 'Islands of Solidarity' with Particular Regard to Monetary Union*, 34 Yearbook of European Law 257 (2015).

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THE SOURCES OF GENERAL INTERNATIONAL LAW IN THE RECENT WORKS OF THE INTERNATIONAL LAW COMMISSION

Abstract: *The present text describes the attitude toward sources of law in the recent works of the International Law Commission (ILC) on custom, general principles of law, and jus cogens (with special emphasis on reports of the respective special rapporteurs). The three main tasks of the text are to verify whether the ILC rapporteurs: grasped the essence of unwritten sources (reality-concern); preserved the coherence of views when referring to different topics (coherence-concern); and last but not least allow states to have the decisive voice as regards the set of their obligations (sovereignty-concern). The author notes the nominal strict attachment of the ILC to two-element nature of custom as a general practice recognized as law. Though in fact it should be a good message for states, this strict attitude of the ILC seems not to be based on a real stress test. It seems to ignore the reality of lawyers and even international judges referring to several customary norms without the slightest attempt to verify the true existence of both the two elements of custom – namely practice and opinio juris. What is more, the ILC does not see any problem with calling all general principles as sources of law. What is overlooked is the element of state consent to be bound by several presumed general principles. This is qualified by the author as a threat to state sovereignty – with states being pressured to follow some patterns of conduct to which they have not given their consent.*

Keywords: custom, general principles of law, *jus cogens*, *opinio juris*, sources of international law

INITIAL REMARKS

The sources of international law are a mandatory topic of every international law manual. The number of legal topics connected with them as well as their size usually dissuade authors, as well as editorial boards of journals, from including shorter texts on the sources of international law. It seems that the recent works of the International Law

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Commission (ILC) justify a slight change in this attitude. It is quite exceptional that within the last few years, the ILC has been working almost simultaneously on three (formally separate) topics, namely: custom, general principles of law, and *jus cogens*.

The works of the ILC on custom have taken the form of a Memorandum by the ILC Secretariat,[1] five reports by the Special Rapporteur Michael Wood,[2] and the 2018 Draft conclusions on the identification of customary international law.[3] So far only one report on general principles of law, prepared by Marcelo Vázquez-Bermúdez, was presented in 2019.[4] The year 2019 also witnessed the presentation of the fourth report on peremptory norms of international law (*jus cogens*) by Dire Tladi,[5] and the adoption by the ILC of a set of 23 Draft Conclusions on *jus cogens*.[6] The main aim of the present text is to analyse how the ILC special rapporteurs[7] have, in the three above-mentioned works, approached the issue of sources of general (unwritten) international law.[8] It must be stressed that the subject of interest of this article is not divided equally among all the three topics of the ILC works. The nature and definition of custom lies at the very centre of this examination. General principles are interesting for this text only insofar as concerns their qualification as a source of general international law. In contrast, only two aspects of *jus cogens* will be of our interest, as *jus cogens* norms do not, as such, form a separate type of sources of international law.

It will be interesting for us to see how the ILC (and especially its rapporteurs) have defined those sources, identified their basic elements and prerequisites, and to assess the merits and drawbacks of their approach(es).

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[1] ILC, *Formation and evidence of customary international law. Elements in the previous work of the International Law Commission that could be particularly relevant to the topic. Memorandum by the Secretariat*, A/CN.4/659 (Memorandum).

[2] ILC, *First report on formation and evidence of customary international law by Michael Wood, Special Rapporteur*, 17 May 2013, A/CN.4/663; ILC, *Second report on identification of customary international law by Michael Wood, Special Rapporteur*, 22 May 2014, A/CN.4/672; ILC, *Third report on identification of customary international law by Michael Wood, Special Rapporteur*, 27 March 2015, A/CN.4/682; ILC, *Fourth report on identification of customary international law by Michael Wood, Special Rapporteur*, 8 March 2016, A/CN.4/695; ILC, *Fifth report on identification of customary international law by Michael Wood, Special Rapporteur*, 14 March 2018, A/CN.4/717.

[3] Available at: https://bit.ly/2WUWFa0 (accessed 30 June 2020).

[4] ILC, *First report on general principles of law by Marcelo Vázquez-Bermúdez, Special Rapporteur*, 5 April 2019, A/CN.4/732.

[5] ILC, *Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur*, 31 January 2019, A/CN.4/727. It was preceded by: ILC, *First report on jus cogens by Dire Tladi, Special Rapporteur*, 8 March 2016, A/CN.4/693; ILC, *Second report on jus cogens by Dire Tladi, Special Rapporteur*, 16 March 2017, A/CN.4/706; ILC, *Third report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur*, 12 February 2018, A/CN.4/714.

[6] ILC Report 2019, UN Doc. A/74/10, p. 142.

[7] For reasons of simplicity they will be referred to using the names of the respective Special Rapporteur and numbers, e.g. Wood, 1st report.

[8] For more on the understanding of this term as "an umbrella term that includes both customary international law and general principles", *see e.g.* Memorandum, Observation 29, p. 35. *See also* Tladi, 2nd Report, p. 27, para. 53.

The subsequent analysis focuses on three main concerns. The first has to do with the correctness of the main answers given by the ILC. We can label this as a "reality-concern." The main underlying concern is whether the ILC has been able to properly address the essences of custom and general principles. If not, the fundamental question would be: What is the source of any mistake(s) and how can they be corrected? It must be admitted that this fear may speak in favour of taking a more bold attitude toward the creation of norms of general international law (sources of general international law).

Secondly, one may be concerned that the teaching on the sources of general international law contains some incoherent statements and sometimes lacks logical foundations. We can label this a "coherence-concern." This concern constitutes the primary reason for referring in this article to all three of the above-mentioned topics of the ILC works and not reducing our interest here to its works on custom only.

Last but not least, the third concern has to do with the necessity of respecting state sovereignty. If we accept this as a fundamental basis of international law, the teaching on sources must take it into serious consideration. We can call this a "sovereignty-concern." Such an approach calls for adopting a more careful attitude toward the sources of international law. The central issue will be to discover and analyse the element of state consent (even tacit consent) to a given norm of unwritten international law.

An attempt will be made to show that the works on custom adopt a very traditional approach, very friendly to state sovereignty. One can wonder whether it fully reflects the reality. On the other hand, the attitude of the ILC to general principles is not based on a careful consideration of the implications for state sovereignty. This forms a challenge both with respect to state sovereignty and to the coherence of the entire field of general international law.

1. THE ILC WORKS ON CUSTOM – AN ATTEMPT AT EVALUATION

1.1. Introductory remarks

As was noted above, custom must be treated as a crucial element of any discussion of general international law. Two aspects of custom deserve to be emphasized here, namely its definition and its unique position. The former aspect is discussed in detail in the sections that follow. As regards the position of custom, we must take as a point of reference the positivist view, which accepts only two sources of international law, namely: international custom and treaties.[9] This conclusion has been considered as a consequence of the principle of sovereignty of states and the necessity of their consent[10]

[9] F. Despagnet, *Cours de droit international public*, Recueil Sirey, Paris: 1910, p. 69. P. Heilborn, *Les Sources du droit international*, Recueil des Cours de l'Académie de Droit International, vol. 11 (1926), p. 19.

[10] Which however is understood in the case of custom. As concerns some modifications of this requirement with respect to some basic underlying rules of the international order, *see* Tladi, 1st Report, pp. 11-12, para. 22.

to norms which bind them. This consent could be express (via treaties) and tacit (by custom). For some positivists, custom is a tacit treaty.[11]

It must be stressed that the number of sources of general law is a subject of controversy. In practice this means that there are two groups of authors. The first group limits general international law to custom only.[12] This is why custom is of such great importance, both in general and in the present text. The second group of authors adds to custom also general principles of law.[13] One should include in this second group those authors who deny any *numerus clausus* of sources of international law.[14]

All the same the overall picture of norms of general law advocated by these two groups of authors are not that different. The definitions of custom advocated by them are also either identical, or almost identical. This is the main reason underlying the reality-concern in this area. The main underlying question is whether the classical (traditional, orthodox) definition of custom should be modified. The voice of the ILC in this matter is of primary importance.

1.2. The two-element definition of custom as the main message from the reports of M. Wood

Despite the relatively large number of reports of M. Wood and their considerable size (especially the 2nd and 3rd report), it is not difficult to sum them up. Together they form a very strong voice in favour of the classical definition of custom. As the Special Rapporteur put it "[t]here was general support among members of the Commission for the 'two-element' approach, that is to say, that the identification of a rule of customary international law requires an assessment of both general practice and acceptance of that practice as law."[15] In the next report he pointed to the full consensus as to the two-element approach in the Sixth Committee.[16] It is thus little wonder that the 2018 Conclusions provide that: "[t]o determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (*opinio juris*)."[17]

The Special Rapporteur did not hesitate to cite numerous works advocating this definition, a task which is quite easy. The two-element definition finds its support in

[11] Heilborn, *supra* note 9, p. 19.

[12] Ch. Rousseau, *Droit international public*, Sirey, Paris: 1970, pp. 59-60; W. Góralczyk, *Prawo międzynarodowe publiczne w zarysie* [Public international law. An overview], PWN, Warszawa: 1989, pp. 65-66; R. Bierzanek, J. Symonides, *Prawo międzynarodowe publiczne* [Public international law], PWN, Warszawa: 1994, p. 78.

[13] P. Cahier, *Changements et continuité du droit international. Cours général de droit international public*, Recueil des Cours de l'Académie de Droit International, vol. 195, p. 222; N. Quoc Dinh, P. Daillier, A. Pellet, *Droit international public*, Libraire Générale de Droit et de la Jurisprudence, Paris: 1994, p. 114; A. Cassese, *International Law*, Oxford University Press, Oxford: 2005, p. 183.

[14] A. Verdross, B. Simma, *Universelles Völkerrecht. Theorie und Praxis*, Duncker & Humblot, Berlin: 1984, p. 323.

[15] Wood, 2nd Report, p. 2. *See also* p. 9, para. 24.

[16] Wood, 3rd Report, p. 3.

[17] Conclusion No. 2.

several judgments of the World Court,[18] the case law of international and domestic courts, arbitral awards, and perhaps all manuals of international law, monographs of sources, of custom,[19] and countless articles on the latter and other works referring to the matter of custom. In fact, the considerable size of the reports of M. Wood is to a large extent due to this rich bibliography.

The basic question is thus whether one could have expected something else as regards the definition of custom. The theoretically possible decision to abandon the "two-element" approach could have been viewed as an abuse in many respects. Firstly, it would look as if the subsidiary body of the UN GA were ready to neglect the very wording of Art. 38 of the ICJ Statute (as an annex to the UN Charter). Secondly, it would seem to be ignoring the almost complete consensus among states and among scholars in the matter (despite some opinions to the contrary, which are cited below). Last but not least, it would seem to be a "motion of no-confidence" towards the World Court. Additionally, the attitude of the Special Rapporteur seems to respond in a satisfactory way to the sovereignty-concern. There is still an open question with respect to the two other concerns, however the evaluation of the ILC works on custom may, as a result of their perspective, influence the definitive answer as to the sovereignty-concern as well.

First of all, it must be stressed that what is expected is not an overt denial of the two-element definition of custom. Nobody can deny the existence of norms based on long term-usage,[20] or general, uniform, consistent practices recognized as law. In this sense nobody can deny the customary nature of such norms as: the territorial sovereignty of a state (the right to regulate matters on its territory); the right of a coastal state to a territorial sea; or the inviolability of diplomats. Given the prevalence of practices on those matters nobody can deny the binding force of norms founded on them or defend the opposite or contrary propositions as norms (e.g. a general lack of territorial sovereignty; a general prohibition of the creation of territorial seas of whatever width or a general lack of inviolability of diplomats). Nobody can deny the existence of such norms even if there may exist some doubts as to their exact shape. In this sense the binding force of such norms could not have been denied based on the fact that prior to 1982 the size of territorial seas differed to some extent, or before 1961 there were voices proposing some possible exceptions to the rule of inviolability of diplomats.

What remains to be discussed are the borderline cases, doubts, unexpected and unorthodox visions of custom, and possible heresies. They were fortunately referred to in the first report. In this sense M. Wood made a great concession to the reality-concern.

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[18] The International Court of Justice (ICJ) and its predecessor the Permanent Court of International Justice (PCIJ). *See* in particular: the *Lotus* case, PCIJ Publications A 10, p. 28; *North Sea Continental Shelf*, Judgment, ICJ Rep 1969, p. 44; para. 77, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits*, Judgment, ICJ Rep 1986, p. 109, para. 207.

[19] *See e.g.* K. Wolfke, *Custom in Present International Law*, Kluwer Academic Publishers, Dordrecht, Boston, London: 1993, pp. 40-41.

[20] It being understood that some norms can emerge in a shorter time frame.

These unorthodox elements will occupy a special position in the present text. They are new and form a challenge for specialists of international law, and the ability of the ILC and its rapporteurs to cope with them is especially important. One should however stress that their importance is much smaller than it may seem. This error of perspective is inevitable, and the only thing that can be done is to foresee it and call it by its proper name.

1.3. The mystery of custom and the ILC

One of the most interesting trends in the legal scholarship concerning general international law is connected with doubts as to the very phenomenon of custom in general and/or its elements. This trend may lead to different results. Firstly, it may lead to remarks which refer to the mysteries, paradoxes, and irony of custom, creating a vicious circle in the teaching on it and so on. Secondly, it may lead to an abrupt denial of custom. Last but not least, it may also lead to putting into doubt the correctness of the two-element definition of custom. The latter aspect will be discussed in the following section, while the other doubts and trends are examined below.

What can be treated as an extreme is a famous statement on custom made by N.C.H. Dunbar, according to whom:

> Students of the subject have, from the cradle so to speak, been brought up to embrace this kind of affirmation as an article of faith. Indeed, to question its veracity might well be regarded as tantamount to a heretical attack on the fundamental beliefs and dogma of the creed, shaking, if not destroying, the very foundations on which international law is built.[21]

Other authors rather do not treat custom as a myth, but simply point out mysteries surrounding it. A good example of this trend is a remark of P. Weil, according to whom "Tous les auteurs ont été interpellés par le mystère de la coutume, qui change le fait en norme. Tous se sont interrogés sur cette alchimie et se sont demandé pourquoi et comment «ce qui *est* devient ce qui doit être»."[22]

The Special Rapporteur did not pay special attention to this general aspect of custom. He was more ready however to refer to the paradox of *opinio juris*. As he wrote:

> In particular, some have debated whether the subjective element does indeed stand for the belief (or opinion) of States, or rather, for their consent (or will). Others have deliberated the *opinio juris* "paradox", that "vicious cycle argument" which questions how a new rule of customary international law can ever emerge if the relevant practice must be accompanied by a conviction that such practice is already law. Still others have questioned whether States may be capable at all of having a belief, and whether such inner motivation can ever be proved.[23]

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[21] N.C.H. Dunbar, *The Myth of Customary International Law*, 8 Australian Yearbook of International Law (1978-80), pp. 1-2.

[22] P. Weil, *Le droit international en quête de son identité. Cours général de droit international public*, Recueil des Cours de l'Académie de Droit International, vol. 237, pp. 161-162.

[23] Wood, 2nd Report, p. 47, para. 66.

This paradox was magnificently summed up by P. Cahier, who wrote that:

> Mais le processus de création de la coutume reste tout à fait mystérieux. Son origine repose sans doute sur une pratique uniforme, mais qui ne saurait être considérée par les Etats dès le début comme obligatoire, autrement, comme l'a indiqué Kelsen, la coutume naîtrait de l'erreur.[24]

The readiness of the Special Rapporteur to go into detail on these matters was however rather restrained. He himself disqualified these elements as academic debates.[25] The question remains however whether one can try to grasp the essence of custom as such without going into such debates. In my opinion the answer is no. Therefore it seems to me that the worst omission of M. Wood in his reports was his failure to trace back the very origin of the teaching on custom.[26] In particular, one should ask what justifies the predominant position of certain practices in law.[27] Is it a question of analogy with domestic law, which is believed to have originated from customary law? In this sense custom would be a phenomenon common to all law – be it domestic or international. Or maybe international law has a particular standing? But if so, what does that mean? Does it speak in favour of a monopoly of customary norms as a source of general law?

This is a good place to address the decision of M. Wood to not deal with the nature (customary or otherwise) of the very rules on formation and identification of custom.[28] It is worth pondering whether custom can be justified by custom – i.e. whether there is a customary norm according to which customs should be obeyed? A norm identifying custom as law would be rather a kind of meta-norm. There is no particular problem with calling it a general principle of law, though maybe not necessarily the one recognized by internal orders of "civilized nations."

The only general element that attracted the attention of the Special Rapporteur was the sequence of practice and *opinio juris*. The Special Rapporteur himself expressed the view that "custom begins with 'acts' that become a 'settled practice'; that practice may then give rise to the belief that it had become obligatory."[29] In his third report M. Wood conceded that different scenarios are possible as to the sequence of the two elements of custom.[30] One can agree with this opinion with the full consciousness that it is only a fraction of the problems requiring clarification, and neither the most difficult nor the most important one.

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[24] Cahier, *supra* note 13, p. 230.

[25] Wood, 2nd Report, p. 48, para. 66.

[26] In this sense the attitude of M. Vázquez-Bermúdez seems to be much better, *see* Vázquez-Bermúdez, 1st Report, p. 20 ff. The same applies to D. Tladi, *see* Tladi, 1st Report, p. 23, para. 42.

[27] For more on different justifications of practice, *see* N. Petersen, *Customary Law without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation*, 23(2) American University International Law Review 275 (2008), pp. 280 and 283.

[28] Wood, 1st Report, p. 17, para. 38.

[29] *Ibidem*, p. 46, para. 96.

[30] Wood, 3rd Report, p. 7, para. 16.

On the other hand, it seems obvious that it would be very difficult to transform the doubts and mysteries of custom and the critical remarks on it into the language of articles proposed by the ILC special rapporteurs. M. Wood repeated several times that "the outcome should be a practical guide for assisting practitioners in the task of identifying customary international law."[31] To a large extent the Special Rapporteur is also right in presenting such and similar views as attempts at "de-emphasizing one of the two standard requirements or by displacing them altogether."[32] This matter requires closer scrutiny in the next section.

1.4. Doubts as to two-element definition of custom

The above-mentioned reality-concern refers first of all to doubts as to the correctness of the two-element definition of custom. Such doubts may appear on different levels. They may concern a given customary norm or pretended/assumed customary norm (e.g. the immunity of diplomats in transit, rights of equatorial states to geo-stationary orbit or *non-refoulement*) or entire sets of customary norms or pretended/assumed customary norms (e.g. investment law, law of development). We can examine the attitude of a given actor (a state, the ICJ, ILC, or International Committee of the Red Cross) toward the task of proving the existence of the customary norms advocated, or even entire ways of legal argumentation in general. In all cases the readiness to confirm the existence of a coherent practice and *opinio juris* lies at the centre of interest. Doubts as to the existence of that readiness may be expressed by a given actor directly, or they may be generated unconsciously and unintentionally by authors who speak in favour of the presence of a given norm.

Possible deviations from the two-element character of custom attracted the attention of the Special Rapporteur already in his first report. As he noted: "[o]ne issue that the Commission will need to address is whether there are different approaches to the formation and evidence of customary international law in different fields of international law, such as international human rights law, international criminal law and international humanitarian law."[33]

The special rapporteur in his second report recalled the view according to which in these three fields "among others, […] one element may suffice in constituting customary international law, namely *opinio juris*."[34] However, according to him "the better view is that this is not the case."[35]

In the third report the Special Rapporteur limited himself to citing the previous report (without however enumerating the three areas) and adding that:

> This reflects the inherently flexible nature of customary international law, and its role within the international legal system. Accordingly, in some cases, a particular form (or

[31] *Ibidem*, p. 2, para. 4.
[32] Wood, 1st Report, p. 50, para. 97.
[33] *Ibidem*, pp. 7-8, para. 19. *See also* Wood, 2nd Report, para. 28.
[34] Wood, 2nd Report, p. 12.
[35] *Ibidem*.

> particular instances) of practice, or particular evidence of acceptance as law, may be more relevant than in others; in addition, the assessment of the constituent elements needs to take account of the context in which the alleged rule has arisen and is to operate. In any event, the essential nature of customary international law as a general practice accepted as law must not be distorted.[36]

This statement is the main argument for labelling the attitude of the Special Rapporteur as conservative. He seems to have been deeply impressed by the phrase of K. Wolfke, according to which:

> Without practice (*consuetudo*), customary international law would obviously be a misnomer, since practice constitutes precisely the main *differentia specifica* of that kind of international law. On the other hand, without the subjective element of acceptance of the practice as law, the difference between international custom and simple regularity of conduct (*usus*) or other non-legal rules of conduct would disappear.[37]

While one should be grateful to the Special Rapporteur for referring directly to the matter of possible doubts, their treatment however is far from satisfactory. As the previous section was the proper place to criticize the ILC for not examining the matter of the origins of custom in general, the present section is the proper place to do so with respect to the analyses of the origin of chosen customary norms. Of course nobody could have expected this with respect to all norms, or even massive numbers of norms. All the same, the choice of a few representative examples would be a very good decision. It would mean the adoption of the inductive method.[38] Unfortunately, this is almost[39] absent in the reports. It would be interesting to know, for example, what kinds of practices justify the existence of several norms of humanitarian law (starting with the prohibition of killing prisoners of war). Where does one look for the practice justifying a norm prohibiting genocide? What types of practices justify the norm according to which a treaty obtained by corruption is void? What kinds of practices would undergird a finding that there is a norm dealing with the use of the Moon?

This is the central issue from our perspective. My suggestion is to dwell on it within a more general framework of "creation of norms of general international law." To this end it is necessary to refer to works on general principles of law.

2. GENERAL PRINCIPLES OF LAW AND THE PROBLEM OF SOURCES OF INTERNATIONAL LAW

It must be stressed that the 2019 first report of M. Vázquez-Bermúdez could be treated as a masterpiece in many respects. However, his treatment of the theoretical

[36] Wood, 3rd Report, pp. 7-8, para. 17. *See also* a statement by P. Šturma, Summary record, A/CN.4/SR.3226, 17 July 2014, cited after: Wood, 3rd Report, p. 7, fn 31.

[37] Wolfke, *supra* note 19, pp. 40-41.

[38] For the choice of this method *see* on the contrary: Tladi, 1st Report, p. 7, para. 13.

[39] For exceptions *see* Wood, 3rd Report, p. 10, para. 20; p. 21, para. 37, fn 77; p. 27, para. 40.

matter of sources of law does not belong to them. The Special Rapporteur does not seem to see any problem in this area. He treats general principles of law as one of the sources of law without seeing any necessity to justify or test the thesis, which seems to be obvious to him. For example, when presenting a plan of his report, he writes that: "[p]art Three provides an overview of the development of general principles of law over time. Section I sets out the practice of States and adjudicative bodies relating to this source of international law prior to the adoption of the Statute of the Permanent Court of International Justice."[40] The beginning of Part One contains the even more promising words that "[t]he present topic concerns "general principles of law" as a source of international law."[41] In fact however one can hardly encounter any serious argument on the matter of sources. It should be noted that this attitude is frequent in the legal doctrine.[42]

What seemed to attract more attention on the part of M. Vázquez-Bermúdez was a doctrinal qualification of the general principles as a supplementary source of law,[43] a fact which is of much less importance for the present text.

Interestingly though, the reports of M. Wood contain some statements on general principles, and the report of M. Vázquez-Bermúdez also refers to custom. It is thus helpful to confront these remarks.

M. Wood wrote in his first report that: "[t]he distinction between customary international law and 'general principles of law' is also important, but not always clear in the case law or the literature."[44] He seemed to take for granted that general principles of law recognized by civilized nations were a source of international law, separate from customary international law. He noted that the role played by the former was due to a narrow definition of custom.

This remark on the "unclear" nature of the relationship between the two phenomena did not escape the attention of M. Vázquez-Bermúdez. As he wrote:

> The relationship between general principles of law and customary international law, sometimes described as unclear, deserves particular attention. Nevertheless, the fact that a rule of customary international law requires there to be a "general practice accepted as law" (accompanied by *opinio juris*), while a general principle of law needs to be "recognized by civilized nations", should not be overlooked. This suggests that these two sources are distinct and should not be confused.[45]

The cited fragments allow us to identify two underlying ideas. The first of them refers to ontological differences between customary norms and general principles and

[40] Vázquez-Bermúdez, 1st Report, p. 4, para. 7.

[41] *Ibidem*, p. 5, para. 10.

[42] B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge University Press, Cambridge: 2006, p. 24; R. Kwiecień, *General Principles of Law: The Gentle Guardian of Systemic Integration of International Law*, 37 Polish Yearbook of International Law 235 (2017).

[43] Vázquez-Bermúdez, 1st Report, p. 7, paras. 25 and 26 respectively.

[44] Wood, 1st Report, p. 16, para. 36.

[45] Vázquez-Bermúdez, 1st Report, p. 8, para. 28.

the self-sufficient character of both of them as sources. The second has to do with the role of principles for the formation of customary norms and their interpretation.

Both trends are visible in another statement of M. Wood, according to which:

> An important interaction was the one that took place between customary international law and the general principles of law, the latter often being used in conjunction with or in place of the traditional criteria of customary law. It was thus conceivable for a customary rule to be interpreted in the light of a recognized general principle. The role of such principles was closely linked to the formation and evidence of customary international law […] The Commission must be careful, however, not to exclude the possibility of identifying a general principle as a source of international law, whether as a stand-alone rule or as a complement to other rules from other sources.[46]

In fact, the number of links is much larger.[47] However, neither these matters nor the place of general principles of law in arbitral awards and judgments of international courts are the topic of the present study. The same applies to lists of general principles and their groups. Important as they are, such matters cannot replace a thorough analysis of the reasonableness of calling general principles sources of law, especially from the perspective of the sovereignty-concern. On the other hand, the coherence-concern brings to the fore the issue of the value of very strict adherence to the traditional definition of custom if we accept a relatively open category of general sources of law, namely general principles.

This question is quite complicated. One can imagine a traditional dispute between a positivist (as defined in section 2.1.) and non-positivist, with the former arguing that only customs form general unwritten law, and the latter accepting another source (or maybe other sources) of general international law. One can however imagine dozens of disputes between other pairs of protagonists with opposing views, both accepting that some norms of general international law may not have a customary nature. All the same, the sets of such norms accepted by a given protagonist may differ to a great extent, as well as the justifications adopted by them. The basic challenge is how to reconcile such norms with state sovereignty – in other words, where to look for the consent of states for a given norm.

M. Vázquez-Bermúdez seems to attach decisive importance to Art. 38 of the ICJ Statute. As he writes, "Article 38, paragraph 1(c), of the Statute of the International Court of Justice is an authoritative statement of the legal nature of general principles of law as a source of international law."[48] In this respect he can refer to many other authors. C. Eggett even goes so far as to write "that Article 38(1)(c) ICJ Statute is one of the established sources of international law is uncontroversial."[49] It is difficult to agree with

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[46] *Yearbook … 2013*, vol. I, 3183rd meeting, p. 92, para. 14. Cited on the basis of Vázquez-Bermúdez, 1st Report, pp. 17-18, para. 67.

[47] Vázquez-Bermúdez, 1st Report, p. 67, para. 233.

[48] *Ibidem*, p. 5, para. 14.

[49] C. Eggett, *The Role of Principles and General Principles in the 'Constitutional Processes' of International Law*, 66 Netherlands International Law Review 197 (2019), p. 205.

that thesis. Although there is a group of authors attributing this role to Art. 38 of the Statute of the ICJ,[50] there is another group which stresses that from the formal point of view Art. 38 lists the bases of decision-making by the ICJ, and not necessarily sources of law.[51] I myself am very impressed by the words of A. Ross, according to whom Art. 38 of the Statute of the ICJ "cannot formally constitute the foundation of the doctrine of the sources of International Law", and that "the doctrine of the sources can never in principle rest on precepts contained in one among the legal sources the existence of which the doctrine itself was meant to prove."[52]

The fact of the ICJ being able to apply general principles of law to inter-state disputes is important, but it tells more about the treaty law creating the ICJ and empowering it to act than about the nature of general law as such. It would be unrealistic to ignore the fact that the drafters of the Statute of the PCIJ (which introduced the reference to "general principles of law recognized by civilized nations") had great influence upon the teaching of international law and its sources. In my opinion there are, however, very important arguments against treating Art. 38 of the Statute as the constitution of general law. If we are to look for such a constitution it should be looked for rather in Art. 2(1) of the UN Charter, which refers to the sovereign equality of states. Can we call a state sovereign and believe that it is bound by a principle which it was not only never asked about, but it has not even had any chance to suspect its existence. It is believed that the requirements of practice and *opinio juris* give states a say at the time of the formation of customary norms. That is why the matter is so pressing with respect to general principles. This is especially important if we are confronted with strongly normative statements, e.g. that states are "obliged" to follow those principles. How can states follow at a given moment principles which are going to be discovered, inferred, or maybe even invented within the next 50 or 100 years without any chance for that state to take part in their formation?

That is why special care should be taken when formulating statements about the normative character, binding force, and source of law character of general principles. The most dangerous mistake is the readiness to find easy answers, of the type that "principle x is a source of law and is not a custom, so all principles are also sources of law" or "principle y is not a source of law, so no principle of law can be such a source unless it fulfils the criteria of a customary norm."

This is especially pressing if we are aware of the weaknesses inherent in the narrowing-down effects of elements present in both the very notion of general principles of law and in Art. 38(1)(c) of the ICJ Statute. In particular, these factors are: being a principle;

[50] M.N. Shaw, *International Law*, Cambridge University Press, Cambridge: 1991, p. 98. He does not conceal the dispute on this matter, *ibidem*, p. 99. *See also* K. Zemanek, *Unilateral Legal Acts Revisited*, in: K. Wellens (ed.), *International Law: Theory and Practice*, Nijhoff Publishers, The Hague: 1998, p. 131.

[51] Góralczyk, *supra* note 12, p. 63; Bierzanek, Symonides, *supra* note 12, p. 78; P.-M. Dupuy, *Droit international public*, Dalloz, Paris: 2008, p. 280; A. Ross, *A Textbook of International Law. General Part*, Longman, London, New York, Toronto: 1947, p. 83.

[52] Both citations from Ross, *supra* note 51, p. 83.

being general; and being "recognized by civilized nations" (recognized generally). In fact, however, the first two elements are only apparent narrowing-down factors. The first is usually an opportunity for referring to Dworkin's division between principles and rules,[53] although it is hard to imagine disqualification of a general norm only because of it being a rule and not a principle.[54] We can compare the following: *nemo iudex in causa sua propria*; good faith; reciprocity; *inadimplenti non est adimplendum*; *competence de competence* of an international court; *negotiorum gestio; lex specialis derogat generali*; and extinctive prescription. Which of them has the nature of a principle and which of a rule? Are they general enough? In my opinion, three first ones are principles, and the remaining ones are rules.[55] The second question seems to be purely academic. Whatever answers are given to both questions, however, all of the listed elements can be justified either as general principles or simply principles.

As regards the last narrowing-down factor (namely the fact of a given principle "being recognized") one should note that M. Vázquez-Bermúdez identifies two groups of general principles. They are, namely, those stemming from domestic laws and those typical for the international order only. For both groups he underlines the importance of recognition.[56] He is also aware of the problems with understanding this term. For the first group he stresses not only the presence of a given principle in the domestic law of several groups of states, but also the possibility of its transformation into the international order.[57]

The basic question is how to grasp state consent for such principles. Could it be found in this element of recognition, or maybe also in the element of transformation? One can be rather sceptical about this. The special rapporteur does not seem to see the importance of this element and therefore does not take a definitive position on it. All the same he seems to see the element of recognition in the very presence of a given rule in domestic systems.[58] What does it mean, however, that states adopt certain domestic provisions establishing, for example, relatively short periods (3-10 years) of extinctive prescription? Can anybody see in this their consent for a parallel rule of international law? I cannot see any such consent in this area.

There is also the risk of misunderstandings. There is no problem with calling as principles such norms as *pacta sunt servanda* or the basis of state responsibility (any breach of law gives rise to responsibility). Does this mean however that they are not customary norms? In my opinion it would be a great mistake to think so. In any case the presence in international law of such principles/rules would not have been any smaller in the absence of Art. 38(1)(c) of the ICJ Statute.

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[53] Vázquez-Bermúdez, 1st Report, p. 44, para. 146. *See also* Petersen, *supra* note 27, p. 289 ff.

[54] The Special Rapporteur expressly concedes this. *See* Vázquez-Bermúdez, 1st Report, p. 46, para. 152.

[55] C. Eggett rightly qualifies "general principles" as rules, Eggett, *supra* note 49, p. 199, *see also* p. 205.

[56] Vázquez-Bermúdez, 1st Report, p. 49, para. 165.

[57] *Ibidem*, p. 51, paras. 168-169.

[58] *Ibidem*, pp. 56-57, paras. 190-191.

This is why it is useful to look at how the sovereignty of states is respected in the hitherto works of the ILC concerning both custom and general principles of law.

3. NORMS OF GENERAL INTERNATIONAL LAW AND STATE CONSENT

The strict attachment of M. Wood to the two-element nature of custom could be treated as a calming-down factor if viewed from the perspective of the sovereignty-concern. It is worthwhile to test the practical value of this factor on several levels.

The first level has to do with establishing what kind of scrutiny is presented by the most important actors with respect to practice and *opinio juris*. Such actors certainly include, among others, the ICJ and the ILC itself.

Viewed in this light the picture looks much worse than can be expected. The examination of the attitude of the World Court to evidence of customary norms would require a voluminous study. That is why is seems useful to look at the perception of this attitude in the doctrine and by the ILC special rapporteurs themselves.

A careful reader of the reports on custom may discover a somehow hidden, but yet visible, critical assessment of the influence of the ICJ on the teaching regarding custom. As M. Wood wrote: "At the same time, commentators have suggested that the Court has thus far provided only limited guidance on how a rule of customary international law is formed and is to be ascertained, having 'a marked tendency to assert the existence of a customary rule more than to prove it'."[59]

Even more critical was his remark distinguishing –"at the risk of oversimplification" – two main approaches of the ICJ to the identification of particular rules of custom. Namely, he states that:

> [I]n some cases the Court finds that a rule of customary international law exists (or does not exist) without detailed analysis. This may be because the matter is considered obvious (…) In other cases the Court engages in a more detailed analysis of State practice and *opinio juris* in order to determine the existence or otherwise of a rule of customary international law.[60]

The Special Rapporteur is in a position to cite only one case of the latter type however. What is a little bit striking is his statement according to which:

> There is a considerable number of cases in which the Court has addressed specific aspects of the process of formation and identification of rules of customary international law, covering many of the issues that arise under the present topic, chief among them the nature of the State practice and *opinio juris* elements, and the relationship between treaties and customary international law. While such cases do not provide complete answers, they offer valuable guidance.[61]

[59] Wood, 1st Report, p. 25, para. 64.
[60] *Ibidem*, pp. 24-25, para. 62.
[61] *Ibidem*, p. 25, para. 63.

What is worrying however is the lack of any citation in support of this statement. In fact, the Special Rapporteur simultaneously cites the words of Tomka to the contrary. According to Judge Tomka:

> However, in practice, the Court has never found it necessary to undertake such an inquiry for every rule claimed to be customary in a particular case and instead has made use of the best and most expedient evidence available to determine whether a customary rule of this sort exists. Sometimes this entails a direct review of the material elements of custom on their own, while more often it will be sufficient to look to the considered views expressed by States and bodies like the International Law Commission as to whether a rule of customary law exists and what its content is, or at least to use rules that are clearly formulated in a written expression as a focal point to frame and guide an inquiry into the material elements of custom.[62]

Similar (also very cautious) remarks are addressed by M. Wood to the ILC. Interestingly enough, the Special Rapporteur seems to look at it through the prism of "legal writings." In one sentence referring at one and the same time to the ILC, the International Law Association (ILA), and the Institute of International Law (IDI), he notes that: "[a]s with all writings, however, it is important, if not always easy, to distinguish between those that are intended to reflect existing law (codification, or *lex lata*) and those that are put forward as embodying progressive development (or *lex ferenda*)."[63]

It is a kind of irony that D. Tladi – confronted with critical statements on the insufficient references to practice in his first report – went so far as to say that: "(...) many texts on other topics of the Commission have been adopted on significantly less practice than what is provided in support of the contents of paragraph 2 of draft conclusion 3."[64] Perhaps this is true, but what does it actually mean?

In fact it refers to a wider problem – that of making very bold statements on binding norms of international law – be they customary ones or general principles – without special and focused attempts to verify the grounds of their binding force. This has provided many authors with reasons to offer very critical assessments of the situation.

It is difficult not to refer to a few remarks made in a provocative text by F.R. Tesón. He refers to what he calls "fake custom." As he notes, "International lawyers, norm entrepreneurs, and international courts perpetrate fake custom with alarming frequency."[65] Though it is difficult to agree with all the opinions expressed by this author, in my opinion he addresses the essence of a true problem. It can be partly traced in publications treated as "scientific", but they form only the tip of the iceberg. What is a hidden

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[62] P. Tomka, *Custom and the International Court of Justice*, 12(3) The Law and Practice of International Courts and Tribunals 195 (2013), Cited after: Wood, 1st Report, p. 27, para. 65. *See also* D. Tladi who notes (with respect to the Inter-American Court of Human Rights) that "Similarly, the Court's earlier decisions on the *jus cogens* nature of torture focused on the nature and gravity of torture rather than any State consent to the prohibition." Tladi, 1st Report, p. 34, para. 55.

[63] Wood, 3rd Report, p. 45, para. 65.

[64] Tladi, 2nd Report, p. 8, para. 17.

[65] F.R. Tesón, *Fake Custom*, in: B.D. Lepard (ed.), *Reexamining Customary International Law*, Cambridge University Press, Cambridge: 2017, p. 87.

underneath are hundreds and thousands of oral or written statements which are very strict and refer to very precise norms of international law, without the slightest attempt being made to refer to any practice and *opinio juris* or other forms of state consent. The only addition which should be made to the remarks of F. R. Tesón would have to refer to "fake general principles." In my opinion, they may be even more dangerous and ruinous for any rational arguing in the field of public international law.

F.R. Tesón identifies what he calls "fake custom techniques."[66] They mainly refer to types of argumentation which employ the formulation of bold statements on apparent customary rules which in fact are based on the contents of nonbinding resolutions (the *Ad Nauseam* Fallacy), treaties (the Treaty Fallacy), and domestic laws (the Legislative Fallacy). Some others are based on selective citations of sources; auto-citations of international courts, bad faith citations of very vague statements of international courts, and so on.

N. Petersen is perfectly right to say that "it seems practically impossible to ascertain the practices of the nearly 200 states in the international community. Thus, a survey of customary international law is often highly selective and takes into account only major powers and the most affected states."[67] This picture is actually too optimistic. In many cases no attempt to refer to any practice is visible. Therefore, he is more right when he writes that: "But even in this smaller focus there is no adequate and systematic method for proving the elements of custom. Consequently, international law arguments based on custom always suffer from a considerable degree of arbitrariness."[68]

One can only add here that arguments referring to general principles go even further. Their potential was not ignored at the time of drafting the Statute of the PCIJ. What deserves special mention is the opinion of E. Root, who said that "[i]t is inconceivable that a Government would agree to allow itself to be arraigned before a Court which bases its sentences on its subjective conceptions of the principles of justice. The Court must not have the power to legislate."[69] What can one then say about states which do not accept the jurisdiction of the Court but are at the same time confronted with very apodictic statements on the binding force of some pretended/assumed rules.

It is not difficult to foresee two important areas in which this process is the most likely. They are firstly – rules which are so common to thinking about law that they are inevitable to a high extent. The second group is composed of true or apparent rules on matters associated with human rights. The first area seems to a high extent acceptable, although discussions and disputes may be encountered over details.

The second area however is much more complicated. In fact, it is no coincidence that the reports of M. Wood identified possible anomalies in such areas as human rights, humanitarian law, and international criminal law.

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[66] Tesón, *supra* note 65, pp. 92-99.

[67] Petersen, *supra* note 27, p. 277.

[68] *Ibidem*.

[69] Vázquez-Bermúdez, 1st Report, p. 27, para. 99.

The International Criminal Tribunal for ex-Yugoslavia (ICTY) in its judgment in the case *Prosecutor v. Kupreškić* ruled that:

> Principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent. The other element, in the form of *opinio necessitatis*, crystallizing as a result of the imperatives of humanity or public conscience, may turn out to be the decisive element heralding the emergence of a general rule or principle of humanitarian law.[70]

N. Petersen also describes attempts to justify the binding force of unwritten norms on human rights. There is no wonder that those justifications easily jump back and forth between custom and general principles.[71]

It must be noted that there is a group of authors ready to see custom even without developed practice.[72] What is required is a genuine consensus of states on a given matter.[73] This, however, seems to be denied by the ILC as regards custom. This should be a good message for states. All the same this is of no special value for states if they can be ambushed by arguments referring to general principles of law.

This process of argumentation with respect to norms should be subjected to strict scrutiny, even if it is understood that it cannot be stopped or reversed entirely. In some instances, it would not be rational to stop it. Let us take human rights. It is easy to justify the presence of international norms on the prohibition of genocide, massive killing of non-belligerents, and the prohibition of torture. Can we, however, prove the binding force of such general norms as guaranteeing the freedom of trade unions or assembly? Why not of housing and access to culture? If so, what would be the sense of making any agreements to this end. In any case the element of practice would require the actual presence of such rights in the legal orders of all states (it being understood that even such presence does not guarantee the presence of *opinio juris*). It is all the more necessary to exercise caution if we look at the attitude of all three above-mentioned special rapporteurs to the importance of nonbinding resolutions. They were referred to in the third report of M. Wood. As he put it (with respect to the UN GA resolutions): "Such resolutions may be particularly relevant as evidence of or impetus for customary international law."[74] The special rapporteur was in a position to cite both proponents as well as opponents of treating nonbinding resolutions as evidence of customary law.[75] Interestingly enough, references to such resolutions emerge also in the reports on general principles of law[76] and on *jus cogens*,[77] largely in the affirmative.

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[70] Wood, 1st Report, p. 30, para. 70.
[71] Petersen, *supra* note 27, pp. 283-285.
[72] Tesón, *supra* note 65, p. 109.
[73] *Ibidem*.
[74] Wood, 3rd Report, p. 31, para. 46.
[75] *Ibidem*, p. 35, paras. 49-50.
[76] Vázquez-Bermúdez, 1st Report, p. 52, para. 173.
[77] Tladi, 2nd Report, p. 41, para. 82.

A somewhat calming-down factor is the cautious reference of the ICJ to Art. 38(1)(c) of its Statute.[78] All the same, lawyers must look at the potential of some processes. This potential is both great and dangerous. The treatment of *jus cogens* can serve as an illustration of this process.

4. THE TEACHING ON *JUS COGENS* AS A PRACTICAL TEST OF RESPECT FOR THE SOVEREIGNTY-CONCERN

It is not the task of this present text to describe the four reports on *jus cogens* and the 2019 Draft Conclusions. What is interesting is the influence of the teaching on *jus cogens* on the legal scholarship on sources of general international law, and vice versa. It is difficult not to refer to what seemed to be the worst scenario which came to my mind at the start of the ILC works on *jus cogens*. It was described as follows: "[i]f the above-mentioned way of apodictic teaching on norms is continued, we will be soon informed about a new type of source – namely jus cogens." What could be treated as a warning was the statement by D. Tladi, according to which "[t]he peremptory nature of public order norms could themselves be explained by either consent or non-consent based theories."[79] I feel obliged to confess that this worst-case scenario has not been realized so far.

What interests me in particular here is the correlation between the character of *jus cogens* and the type of source from which it stems. As D. Tladi put it in his first report: "[t]he requirement that, to be *jus cogens,* a norm must be a norm of general international law is also a key requirement of peremptoriness. It is not only a requirement for peremptoriness, it is also an element for its identification."[80]

In the second report D. Tladi developed this idea and wrote that:

> Article 53 [of the Vienna Convention on the Law of Treaties] sets forth two cumulative criteria for the identification of *jus cogens*. First, the relevant norm must be a norm of general international law. Second, this norm of general international law must be accepted and recognized as having certain characteristics, namely that it is one from which no derogation is permitted and one which can be modified only by a subsequent norm of *jus cogens*.[81]

He seems to adopt these elements as general preconditions, which would seem to be a calming-down factor. This is all the more so because in the second report D. Tladi identified two sources of norms which may be *jus cogens* norms; namely custom and general principles.[82]

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[78] Vázquez-Bermúdez, 1st Report, p. 36, para. 127. *See also* Kwiecień, *supra* note 42, p. 239.

[79] Tladi, 1st Report, p. 35, para. 56.

[80] *Ibidem*, p. 38, para. 62.

[81] Tladi, 2nd Report, p. 18, para. 37.

[82] *Ibidem*, p. 22, para. 43 and p. 24 para. 48 ff.

The second interesting element to me here has to do with the notion of the persistent objector. D. Tladi wrote that:

> Norms of *jus cogens,* as distinct from *jus dispositivum,* are also generally recognized as being universally applicable. As a point of departure, the majority of international law rules are binding on States that have agreed to them, in case of treaties, or at the very least, to States that have not persistently objected to them, in the case of customary international law (*jus dispositivum*). *Jus cogens*, as an exception to this basic rule, presupposes the existence of rules "binding upon all members of the international community. In reality, the characteristic of universal applicability flows from the notion of non-derogability, that is, it is difficult to see how a rule from which no derogation is permitted can apply to only some States.[83]

How does one reconcile this with the previous statements of D. Tladi? On its face it seems not a very dangerous picture for states. A given norm should be erected as any other. Only its *jus cogens* status is believed to be not subject to the persistent objector rule. As the D. Tladi puts it:

> This characterization is correct, as long as it is understood that the "first" and "second" acceptance are qualitatively different from each other. In the first acceptance, the norm is accepted as a norm of international law, either through "acceptance as law" (*opinio iuris sive necessitatis*) for customary international law or recognition "by civilized nations" for general principles of law. The second acceptance is the acceptance of the special qualities of that norm of general (...) international law, namely its non-derogability. This latter acceptance has been referred to as *opinio juris cogentis*.[84]

This assumes, however, that there is a very precise temporal sequence to the creation of *jus cogens* norms. But what if this description does not work. What if a given norm makes no sense if it is not given the status of *jus cogens*?

It is worth recalling that just a few years earlier M. Wood had the opportunity to refer to the matter of a persistent objector.[85] There is no sense in summarizing this part of his report here, but what is interesting is what is *not in it*. Namely, it does not contain any reference to customary norms *jus cogens* being any different with respect to the phenomenon of the persistent objector. It is true that already in his first report M. Wood excluded from his works the topic of *jus cogens*.[86] In any case however it seems to me impossible for the norm advocated by D. Tladi to exist and to be overlooked by M. Wood. There would seem to be no problem if one Rapporteur defended one general norm and another Rapporteur defended another one which was to a great extent irreconcilable with the former.

Of course, the coherence-concerns seem to arise in such situations. I must stress that it is not my intention to make the matter of the persistent objector and *jus cogens*

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[83] Tladi, 1st Report, pp. 40-41, para. 66.
[84] Tladi, 2nd Report, p. 39, para. 77.
[85] Wood, 3rd Report, pp. 59-67.
[86] Wood, 1st Report, pp. 9-12, paras. 24-27.

the central issue. It should serve rather as an illustration of a wider process of very bold "norm advocacy." It illustrates the perils for states and their sovereignty, which have been referred to several times in this text. It makes it very probable that states will be persuaded to, pressed to, and even forced to follow some patterns of conduct which were not accepted by them in any way. That is why the main concern which arises here is the sovereignty-concern.

5. STATES VIS-À-VIS THE ILC

If the main danger identified so far has to do with the preservation of the position of states (the sovereignty-concern), it would be interesting to examine how they take care about their own interests. As it is impossible to examine all the works of the Sixth Committee since the beginning of its functioning, a tempting alternative would be to examine all the reactions of states to all reports on custom and on general principles of law. In fact, however, the position of M. Wood with respect to the requirements of custom was very conservative and did not call for any state reaction. In contrast, several statements of M. Vázquez-Bermúdez called for such a reaction, at least in my opinion. Thus I have decided to examine the statements made by states in the Sixth Committee in 2019[87] with respect to the first report on general principles of law and the draft articles on *jus cogens*.

As regards the first item, it is visible that states have no problem with referring to general principles as sources of law.[88] What attracted more attention was the more precise qualification of this type of source. Thus for example India expressed itself as being against calling general principles a "subsidiary source" or "secondary source", opting instead for the term "supplementary source."[89] One can thus wonder what are the normative effects of such a choice of the basic term. For example, the Netherlands also expressed itself as being against calling general principles of law a subsidiary source of international law; although it acknowledged at the same time that "States can be responsible for an internationally wrongful act when acting contrary to an obligation arising from a general principle."[90] All the same, the Netherlands stressed that "a further

[87] All statements are available on the webpage: https://papersmart.unmeetings.org/en/ga/sixth/74th-session/statements/ (all accessed 30 June 2020). Due to the small size of State statements, the numbers of pages or paragraphs were given exceptionally.

[88] *See e.g.* the positions of Poland: http://statements.unmeetings.org/media2/23329211/-e-poland-statement.pdf; of Philippines: http://statements.unmeetings.org/media2/23329226/-e-philippines-statement.pdf, of the UK: http://statements.unmeetings.org/media2/23329156/-e-united-kingdom-statement.pdf; of Australia: http://statements.unmeetings.org/media2/23557938/-e-australia-cluster-iii-statement_final.pdf; of Greece: http://statements.unmeetings.org/media2/23329232/greece-statement.pdf.

[89] *See* http://statements.unmeetings.org/media2/23329202/-e-india-statement.pdf. For more on the use of this term, *see also* the position of the Czech Republic, http://statements.unmeetings.org/media2/23329204/-e-czech-republic-statement.pdf.

[90] The present and the following citations are based on: http://statements.unmeetings.org/media2/23329149/-e-netherlands-statement.pdf, p. 3.

inquiry would be appreciated into the question whether general principles of law can be violated." One can add that if not, it would mean that their normative character could be put into doubt. Interestingly enough, Austria also expressed its awareness of the difficulties concerning the term "source" of international law. Nevertheless it was ready to acknowledge general principles of law as norms of international law.[91] In fact only a very short Japanese statement demanded a clarification of the very term "source of law"[92] and therefore referred to the core of the problem.

In this sense states did not show any special sensitivity to the potential dangers to their sovereignty connected with automatically calling all principles as sources of law, norms, or obligations.

Several delegations referred to the question of distinguishing general principles from custom.[93] Italy was a little more specific in this respect and considered two possibilities. According to the first, general principles of international law would be those inferred from the rules of customary international law.[94] The second possibility would be to consider general principles as being of a self-sufficient nature. The first possibility could be seen as a kind of protection of the interests of states, even though in any case this defence is quite weak. In fact, several such calls look like no more than attempts to clarify the matter. Several of them referred to the relationship between general principles of law, the fundamental principles of international law, as well as the principles regulating the various branches of international law.[95]

Another relatively weak form of defence consists of references to the necessity for a cautious approach. As Norway put it, "this is especially so when it comes to general principles of law in relation to the applicable substantive law."[96]

It is a kind of paradox that states were more suspicious of general rules formed within the international legal order than those stemming from domestic legal systems.[97]

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[91] *See* http://statements.unmeetings.org/media2/23329132/-e-austria-statement.pdf, p. 3.

[92] *See* http://statements.unmeetings.org/media2/23329181/-e-japan-statement.pdf.

[93] *See e.g.* Norway's statement on behalf of the Nordic countries, http://statements.unmeetings.org/media2/23329125/-e-norway-on-behalf-statement.pdf. For the position of Ireland *see* http://statements.unmeetings.org/media2/23329148/-e-ireland-statement.pdf; of Estonia: http://statements.unmeetings.org/media2/23329213/-e-estonia-statement.pdf; of Croatia: http://statements.unmeetings.org/media2/22000123/-e-croatia-statement.pdf.

[94] *See* http://statements.unmeetings.org/media2/23329159/-e-italy-statement.pdf, pp. 2-3.

[95] *See* the position of Romania: http://statements.unmeetings.org/media2/23329157/-e-romania-statement.pdf, p. 2. Austria called for strict differentiation between principles of international law governing relations among states on the one hand and general principles of law on the other; see: http://statements.unmeetings.org/media2/23329132/-e-austria-statement.pdf, pp. 3-4. For a similar position by Slovakia, *see* http://statements.unmeetings.org/media2/23329143/-e-slovakia-statement.pdf; by Poland, *see* http://statements.unmeetings.org/media2/23329211/-e-poland-statement.pdf; by Spain, *see* http://statements.unmeetings.org/media2/23329162/-s-e-spain-statement.pdf.

[96] *See e.g.* Norway's statement on behalf of the Nordic countries, http://statements.unmeetings.org/media2/23329125/-e-norway-on-behalf-statement.pdf.

[97] *See* the position of the Republic of Korea, http://statements.unmeetings.org/media2/23329216/-e-rep-of-korea-statement.pdf.

One should highly appreciate the remarks of Malaysia, which referred to the fact that "the role that the general principles play in the two very different legal systems i.e. national legal systems and the international legal system, differs greatly."[98]

Summing up, we can see a very low level of awareness on the part of States of the dangers inherent in the very idea of general principles. It is once again a kind of paradox that Spain went as far as to ask: "Who is afraid of general principles of law?"[99] One should reverse this question and ask: "Who should be afraid of some interpretations of general principles?" In my opinion the answer should be simply: States.

On the other hand, one could associate this low level of awareness with the very initial stage of works on general principles. This is why it is useful to look at some comments on the 2019 draft articles on *jus cogens*.

In fact, the strict adherence to the criteria for establishing *jus cogens* seems to protect the interests of states. This is in line with the 2019 statement of China.[100] France strongly relied on the division between the existence of primary norms and the secondary rules on those norms having a peremptory character.[101] In the opinion of France, the mandate of the ILC does not cover the former.

Other delegations asked either for less rush in the adoption of the rules on *jus cogens*.[102] or insisted on strict adherence to customary norms in this area.[103] Turkey went so far as to deny the development of such customary norms in this area.[104] Also the UK delegation claimed that the 2019 Draft Articles "cover a diverse range of sensitive issues which do not in all respects reflect current law or practice."[105] One should also cite the position of Thailand, pointing to the fact that the qualification by a very large majority of a given norm as *jus cogens* may be too low.[106]

Two important comments deserve special mention. As the British delegate stated:

> The Commission's work products are nowadays frequently cited by international and domestic courts and tribunals. This is in principle a good thing – provided there is clarity about the legal force of these products. But that is not always the case. The Commission's work is sometimes relied on as an articulation of international law without proper consideration of whether that product has been accepted as a treaty or is sufficiently underpinned by State practice and opinio juris to be regarded as customary international law.[107]

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[98] *See* http://statements.unmeetings.org/media2/23329235/-e-malaysia-statement.pdf, p. 6.

[99] *See* http://statements.unmeetings.org/media2/23329162/-s-e-spain-statement.pdf, p. 5.

[100] *See* http://statements.unmeetings.org/media2/21999909/-e-china-statement.pdf.

[101] *See* http://statements.unmeetings.org/media2/23328954/france-statement.pdf.

[102] For the 2019 position of Slovakia, *see* http://statements.unmeetings.org/media2/21999915/-e-slovakia-statement.pdf.

[103] *See* the position of Israel, http://statements.unmeetings.org/media2/23329042/-e-israel-statement.pdf, p. 6.

[104] *See* http://statements.unmeetings.org/media2/23328689/-e-turkey-statement.pdf.

[105] *See* http://statements.unmeetings.org/media2/21999917/-e-united-kingdom-statement.pdf, para. 23.

[106] *See* http://statements.unmeetings.org/media2/21999964/thailand.pdf, para. 10. *See also* the position of Vietnam: http://statements.unmeetings.org/media2/23328684/viet-nam.pdf.

[107] *See* http://statements.unmeetings.org/media2/21999917/-e-united-kingdom-statement.pdf.

It is also worthwhile referring to the statement of Israel, according to which:

> If the Commission were in fact interested in using its own past work to demonstrate that certain norms have a peremptory character, it should have, at the very least, shown that its past work was well-founded and based on a coherent methodology, in accordance with the principles described above. Otherwise, the list entails a somewhat unseemly and arguably unreliable act of self-referencing to assertions made, with no detail as to how these conclusions were reached or as to why the legal threshold for jus cogens was considered satisfied in such cases.[108]

One can see that states know how to counteract over-activism on the part of the ILC, and thus one can expect that they will react somehow also in the matter of general principles of law in near future. It would probably be too optimistic however to believe that this reaction will address the very core of the issue.

CONCLUDING REMARKS

One can have the impression that critical remarks on the ILC works on custom and on general principles of law (the references to *jus cogens* being of a very selective nature) dominate not only the present text but the overall evaluation of these works. This however would not be accurate. As has been noted, the first report on general principles is a masterpiece in many respects. One should also refer to several valuable elements of the reports on custom. One of them is the topic of the relationship between practice and *opinio juris.* The fragment of the third report devoted to this is one of the brightest elements of the entire works on custom. The systematic scheme of the types of practice[109] is also very valuable. It distinguishes nine types of practice (extending from physical actions of states up to voting on non-binding resolutions in international organizations). Inaction is also qualified as an additional type of practice.[110] This multiplicity of forms of practice is reflected in the multiplicity of instances of *opinion juris*.[111] The Special Rapporteur is aware of the resemblance of some instances of *opinio juris* with forms of practice. His decision not to depart from the two-element definition of custom because of such cases is, in my opinion, one of the most valuable elements of his efforts. He rightly points out the different roles of *opinio juris* and practice. Also the matter of inaction was given a very interesting treatment. The Special Rapporteur distinguished between inaction as an element of practice and inaction as an element of *opinio juris*.[112] The doctrine of international law can be grateful to the Special Rapporteur also for his original systematization of possible relationships between treaties and custom.[113]

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[108] *See* the position of Israel at: http://statements.unmeetings.org/media2/23329042/-e-israel-statement.pdf, p. 8.

[109] Wood, 2nd Report, pp. 21-27, para. 3(e).

[110] *Ibidem*, p. 27, para. 42.

[111] *Ibidem*, pp. 55-60, para. 76.

[112] Wood, 3rd Report, pp. 10-11, para. 21.

[113] *Ibidem*, p. 19, para. 35.

At the same time, it should be said that regardless of whatever added value we are able to accord to the works of the ILC on custom, it is difficult to get rid of a feeling of anxiety. It seems that M. Wood was aiming to build a fortress protecting states from reckless arguments on unwritten norms, but there seems to be a great hole in this fortress (namely general principles of law), which makes the value of – or maybe even the existence of – this fortress quite doubtful. In other words, states got a shield but it may easily turn out to be a paper one. In fact, it is not based on real stress tests. Such tests would have to refer to the legal and philosophical foundations of custom on the one hand, and practical analyses on the emergence of chosen customary norms on the other. In fact, the ILC did not really face the actual problem of the phenomenon of reckless or even bad faith arguments on unwritten norms binding upon states.

What can be worrying is the relative fragmentation of the works on different topics, and lack of sensitivity to the need for a careful analysis of both the term "source of law" as well as of the sovereignty-concern. This is the most important concern, as opposed to the two others discussed in the present text, namely the reality-concern and coherence-concern. The latter have to do with the correctness of the descriptions of the sources of law by the ILC, while the practical effects of any such defects may be very small. In contrast the challenges to state sovereignty are real. In fact, one should stress that it is time for states to take a more active role in defending their interests. If the international elites are ready to see *opinio juris* in each and every nonbinding resolution, it is time for states to issue reservations that their voting for them does not imply any agreement to new binding rules. One can conclude that it is no longer the time for passive behaviour.

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INTERNATIONAL COURTS, UNRECOGNISED ENTITIES AND INDIVIDUALS: COHERENCE THROUGH JUDICIAL DIALOGUE?

Abstract: *The article offers a revisited look at the classic jurisprudence of the ECtHR and CJEU concerning the Turkish Republic of Northern Cyprus from the perspective of the phenomenon of judicial dialogue. In this context, it aims to examine whether judicial dialogue contributes to the development of coherent jurisprudence and in consequence of effective judicial redress in cases involving unrecognised entities and individuals. It draws attention to the threats for both the international rule of law and the protection of rights of individuals resulting from inconsistencies within own jurisprudence of the respective court, as well as from lack of coherence in interpretation and application of the same rules of international law by different courts.*

Keywords: international courts, judicial dialogue, judicial protection, judicial redress, non-recognition, recognition, unrecognised entities, Turkish Republic of Northern Cyprus

INTRODUCTION

Although the legal status of unrecognised entities is disputable under international law,[1] there are some ways in which they may become subjects of interest of international jurisprudence. The existing case law makes it possible to distinguish two types of

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[1] Thus I prefer to use the term "unrecognised entities" to "unrecognised subjects"; for the purposes of the present study it refers to territorial entities claiming statehood (or at least a certain degree of autonomy), including cases of secession or international administration, or to actors (such as e.g. insurgents, self-determination movements) exercising control over a territory of a state (part of it) claiming the status of the legitimate government – *see* E. Milano *Recognition (and Non-recognition) of Non-state Actors*, in: W. Czapliński, A. Kleczkowska (eds.), *Unrecognised Subjects in International Law*, Wydawnictwo Naukowe Scholar, Warszawa: 2019, p. 11. In the broader sense it also may denote cases of "relative non-recognition", which are mentioned here, but not examined *in extenso*.

situations involving unrecognised entities which fall into the sphere of competence of international courts.

The first one – actually less common – may be characterised as a "direct involvement", i.e. when an unrecognised entity becomes either a direct and primary object of the court's consideration or a direct subject of the court's proceedings, as a party thereto. Some significant examples of the former are found within the advisory jurisdiction of the International Court of Justice (ICJ), like the *Western Sahara* opinion and the *Kosovo* opinion.[2] The latter situation is even more uncommon, as the jurisdiction *ratione personae* of permanent international judicial bodies hardly encompasses entities of such questionable status.[3] In this respect the *Front Polisario* dispute before the Court of Justice of the European Union (CJEU), which includes rulings from both the General Court and the Court of Justice, constitutes a rare example.[4] A splinter within this category includes cases where we are dealing with a relative problem of non-recognition, which occurs where the generally recognised states-parties to the dispute do not recognise each other, or one of them is not recognised by the other (as in the ICJ *Genocide* or *Interim agreement application* cases),[5] or because of a change of configuration of the parties to an existing dispute as result of dissolution of a primary state-party (as in *Legality of the Use of Force* – Yugoslavia dissolved into Serbia and Montenegro).[6]

The other type of situations involving unrecognised entities, described as "indirect involvement" is more common and a lot more multifaceted. The first group of examples comprises cases where a court scrutinises a circumstance concerning a state (usually the administration by an occupying power) or a conduct thereof having impact on the unrecognised entity's affairs. The issues regarding the unrecognised entity may thus constitute the subject matter of the case before the international court, but the case itself is induced by an external factor – a third state. Examples of this type may be found

[2] ICJ, *Western Sahara*, Advisory Opinion, 16 October 1975, ICJ Rep 1975; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 22 July 2010, ICJ Rep 2010. Although the applications for advisory opinions were brought by the UN General Assembly, it was not the competences of the General Assembly which were at stake as the subject matter of the proceedings, but the status of the unrecognised entity. Thus I qualify these as examples of "direct involvement", while admitting that a clear distinction between "direct" and "indirect" may sometimes be difficult.

[3] CJEU within the procedure of Art. 230 of the Treaty on the functioning of the European Union (TFEU) procedure, European Court of Human Rights (ECtHR) within the individual complaint procedure under Art. 34 of the European Convention on Human Rights (ECHR), when an unrecognised entity fulfils the provided conditions.

[4] Case T-512/12 *Front Polisario v. Council* (GC), ECLI:EU:T:2015:953; Case C-104/16P *Council v. Front Polisario*, ECLI:EU:C:2016:973. Meanwhile there are a few more cases involving Front Polisario pending before CJEU.

[5] 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; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections*, Judgment, 11 July 1996, ICJ Rep 1996; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Rep 2007.

[6] ICJ, *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Preliminary Objections, Judgment, 15 December 2004, ICJ Rep 2004.

within the ICJ jurisprudence in the series of *South West Africa* judgments and opinions, the *Wall* opinion, or the *East Timor* judgment.[7]

Another instance includes cases where a dispute arises between a state whose territory becomes a plane for activity of an unrecognised entity which claims its alleged right to self-determination (from the parent state) and is supported by another state (the sponsoring state), which in fact usually induces or even organises the activity of the entity. The reasons of the sponsoring state may be diverse; sometimes they are based on ethnic bounds with the minority population organised within the unrecognised entity, and sometimes they disguise its own aspirations of territorial expansion or political domination over the neighbouring state or region. Examples of this kind are found in the ICJ jurisprudence (*Bosnia and Hercegovina against Serbia*, *Georgia against Russia*, and the pending case of *Ukraine against Russia*)[8] and the case law of the ECtHR interestingly also involves the same states in some instances.[9]

The next group of cases is typical for international adjudicatory regimes which provide access for individuals.[10] When the activities of an unrecognised entity impact on the subjective rights of an individual, protected under a given international regime, this individual may seek recourse to justice on the international level. A common characteristic of these cases is that the individual claims are not brought against the unrecognised entity concerned (which has no *locus standi* before the court), but against its parent state or administering/occupying/sponsoring state (or both)[11] or a state or international organisation which recognizes and accepts the activities of the entity (which does not automatically entail the recognition of the entity itself).[12] Furthermore, the effects of

[7] ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa)*, Advisory Opinion, 21 June 1971, ICJ Rep 1971; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Rep 2004; *East Timor (Portugal v. Australia)*, Judgment, 30 June 1995, ICJ Rep 1995.

[8] ICJ, *Genocide convention* case; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, 1 April 2011, ICJ Rep 2011; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)* – pending.

[9] Series of claims from Georgia against Russia, Ukraine against Russia, and Cyprus against Turkey.

[10] Notably the ECHR and the EU regimes. Such access is provided by means of direct complaint or indirectly, via the preliminary ruling procedure involving national courts before the CJEU.

[11] Examples typical for the ECtHR practice with cases concerning TRNC/Turkey/Cyprus, Transnistria/Russia/Moldova, Abkhazia and Ossetia/Russia/Georgia, Crimea and Donbas/Russia/Ukraine. For an exhaustive analysis, *see* S. Zaręba *Specyfika odpowiedzialności za naruszenia Europejskiej Konwencji Praw Człowieka związane z działalnością nieuznawanych reżimów – analiza orzecznictwa* [The specific nature of responsibility for violations of the European Convention on Human Rights related to activities of urecognized regimes – an analysis of judicial decisions], 3 Studia Prawnicze 27 (2016); S. Zaręba, *Responsibility for Acts of Unrecognised States and Regimes*, in: W Czapliński, A. Kleczkowska (eds.), *Unrecognised Subjects in International Law*, Wydawnictwo Naukowe Scholar, Warszawa: 2019, pp. 159-193.

[12] Examples typical for the CJEU practice, with cases concerning e.g. certificates of origin issued for goods originating form occupied territories in Cyprus, Palestine, Crimea, EU sanctions, and measures of cooperation concerning the territories under dispute.

the entity's conduct may influence relations between individuals, which in specific circumstances may lead to a court dispute and by means of special proceedings (such as, e.g., a preliminary ruling before the CJEU) may become subject of consideration for an international judicial body.[13]

This short digest shows how numerous and diverse are the possibilities of bringing a case with an unrecognised-entity-element to the cognition of international courts. In this way the courts obtain opportunities to argue and rule on various aspects of recognition/non-recognition and on the status of unrecognised entities. Due to the proliferation of international dispute settlement institutions and the diversification in the scope of their respective jurisdictions, the same facts or events may actually fall within the competence (and interest) of more than one court. Thus there is certain risk that the courts might take different views on corresponding problems or issue contradictory decisions even in cases based on the same subject matter.

Such potential hazards may be minimised when the courts pay due regard not only to their own case law (which is natural), but also to the jurisprudence of other international judicial bodies. In this way they enter into a form of judicial dialogue in a practical dimension, as it is connected with the exercise of their adjudicative function and the administration of international justice. But they also build up a body of case law which serves as the basis for development of theoretical concepts and legal principles with respect to recognition/non-recognition issues.

The present paper aims to examine whether judicial dialogue serves the development of coherent jurisprudence in cases involving unrecognised entities and individuals. For this purpose the phenomenon of judicial dialogue is defined broadly, as a practice of using any kind of cross-references to the reasoning and interpretation of law conducted by other courts and judges.[14] The selected case-studies focus on the Turkish Republic of Northern Cyprus (TRNC) for two reasons. Firstly, the TRNC is probably the most comprehensively elaborated exemplification of non-recognition in the practice of international courts. This is so because of the involvement of its parent and sponsoring states – Cyprus and Turkey respectively – in the legal regimes of the ECHR (as state-parties to the Convention) and the European Union (Cyprus as a member state[15] and Turkey as an associated country, maintaining a net of economic and political bounds with the EU). Therefore the situations related to the TRNC may fall within the respective competences of the ECtHR or the CJEU. Secondly, due to the special characteristics of their jurisdictions *ratione personae* and *ratione materiae*, both Courts have the opportunity – from time to time – to consider cases concerning the impact of various practical and legal aspects of non-recognition of the TRNC on the situation of individuals.

[13] C-420/07 *Meletis Apostolides v. David Charles Orams, Linda Elizabeth Orams*, ECLI:EU:C:2009:271.

[14] The same approach is adopted by authors of A. Wyrozumska (ed.), *Transnational Judicial Dialogue on International Law in Central and Eastern Europe*, Wydawnictwo Uniwersytetu Łódzkiego, Łódź: 2017, p. 11.

[15] Before its accession to EU the character of Cyprus' involvement – as both an associated and candidate state – was similar to that of Turkey.

Another factor that determines the approach of the ECtHR and CJEU to issues concerning the TRNC is the fact that there is no controversy within the international community as to the non-recognition of the TRNC as a sovereign state (except for its "sponsor state" Turkey of course). Thus, the Courts, relying on this "common non-recognition", do not engage themselves with an examination whether the TRNC is a state or not. They just take it for granted and focus on the particular legal consequences of such non-recognition, depending on the circumstances and legal problems and issues in a given case.[16]

1. THE "*NAMIBIA* EXCEPTION" IN THE JURISPRUDENCE OF THE ECTHR ON THE TRNC

It is not uncommon in international law that an innocent passage in the *obiter dicta* of international court's ruling becomes a seed for serious legal concepts and theories – the *erga omnes* paragraph in the ICJ's *Barcelona Traction* judgment being probably the most widely known example.[17]

Regarding the topic of recognition/non-recognition such a quality may be attributed to paragraph 125 of the *Namibia* advisory opinion. The ICJ confirmed the rule: the general duty of the UN member states not to recognise as lawful the South African continued presence in Namibian territory, which resulted in the illegality and/or invalidity of the acts of its administration performed with respect to Namibia.[18] However, the Court also provided – under the very paragraph 125 – an exception to this rule, allowing for the recognition of acts which effects could not be ignored for the sake of individuals, such as e.g. registrations of births, deaths and marriages.[19] This concept – soon called by the doctrine "the *Namibia* exception" – drew attention to what was until then rather neglected aspect of the functioning of unrecognised entities on the international plane, the situation of individuals under such unrecognised governance. Previously the

[16] I do not share the view of E. Milano that in this way the ECtHR adopts a "constitutive approach to recognition" – *see* E. Milano, *Unlawful Territorial Situations in International Law*, Martinus Nijhof, Leiden: 2006, pp. 143 ff. It is much more a practical approach of "procedural economy": not to engage into superfluous argumentation to prove something that is merely an established fact. Such a "common non-recognition" of a territorial entity by all states but one (which is not very frequent in the international community) is as a rule based on sound (and not just political) grounds.

[17] ICJ, *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment, 5 February 1970, ICJ Rep 1970, paras. 33-34.

[18] *Namibia (South-West Africa)*, para. 119.

[19] *Ibidem*, para. 125: "In general, the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory." *See also* Milano, *supra* note 16, pp. 137 ff.

focus was on the consequences of non-recognition on the somewhat abstract level of relations between states and other subjects (entities) of international law. By its "*Namibia* exception" the ICJ raised awareness of the real-life problems that individuals had to deal with in the context of the non-recognition of the regime controlling, administrating, or governing them. Thus it has become a point of reference for any judicial or academic reflection on the status, rights and duties of individuals within an unrecognised entity. The ECtHR jurisprudence concerning the TRNC is no exception in this respect.

The case of *Loizidou v. Turkey* is one of the best known and most commented-on cases within the jurisprudence of the ECtHR on the topic.[20] As its first ruling concerning the TRNC, this judgment turned out to be particularly relevant for the development by the Court of some concepts which strongly influenced the interpretation and application of the European Convention on Human Rights, such as effect of declarations of the state-parties, issues of "continuing violations", the determination of its jurisdiction *ratione temporis*, or extraterritorial aspects of state's jurisdiction within the meaning of Art. 1, including the adoption of the criterion of "effective control" for assessment of the possibility to establish the responsibility of a state-party with regard to situations occurring outside the territory of the state concerned.[21] However, from the perspective of general international law it constitutes a vital contribution to judicial deliberations on the consequences of non-recognition for the status of individuals.

For reasons of clarity it seems appropriate to briefly recall the basic facts.[22] The applicant, Mrs. Titina Loizidou, a Cypriot national, lost access to her property located in the northern part of the island and the possibility to exercise her property rights as a result of Turkey's military intervention in 1973 and subsequent occupation. After the proclamation of the TRNC, on the basis of Art. 159 of the TRNC "constitution" (of 1985) the property of Mrs. Loizidou was considered abandoned and taken over by the TRNC. These circumstances constituted the basis for the application to the ECtHR against Turkey.

Turkey's main argument against the ECtHR's jurisdiction in *Loizidou* concerned the impossibility of attribution to Turkey of conduct of the TRNC authorities – as organs of another sovereign state. In its submissions in the preliminary objections proceedings, the Turkish government argued even that it should not have been regarded as a party to this case, but it could only take a position of *amicus curiae*, representing the interests of the TRNC government, which – for obvious reasons – could not take part in the proceedings.[23] The Court, however, simply and shortly replied that it was not for the defendant state to characterize its standing in the proceedings. Since the application was

[20] ECtHR, *Loizidou v. Turkey (Preliminary Objections)* (App. No. 15318/892), 5 March 1995; *Loizidou v. Turkey (Merits)* (App. No. 15318/892), 18 December 1996.

[21] *See Loizidou (Preliminary Objections)*, paras. 60 ff., 67 ff., *Loizidou (Merits)*, paras. 39 ff, 52 ff.

[22] I present the circumstances and argumentation in *Loizidou* more extensively as a "template" TRNC case; while discussing subsequent cases we shall refer thereto.

[23] *Loizidou (Preliminary Objections)*, para. 47.

only duly submitted against Turkey, as the High Contracting Party to the Convention, Turkey became the party to the proceedings.[24]

The Turkish government further developed its argument by stressing that the problem of deprivation of access to the applicant's property and her expropriation (which constituted the alleged violations of Art. 1 of the Protocol No. 1 to ECHR) could not at all be regarded as falling within Turkish jurisdiction within the meaning of Art. 1 ECHR. It maintained that the Turkish Republic of Northern Cyprus was a sovereign, democratic, constitutional state, where free elections were held and citizens' rights guaranteed.[25] Public authority was exercised by constitutional organs of the TRNC, conduct of which was not imputable to Turkey. The mere presence of Turkish military forces in the territory of Northern Cyprus could not lead to the conclusion that it was under Turkish jurisdiction. The control over these forces was supposed to be exercised jointly by Turkey and TRNC authorities, so Turkish soldiers were to be regarded as acting there on behalf of the TRNC, which itself did not possess sufficient armed forces (sic!).[26] At the same time, according to Turkey the lack of recognition of the statehood of the TRNC by the international community was irrelevant for the assessment of the attribution question.

It seems to follow from such a standpoint that Turkey had only placed a part of its Army at the disposal of an allied state, whose own military was not strong and numerous enough to enable its authorities to effectively exercise their sovereign powers. Paradoxically, such argumentation undermines the thesis of the statehood of the TRNC, because it rises serious doubts exactly as to the effectiveness of this entity as a sovereign state.

The applicant and the Cypriot government (supporting her) expressed an opposite view. According to their position, the non-recognition of the TRNC constituted a key factor. They argued that a state was, as a rule, accountable for violations occurring in territory over which it has physical control.[27] Of course, in the first place this refers to its own territory. But it also applies in case of administration by a state of a territory with no regular status, in particular to an instance where such administration, while remaining under that state's control, is exercised by local organs. It does not matter whether such local administration is functioning in accordance with international law (as in protectorates or dependent territories) or whether its creation is an effect of an illegal situation – e.g. an illegal use of force, as in case of Turkey and the "puppet" local authorities established by it or with its support in the occupied territory of Cyprus. Otherwise, a state would be able to avoid responsibility for a military invasion, occupation and further consequences thereof by creating an apparently independent local administration. In the light of international law this is neither acceptable nor possible. The "common non-recognition" of the TRNC by the international community means that it remains only some territorial entity without a separate international personality, and continues to exist only because of military and economic support from Turkey.

[24] *Ibidem*, paras. 51-52.

[25] *Loizidou (Preliminary Objections)*, para. 56; *Loizidou (Merits)* paras. 35 and 51.

[26] *Loizidou (Preliminary Objections)*, para. 56.

[27] *Ibidem*, para. 57; *Loizidou (Merits)*, para. 49.

Therefore, Turkey is the sole subject to whom violations occurring in the northern part of Cyprus may be attributed.

The ECtHR barely referred to these arguments of the parties in its first judgment on preliminary objections. It replied only to allegations concerning the lack of Turkey's jurisdiction over the area of northern Cyprus, by confirming the state-party's obligation to ensure the observance of the rights protected by the ECHR, including when this state, by use of force (no matter whether contrary or not to international law) takes effective control over an area beyond its territory. Moreover, it was irrelevant for the purpose of determining the admissibility of the case whether such control was exercised by the state's own organs, including its military forces, or by locally-established organs.[28] Thus the situation of the applicant potentially fell within the scope of Art. 1 ECHR. The Court, however, found that the detailed arguments of the parties regarding the problems of imputation needed to be examined while ruling on the merits.

In the judgment on the merits, the ECtHR returned to these questions and focused on the assessment of the possibility of attribution of the alleged violations to Turkey in light of the established facts.[29] While it may seem that the Court only slightly expanded its earlier arguments, if however we look at the Court's reasoning through the prism of classical rules of attribution in international responsibility (as expressed in the International Law Commission's *Draft articles on Responsibility of States for Internationally Wrongful Acts*),[30] some interesting conclusions may be drawn. The ECtHR reiterated that state responsibility for violations of the Convention might arise in connection with situations occurring outside the state's territory in an area over which it had overall effective control, irrespective of whether the state exercised such control through its own organs (including military forces) or through a subordinated local administration.[31] Thus the Court, in examining whether the violations of Mrs. Loizidou's rights could be attributed to Turkey, found that Turkey's control over the northern part of Cyprus could be established just on the basis of the mere presence of such a large number of Turkish troops and their engagement in the current administration of the area.[32] It was not necessary to prove that Turkey actually exercised detailed control over the policies and actions of the authorities of the TRNC; it sufficed that without such military support the functioning of the TRNC would not be possible.

The ECtHR noted that the international community consistently refused to recognize, in conformity with international law, the Turkish Republic of Northern Cyprus as a state, concluding that the government of the Republic of Cyprus is the only legal authority on the island representing the state as a whole.[33] Although the Court did

[28] *Loizidou (Preliminary Objections)*, para. 62.

[29] *Loizidou (Merits)*, paras. 52-57.

[30] *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, ILC Report 53rd Session (2001), Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (U.N. Doc. A/56/10), pp. 43-365 (text with commentaries).

[31] *Loizidou (Merits)*, para. 52.

[32] *Ibidem*, para. 56.

[33] *Ibidem*, para. 56; *see also* paras. 42-44.

not develop this reasoning further and neither referred expressly to the principles of international responsibility nor the ILC's draft, it reached the conclusion that the "common non-recognition" of the TRNC results in non-application and prevents the application of norms of international law binding on states to the TRNC. Consequently, this regards also the norms on international responsibility, including the principles of attribution of conduct. Therefore the non-recognition of the TRNC results – in the context of *Loizidou* case – in the impossibility of attribution to it of any conduct on the international plane. Accordingly, the violations alleged by the applicant can be attributed solely to Turkey.

This reasoning leads to further conclusions. In the light of international law, acts of an entity such as the TRNC and attributed to a state such as Turkey may be classified as illegal, invalid, ineffective, or even – from legal point of view – non-existent. Regardless of the exact description, the ultimate consequence thereof is the lack of any legal effects of such acts. And here we reach the point where reference to the *Namibia* opinion comes to the foreground.

The ECtHR indeed referred to the ICJ's opinion, but only in a very brief manner, in its judgment on the merits, while considering the arguments with respect to preliminary objections to the Court's jurisdiction.[34] *Inter alia*, Turkey raised an objection of lack of temporal jurisdiction, as the ECtHR gained competence with respect to Turkey only with regard to situations that occurred after 20 January 1990. It was pointed out that the applicant had left her property in 1974 and had lost her property rights as a result of a process of expropriation of abandoned property conducted by the TRNC authorities in 1985 on the basis of the TRNC constitution. In the view of the Turkish authorities, the expropriation was thus fully lawful and Mrs. Loizidou could not have been considered the owner within the meaning of Art. 1 Protocol 1 of the ECHR. However, the ECtHR rejected this argument and confirmed its competence to deal with the case by qualifying the applicant's situation as a "continuing violation" of the Convention. The Court stated that it could not recognize the formal act of expropriation as legally valid as it was committed by the TRNC, an entity unrecognized by the entire international community (except Turkey).[35] Thus the applicant remained the owner entitled to bring a claim regarding the violations of her rights.

Subsequently the ECtHR concluded its reasoning by expressly referring to the *Namibia* exception.[36] It emphasised that international law allowed for recognition – in similar circumstances – of "the legitimacy of certain legal arrangements and transactions."

[34] *Ibidem*, paras. 39-47.

[35] *Ibidem*, paras. 44, 46-47.

[36] *Ibidem*, para 45: "The Court confines itself to the above conclusion and does not consider it desirable, let alone necessary, in the present context to elaborate a general theory concerning the lawfulness of legislative and administrative acts of the 'TRNC'. It notes, however, that international law recognises the legitimacy of certain legal arrangements and transactions in such a situation, for instance as regards the registration of births, deaths and marriages, 'the effects of which can be ignored only to the detriment of the inhabitants of the [t]erritory' (see, in this context, *Namibia (South-West Africa)*, p. 56, para. 125)."

But this exceptional recognition could be limited only to acts, a disregard of which would cause harm to the inhabitants of the concerned territory, e.g. acts like registrations of births, deaths and marriages. And having stated that, the Court decided not to elaborate on this issue any further, explaining that it was not indispensable for ruling on the case.

Obviously the expropriation of the applicant's property could by no means be regarded as an act in her favour and thus it did not fall within the scope of application of the *Namibia* exception. It is however a little disappointing that the Court did not conclude the "dialogue" with the ICJ opinion with a clear statement. One might even wonder what was the purpose of recalling the *Namibia* opinion at all. The answer may be found in the beginning of para. 45, where the ECtHR admitted that it did not "consider it desirable, let alone necessary, in the present context to elaborate a general theory concerning the lawfulness of legislative and administrative acts of the 'TRNC'." By this statement the Court implicitly confirmed the existence of established rules of international law governing the legitimacy, lawfulness, and legal effect of the acts of unrecognised entities' (or acts of recognised states in unrecognised situations) – rules which are expressed and applied by the ICJ in the *Namibia* opinion. Therefore the ECtHR found that it did not need to prove the binding force of these norms by "elaborating a general theory"; its short, almost superficial, reference was supposed to "do the trick." It constitutes an example of affirmative judicial dialogue with respect to both dimensions of the ICJ opinion, the principle and the exception. The exception simply turned out to be inapplicable in the circumstances of the *Loizidou* case.

Yet, a few years later the ECtHR got the opportunity to explore the *Namibia* opinion more profoundly in the *Cyprus v. Turkey* judgment.[37] Although formally the case was an interstate one, Cyprus' application was submitted in the general interest of the individuals affected by the effects of Turkish aggression and occupation of northern part of Cyprus, with the main purpose being to protect their personal and property rights as guaranteed by the Convention.[38] Accordingly, the Court's ruling and judgment is relevant for the situation of individuals and their relations with unrecognised entities such as TRNC.

The need for the extensive reference to ICJ opinion was triggered by the decision on admissibility of the case issued by the European Commission of Human Rights (EComHR).[39] While having stated that the case was admissible for the consideration of the Court, the Commission indicated that the condition of exhaustion of local remedies with respect to the TRNC courts should be re-examined, in the light of the Court's findings as to Turkish jurisdiction in *Loizidou*, at the merits stage of the

[37] ECtHR, *Cyprus v. Turkey (Merits)* (App. No. 25781/94), 10 May 2001.

[38] The alleged violations concerned Arts. 1, 2, 3, 4, 5, 6, 8, 9, 11, 13 ECHR. Arts. 1, 2, 3 of the Protocol No. 1, and Arts. 14 and 17 of the ECHR in conjunction with all those mentioned above; *Cyprus v. Turkey (Merits)*, para. 3.

[39] EComHR, *Cyprus v. Turkey (Admissibility)* (App. No. 25781/94), 28 June 1996.

proceedings.[40] It was understood by the parties as an implicit acknowledgment that it could be possible – under some conditions – to recognise means of legal, especially judicial, redress provided for by the TRNC "constitution" as "local remedies" within the meaning of former Art. 26 ECHR (present Art. 35(1)).[41] This was explicitly confirmed by the Commission in its report and justified as an instance of application of the *Namibia* exception.[42]

The ECtHR drew attention to the Commission's observation that in the light of the *Namibia* advisory opinion the remedies relied on by the respondent State were intended to benefit the entire population of northern Cyprus, and to the extent they could be considered effective, they should be in principle taken into account for the purposes of former Art. 26.[43] As to whether or not a particular remedy could be regarded as effective, and had therefore to be used, had to be determined in relation to the specific complaint at issue.[44] The ECtHR endorsed the Commission's approach in avoiding general statements on the validity of the acts of the TRNC authorities from the standpoint of international law, and confined its considerations to the Convention-specific issue of the application of the exhaustion requirement. In the Court's view, in this way it was not undermining either the opinion adopted by the international community regarding the establishment of the TRNC or the fact that the government of the Republic of Cyprus remained the sole legitimate authority of Cyprus. However, it could not be excluded that under the former Art. 26 ECHR remedies generally made available to individuals in northern Cyprus to enable them to seek redress for violations of their Convention rights had to be examined.[45] Since the TRNC exercised de facto authority over the territory of northern Cyprus, according to what the Court had already stated in its *Loizidou (Merits)* judgment with reference to the *Namibia* opinion, under international law the legitimacy of certain legal arrangements and transactions by TRNC could be recognised, for instance as regards the registration of births, deaths, and

[40] *Cyprus v. Turkey (Admissibility)*, Section IV *in fine*: "Apart from these considerations, the Commission considers it relevant to observe that, in distinction from the previous applications, the respondent Government in the present case rely exclusively on remedies which are claimed to be available before Turkish Cypriot authorities whereas the applicant Government claim that these authorities are *de facto* under the control of Turkey. The Commission also notes the applicant Government's submission according to which these remedies are generally ineffective for Greek Cypriots, and the related complaints submitted under Article 13 (Art. 13) of the Convention. In the light of the Court's *Loizidou* (Preliminary Objections) judgment according to which Turkish responsibility under the Convention may arise also where it exercises control over an area outside its national territory "through a subordinate local administration" (loc. cit. p. 24, para. 62), it appears that the question of the exhaustion of domestic remedies before TRNC courts is closely related to the issue of Turkish "jurisdiction" which can only be determined at the merits stage of the proceedings. To this extent the Commission must accordingly reserve the final determination to the later stage of the proceedings."

[41] *Cyprus v. Turkey (Merits)*, paras. 82 ff.

[42] Report of the EComHR, 4 June 1999, *Cyprus v. Turkey*, paras. 104-128.

[43] *Cyprus v. Turkey (Merits)*, para. 86.

[44] *Ibidem*, para. 87.

[45] *Ibidem*, paras. 89-90.

marriages, "the effects of which can only be ignored to the detriment of the inhabitants of the [t]erritory."[46]

The ECtHR disapproved the applicant Government's criticism over the Commission's interpretation of the *Namibia* opinion. In its view, judged solely from the perspective of the European Convention, the advisory opinion confirmed that "where it can be shown that remedies exist to the advantage of individuals and offer them reasonable prospects of success in preventing violations of the Convention, use should be made of such remedies."[47] It was also supposed to be consistent with the Court's earlier statement on the need, in the territory of northern Cyprus, to avoid the existence of a vacuum in the protection of the human rights guaranteed by the ECHR.[48]

The Court was convinced that the absence of such mechanisms of judicial redress as existed under the TRNC regime would worsen the situation of the members of the Greek-Cypriot community in Northern Cyprus. So the individuals concerned actually benefited from the TRNC regulations in that respect, while recognising the effectiveness thereof for the limited purpose of protecting the rights of the inhabitants did not legitimise the TRNC in any way.[49]

Furthermore ECtHR argued that in the light of the ICJ opinion, the obligation to disregard acts of de facto entities was far from absolute, as:

> Life goes on in the territory concerned for its inhabitants. That life must be made tolerable and be protected by the de facto authorities, including their courts; and, in the very interest of the inhabitants, the acts of these authorities related thereto cannot be simply ignored by third States or by international institutions, especially courts, including this one. To hold otherwise would amount to stripping the inhabitants of the territory of all their rights whenever they are discussed in an international context, which would amount to depriving them even of the minimum standard of rights to which they are entitled.[50]

Therefore, the Court concluded that it could not disregard the judicial organs of the TRNC, because it was in the very interest of the "inhabitants of the TRNC, including Greek Cypriots" (sic!), to be able to seek the protection of such organs. If the TRNC authorities had not established a means of judicial redress, this would be considered as clearly contrary to the Convention. Accordingly, the individuals living in Northern Cyprus may be required to exhaust these remedies, unless their nonexistence or ineffectiveness can be proven, which should be examined on a case-by-case basis.[51]

In consequence, the ECtHR decided to examine each of the violations alleged by Cyprus, whether the persons concerned could have availed themselves of effective

[46] *Ibidem*.
[47] *Ibidem*, para. 91.
[48] *Ibidem*, para. 78.
[49] *Ibidem*, para. 92.
[50] *Ibidem*, para. 96.
[51] *Ibidem*, paras. 98, 102.

remedies, and to take into account such criteria as: whether the existence of any remedies was sufficiently certain in practice; whether there were any special circumstances which absolve the persons concerned from the obligation to exhaust the remedies, in particular where a repetitive administrative practice incompatible with ECHR has developed, with official tolerance by the State authorities, which made such proceedings futile or ineffective.[52] In practice the Court found – with respect to a number of alleged violations concerning both displaced persons and inhabitants of northern part of Cyprus – that the issue of exhaustion of local remedies did not arise at all.[53] Moreover, the ECtHR found that there had been violations of Art. 13 of the Convention, the right to effective remedy against infringements of personal and property rights of Greek Cypriots, both non-resident (generally) and resident (with respect to interference with TRNC authorities) in the northern part under Turkish occupation.[54]

Although the Court in *Cyprus v. Turkey* finally did not find in practice any reason to apply the *Namibia* exception with respect to any means of judicial redress established by TRNC, it acknowledged such a hypothetical possibility and left the door wide open for future developments in this regard. This in fact did not take too long. Following the judgment, albeit also as a result of the political settlement process under the auspices of United Nations. Some arrangements for securing the rights of the individuals concerned and means of their redress were met. The TRNC authorities adopted, among others, the "Law as to Compensation for Immovable Properties Located within the Boundaries of the Turkish Republic of Northern Cyprus, which are within the Scope of Article 159, paragraph (4) of the Constitution" (Law no. 49/2003), which *inter alia* provided for the establishment of a compensation commission.[55] This regulation soon became subject to ECtHR scrutiny in the case *Xenides-Arestis v. Turkey*.[56]

From our point of view the most interesting findings of the Court are expressed in the decision on admissibility. In reply to Turkey's claim of non-exhaustion of local remedies (Turkey pointed to the above-mentioned law) the Court reiterated that it was necessary that the remedies were effective and available in both theory and in practice at the relevant time, which means that they were accessible, capable of providing redress with respect to the applicant's complaints, and offered reasonable prospects of success.[57] In particular the Court wished to take a realistic account of the general legal and political context in which the remedies operated, as well as the personal circumstances of the applicant.[58] This applied specifically to situations involving unrecognised entities, like the TRNC.

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[52] *Ibidem*, para. 99.

[53] *Ibidem*, paras. 168, 193, 295.

[54] *Ibidem*, paras. 194, 324.

[55] The English translation is included in the decision of ECtHR of 14 March 2005 in case *Xenides-Arestis v. Turkey (Admissibility) (*App. No. 46347/99).

[56] *Ibidem* and ECtHR *Xenides-Arestis v. Turkey (Merits)* (App. No. 46347/99), 22 December 2005; *Xenides-Arestis v. Turkey (Just satisfaction)* (App. No. 46347/99), 7 December 2006.

[57] *Xenides-Arestis v. Turkey (Admissibility)*, Section 3.(c)i.

[58] *Ibidem*.

In the light of these criteria and in accordance with its approach established in *Cyprus v. Turkey*, the ECtHR thoroughly examined the mechanism established by Law no. 49/2003. In the first place, it noted that the compensation with respect to the deprivation of property was limited to damages concerning pecuniary loss for immovable property. No provision mentioned movable property or non-pecuniary damages. More significantly, the terms of compensation did not allow for the restitution of the property withheld. Thus, despite the provided compensation, such regulation could not be considered by the Court as a complete system of redress.[59] Additionally the ECtHR pointed out that the Law did not address the applicant's complaints under Arts. 8 and 14 of the Convention. Moreover, the Law was ambiguous as to its temporal application; it was unclear whether it had retrospective effect with respect to applications filed before its enactment and entry into force. Instead it merely referred to the retrospective assessment of the compensation. Finally, the Court raised concerns as to the composition of the compensation commission, since in the light of the evidence submitted by the Cypriot Government the majority of its members were living in houses owned or built on property once-owned by Greek Cypriots. Accordingly, the ECtHR observed that the respondent Government had neither denied the Cypriot Government's arguments, nor had it provided any additional information on that matter. In this regard the Court suggested that a composition involving international members would enhance the commission's standing and credibility. For these reasons the Court found that the remedies under Law no. 49/2003 did not satisfy the requirements under the Convention so as to be regarded as "effective" or "adequate" means for redressing the applicant's complaints.

In *Xenides-Arestis* ECtHR again did not find the occasion to apply the *Namibia* exception, however its extensive and detailed analysis was treated as an instruction by Turkey and the TRNC authorities and paved the way for the significant reversal of the Court's approach in the case *Demopoulos (and others) v. Turkey*.[60]

In its judgment on the merits in *Xenides-Arestis*, the ECtHR decided to establish a pilot-judgment procedure with respect to Turkey regarding the establishment of effective remedies in light of the criteria set out in the admissibility decision. Pending the implementation thereof the Court adjourned consideration of all applications deriving from the same general cause.[61] The eight applications examined jointly under the *Demopoulos* title were the "oldest" affected by it, where the decision as to their admissibility had been withheld until the implementation of the said measures by Turkey.

In response to the pilot procedure a new TRNC law was introduced, namely the "Law for the compensation, exchange and restitution of immovable properties which are within the scope of sub-paragraph (b) of paragraph 1 of Article 159 of the Constitution" (Law no. 67/2005). This Law entered into force on 22 December 2005.[62] The

[59] *Ibidem*, Section 3.(c)ii.

[60] ECtHR (GC), *Takis Demopoulos and Others v. Turkey (Admissibility)* (App. Nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04, 21819/04), 1 March 2010.

[61] *Xenides-Arestis v. Turkey (Merits)*, paras. 40 and 50.

[62] English translation of the relevant provisions, as amended by Laws nos. 59/2006 and 85/2007, are reproduced in the ECtHR decision *Demopoulos and Others v. Turkey (Admissibility)*, para 37.

central figure in the redress system established thereunder is the Immovable Property Commission (the IPC), which examines claims by natural and legal persons concerning rights to immovable or movable property placed in the territory under TRNC control, of which such persons were unwillingly deprived as a result of the Turkish invasion.[63] The decisions of the IPC have a binding effect and are of an executory nature, similar to judgments of the judiciary, and they shall be implemented without delay. Refusal to cooperate with the IPC is an offence. Furthermore, the TRNC "ministry" responsible for financial affairs is obliged to provide, under a separate item of the budget law for each year, for the payment of compensation awarded by the IPC and other relevant expenses.

Despite the fact that the applications which were submitted before (in some cases years before) the adoption of Law no. 67/2005, they were examined by the ECtHR with respect to the exhaustion of local remedies in connection with this regulation. It was clear already from the tone of the decision in *Xenides-Arestis* and the subsequent launching of the pilot-judgment procedure that the Court was tending to block or at least slow down the overflow of claims by the Greek Cypriots harmed by the effects of Turkish invasion from the 1970s. For several years the ECtHR acted as both the first and last instance in their cases, as the only judicial body that could protect their rights. This was a difficult task, as the Court itself observed: "Thus, the Court finds itself faced with cases burdened with a political, historical and factual complexity flowing from a problem that should have been resolved by all parties assuming full responsibility for finding a solution on a political level."[64] This reality, as well as the passage of time and the continuing evolution of the broader political dispute must affect the Court's interpretation and application of the Convention which cannot, if it is to be coherent and meaningful, be either static or blind to concrete factual circumstances.

The only way to remain in line with the principle of non-recognition of situations unlawful under international law, respect the worldwide policy not to recognise the TRNC as a state, and stay coherent with its own jurisprudence, starting with the *Loizidou* judgment, was for the ECtHR to rely on the *Namibia* exception. Thus in the reasoning of the admissibility decision dealing with the argument that requiring exhaustion of local remedies lent legitimacy to an illegal occupation, the Court once more, this time probably the most extensively so far, referred to the ICJ opinion.

In this respect the Court observed that the alleged legitimisation of the TRNC underlaid most of the objections raised by the applicants and the intervening Cypriot Government. It noted that in the proceedings the parties had differed as to the relevance or applicability of the "so-called 'Namibia principle'."[65] Yes, the ECtHR called what actually was an exception a principle, and defined its content as follows:

[63] There are also certain temporal conditions as to the ownership and time limits for bringing a claim, and a fee of 100 TRY. The burden of proof rests upon the applicant. *See Demopoulos and Others v. Turkey (Admissibility)* paras. 35 ff.

[64] *Demopoulos and Others v. Turkey (Admissibility)*, para. 85.

[65] *Ibidem*, para. 93.

> [t]his, in brief, provides that even if the legitimacy of the administration of a territory is not recognised by the international community, 'international law recognises the legitimacy of certain legal arrangements and transactions in such a situation, ... the effects of which can be ignored only to the detriment of the inhabitants of the [t]erritory' (Advisory Opinion of the International Court of Justice in the Namibia case (Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), ICJ Reports 1971, vol. 16, p. 56, § 125).[66]

The Court was aware of the differences between the ICJ case and its own jurisdiction, as well as between the situation in Namibia and that in northern Cyprus, in particular since the applicants in the TRNC cases were not living under occupation in a situation whereby basic daily realities would require recognition of certain legal relationships, but were rather seeking to vindicate from another entity their rights, mostly to property then under the control of the occupying power. Nevertheless, in its opinion the *Namibia* exception (seemingly raised by the ECtHR to a rank of "principle"?) justified a finding "that the mere fact that there is an illegal occupation does not deprive all administrative or putative legal or judicial acts therein of any relevance under the Convention."[67] Furthermore, the ECtHR pointed out that since Turkey exercised control over the territory of northern Cyprus it took responsibility for the policies and actions of the TRNC. In consequence, individuals affected by such policies or actions came within the "jurisdiction" of Turkey for the purposes of Art. 1 ECHR, and Turkey was to be held accountable for violations of their rights guaranteed under the Convention and was obliged to take positive measures to protect those rights. It would thus be inconsistent with such obligations under the Convention if such measures adopted by TRNC organs or their application in the territory under occupation were to be denied any validity.[68]

The crucial consideration of ECtHR was to avoid a legal vacuum in the protection of individual rights on a daily basis. The right of individuals to make claims under the ECHR could not be seen as substitute for a functioning judicial system or mechanism for the enforcement of criminal or civil law. Thus, in the Court's view if there was an effective remedy available under the jurisdiction of the Turkish Government responsible under the Convention (albeit exercised by the organs of the TRNC as a subordinated entity), the rule of exhaustion applied, even if the applicants were not inhabitants of the occupied territory. However, on all occasions the ECtHR consistently repeated in this connection that this could by no means be understood as undermining the

[66] *Ibidem*.

[67] *Ibidem*, para. 94.

[68] *Ibidem*, para. 95. The Court referred to some of its case law in that respect: *Foka v. Turkey* (App. No. 28940/95), 24 June 2008, para. 83, where an arrest for obstruction of the applicant Greek Cypriot by a TRNC police officer was found to be lawful; and *Protopapa v. Turkey* (App. No. 16084/90), 24 February 2009, para. 87, where a criminal trial before a "TRNC" court was found to be in accordance with Art. 6, there being no grounds for finding that these courts were not independent or impartial or that they were politically motivated.

position of the international community regarding the establishment of the TRNC or the fact that the government of the Republic of Cyprus remained the sole legitimate authority thereof. Allowing the respondent State to correct wrongs imputable to it did not amount to an indirect legitimisation of an unlawful regime under international law.[69]

Apart from the argument of illegality the applicants (supported by the Cypriot government) pointed out that it could not be regarded as to their benefit to require them to make use of remedies, given the background of the time, effort and humiliation that this would involve after years of continuing and flagrant violations. The Court however, taking a fully institutionalised approach, could not understand this argument as from its perspective a competent domestic body, with access to the properties, registries and records, was a more appropriate forum than the Court for deciding on matters of property, ownership and financial compensation. This institutional lack of empathy was probably the weakest point of the Court's reasoning.

2. INTERPRETATION OF THE "*NAMIBIA* EXCEPTION" WITH RESPECT TO THE TRNC BY THE CJEU

The Court of Justice of the (then) European Communities,[70] by reason of its function as the guardian of the European Union legal order and of the scope of its jurisdiction, also had to deal with the issue of recognition of the legal effects of the activities of the TRNC – in the light of the *Namibia* exception – and in its case more comprehensively than its Strasbourg fellow court. An opportunity for this arose with the case C-432/92 *Anastasiou*.[71] A British court (High Court of Justice, Queen's Bench Division) referred to the CJEU a question whether, in the light of community law – in particular the association agreement between the EEC and the Republic of Cyprus of 1972[72] and a protocol of 1977 thereto,[73] as well as Directive 77/93/EEC[74] – it was admissible for those member states with importing plant products originating from the area of northern Cyprus to accept movement certificates and phytosanitary certificates issued by the TRNC administration.[75]

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[69] *Demopoulos and Others v. Turkey (Admissibility)*, para. 96.

[70] For coherence I keep using the acronym CJEU in the whole text.

[71] C-432/92 *The Queen v. Minister of Agriculture, Fisheries and Food, ex parte P. P. Anastasiou (Pissouri) Ltd and others*, ECLI:EU:C:1994:277.

[72] Agreement establishing an Association between the European Economic Community and the Republic of Cyprus, OJ 1973 L 133, p. 1.

[73] Concerning the definition of the concept of "originating products" and methods of administrative cooperation, OJ 1977 L 339, p. 1.

[74] Council Directive 77/93/EEC of 21 December 1976 on protective measures against the introduction into the Member States of harmful organisms of plants or plant products, OJ 1977 L 26, p. 20, as subsequently amended.

[75] *Anastasiou*, paras. 14-15.

According to the provisions of the protocol and the above-mentioned Directive, such certificates have to be issued by competent organs of the exporting state.[76] And this state is the Republic of Cyprus, which was recognized by the EU (then still EC) and its member states as the sole sovereign over the entire Cypriot territory. However the authorities of the United Kingdom adopted quite a liberal approach to these requirements. rejecting only documents which contained an express designation of the "Turkish Republic of Northern Cyprus" to refer to the place of origin of the goods or of the bodies issuing the certificates. They accepted, certificates bearing a stamp "Republic of Cyprus – Ministry of Agriculture", which were in fact not issued by the ministry of the real Republic of Cyprus, but by the TRNC organs. From 1991 almost all products from the northern part of the island had been labelled in such a way.[77] Such practice on the part of the UK authorities raised doubts among Cypriot exporters and producers, who brought a claim to the High Court.

In the subsequent case before the CJEU, the applicants in the main proceedings, supported by the Greek government, reiterated that recognition by the EC member states of movement certificates and phytosanitary certificates issued by a body other than authorized organs of the Republic of Cyprus constituted a violation of the obligations set out in the provisions of the association agreement, the 1977 protocol, and the 77/93 Directive. Only the Republic of Cyprus, bound by the same norms, was able to assure the competence of officials issuing the certificates and proper administrative cooperation indispensable for the realisation of the goals of association. Only in this way could it be guaranteed that the properly-examined and certified goods fulfilled the requirements of preferential treatment and phytosanitary standards.

In contrast, according to the UK government and the Commission (which shared its views), the practice in question was justified on the grounds of the extraordinary situation in Cyprus. Acceptance of certificates issued by the TRNC authorities was supposed to prevent possible discrimination between individuals and enterprises from the northern and southern parts of the island. Art. 5 of the association agreement stated that "the rules governing trade between the Contracting Parties may not give rise to any discrimination between nationals or companies of Cyprus." The UK and the Commission pointed out that it was impossible – or at least very difficult – to obtain certificates other than those issued by the local TRNC administration. As a result only the exporters from the south, having documents issued by competent Cypriot authorities would enjoy preferential treatment and other benefits of the association agreement. At the same time, the UK and the Commission stipulated that the practice of acceptance of certificates issued by TRNC authorities was by no means tantamount to a recognition of the TRNC as a state. It only constituted an appropriate and justified response to the need to take into account the interests of the whole Cypriot population.[78] To support

[76] *Ibidem*, paras. 7-9.

[77] Earlier the UK organs accepted even certificates with the notion Republic of Cyprus – Turkish Federated State of Cyprus (*see Anastasiou*, para. 13).

[78] *Ibidem*, para. 34.

this position, the Commission referred to the ICJ *Namibia* opinion and to the EC practice of application of other provisions of the association agreement and its protocols concerning the financial aid dedicated for the whole territory of Cyprus, including the northern part as well.[79]

The CJEU, however, totally rejected this argumentation. The Court stressed that in the case of both types of certificates the certification systems were – as set out by the 1977 protocol and the 77/93 Directive – based on mutual trust and cooperation between the competent authorities of the exporting and importing states.[80] Acceptance of the certificates issued within the framework of these systems constitutes an expression of such trust and guarantees that any verifications, consultations and dispute resolution are conducted by cooperation between the engaged states. Such systems function properly only when the cooperation procedures are strictly observed. And any cooperation with the authorities of an entity such as TRNC is impossible, in particular because it is recognized neither by the EU (EC), nor by its member states. Recognition of certificates by the TRNC authorities would result in defeating the object and purpose of the systems established by the protocol and the Directive.[81]

The Court emphasised that it was impossible, in the case before it, to rely on the *Namibia* exception, and pointed out that the situations in the cases of Namibia and the TRNC respectively were not comparable and that in effect no analogy could be drawn.[82] The CJEU concurred in that respect with the argumentation of Advocate General Gulmann, who after a very comprehensive analysis concluded that the difference concerning the circumstances lies in the extent of the entitlement of the EU Member States – in breach of the express rules of an existing international agreement on the matter – to accept "official acts", the purpose of which was to enable trade with businesses from the area under administration unrecognised under the Security Council's resolutions.[83] Accordingly, the AG stated that the "official documents" in question were not of a type covered by the ICJ's *Namibia* exception, as it concerned official acts issued in the population's interest and the situation regarding the position of the population groups in question was not comparable.[84]

In the light of this approach, the principle of non-discrimination as expressed in Art. 5 of the association agreement also could not justify the non-compliance with the obligation not to recognize such acts. The CJEU noted that according to the rules of interpretation of treaties, the object and purpose of a treaty and the practice of its application are particularly relevant for its proper interpretation.[85] The principle of non-

[79] *Ibidem*, para. 35.

[80] *Ibidem*, paras. 38-39 and 61-63.

[81] *Ibidem*, paras. 40-41 and 63.

[82] *Ibidem*, para. 49.

[83] Opinion of Advocate General Gulmann of 20 April 1994 in case C-432/92 *The Queen v. Minister of Agriculture, Fisheries and Food, ex parte P. P. Anastasiou (Pissouri) Ltd and others*, ECLI:EU:C:1994:159, paras. 57-59.

[84] *Anastasiou* Opinion, paras. 58 in fine-59.

[85] Expressed in Art. 31 of the Vienna Convention on the Law of Treaties of 23 May 1969 (VCLT).

discrimination is just an element of a more complicated construction of the object and purpose of the association agreement and must not prevail over other elements. Therefore, it cannot be used as a justification for non-compliance with the fundamental provisions of the agreement, which determine its application in conformity with the will of all contracting parties and with due consideration of their interests. On no account may Art. 5 be regarded as an excuse for the EU (EC) or its member states to claim a right to interfere in the internal affairs of Cyprus.[86] In that respect the Court referred to the example of application of the protocols on financial aid to the whole territory of the island with respect to the implementation of projects relating to the unified town planning scheme for Nicosia and the Nicosia sewerage scheme, part of which extends into the territory of the northern part of Cyprus.[87] While this example was presented by the Commission to support its argumentation, the CJEU contended however that this was precisely an instance where, unlike in the case of recognition of movement and phytosanitary certificates, it was possible to let the whole population benefit from the association agreement without violation of the interests of the Republic of Cyprus and in complete accordance with its will.

The *Anastasiou* judgment confirms the principle that non-recognition of a territorial entity as a state results in non-recognition of the legal effects of acts and activities of the organs of such entity. From the perspective of international legal order they constitute "illegal situations" and are non-opposable to other subjects of international law. With respect to the ICJ's *Namibia* opinion the judgment constitutes a fine example of constructive judicial dialogue. The CJEU developed a sound justification for limiting the applicability of the *Namibia* exception by reference to the specific circumstances and specific provisions of EU law applicable in this case, interpreted in the light of general international law, and in particular the rules of interpretation of treaties. In this way it contributes to the determination the scope of application of principles governing the legal effects of recognition/non-recognition in international law and to the implementation of the general principle *ex iniuria ius non oritur*.

3. JUDICIAL DIALOGUE AND THE IMPLICATIONS OF NON-RECOGNITION IN RELATIONS BETWEEN INDIVIDUALS

So far the focus has been on cases concerning the effects of non-recognition which materialize at the level of international legal order and in relations mostly between subjects of international law, only occasionally involving individuals (in their relations with states or even international organizations). In this part we examine – on the basis of CJEU judgment in *Apostolides* and the ECtHR decision in *Orams v. Cyprus* – how non-recognition of an entity on the international plane may influence relations

[86] *Anastasiou*, paras. 44, 47.
[87] *Ibidem*, para. 45.

between individuals and how these relations may become the subject of cognition of two different international courts.[88]

When in 2004 the Republic of Cyprus acceded to the European Union, by virtue of protocol 10 to the Accession Treaty the operation of EU law within the area of Northern Cyprus, which remained under the physical control of Turkey and the unrecognized TRNC, had been suspended. In the part of the island under Cypriot control the *acquis communautaire* is applied entirely.

In 2002 a British couple, Mr. and Mrs. Orams, had bought a piece of land (from a private person) in the northern part of Cyprus. They built a house and spent a lot of time there. They acquired it in good faith and in conformity with the laws of the TRNC. However, they were not aware that before the Turkish intervention in 1974 the land had been owned by Mr. Meletis Apostolides, a Greek Cypriot, who after the intervention was, along with his family, expelled and for many years (like Mrs. Loizidou) had lost access to his property and had no possibility to exercise his property rights. The property had been taken over by TRNC, then a third person bought it from the authorities, and subsequently sold it to the Orams couple.

According to Cypriot law, and – in the light of the ECtHR *Loizidou* judgment and subsequent jurisprudence in similar cases – as well as according to international law, Mr. Apostolides remained the owner of the land in question. Having learned about the fate of his property, he brought a claim against the Oramses before a Cypriot civil court in Nicosia (in the southern part of the city). He demanded the return of the property, restitution of it to its original condition, and compensation for unlawful usage thereof.

The respondents had problems with understanding what actually was happening and formulating a proper reaction to the suit. Thus the first instance proceedings ended up with a default judgment in favour of M. Apostolides, issued on 9 November 2004 by the District Court in Nicosia. The Oramses applied to the District Court to have this default judgment set aside, but their application was unsuccessful (judgment of 19 April 2005). Although the Oramses managed to appeal against that latter judgment, the Supreme Court in Nicosia dismissed their appeal on 21 December 2006.

In the meantime, on 18 November 2005 on the basis of regulation 44/2001 (Brussels I),[89] Mr. Apostolides applied for recognition and execution of Cypriot court judgment of 9 November 2004 to a competent British court, which declared the judgments enforceable. This order, however, was successfully challenged by the Oramses, and in effect dismissed. In consequence, Mr. Apostolidis appealed on 28 June 2007 to the Court of Appeal, which decided to refer some questions on the interpretation of the Brussels I regulation for a preliminary ruling; a referral received by the CJEU on 13 Sep-

[88] C-420/07 *Meletis Apostolides v. David Charles Orams, Linda Elizabeth Orams*, ECLI:EU:C:2009:271; ECtHR, *David Charles ORAMS and Linda Elizabeth ORAMS v. Cyprus* (App. No. 27841/07), 10 June 2010.

[89] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001 L 12, p. 1.

tember 2007. The Court of Appeal asked, *inter alia*, whether the suspension of operation of EU law in the area of northern Cyprus and the fact that the property in question is situated there might have had an influence on the enforceability of the judgments, as the government of the Republic of Cyprus did not exercise effective control over it.[90]

The CJEU started with the question of the suspension of application of EU law. It contended that because the suspension concerned the northern area of Cyprus and the judgments in the main proceedings had been issued by a court with a seat in the territory under the control of the Republic of Cyprus – the suspension did not apply to the case. The fact that the judgments in the main proceedings concerned property located in the north did not preclude such an interpretation.[91] Therefore it was possible to apply the Brussels I regulation to the judgments of the Cypriot courts concerning property located in the area controlled by Turkey and the TRNC.

The Court further noted that the case before the national court (i.e. Court of Appeal) fell within the scope of regulation 44/2001, i.e. the Brussels I regulation. Namely, the property is located in the territory of the Republic of Cyprus, even though the legitimate, internationally-recognized government does not control the whole territory. Thus, the Cypriot court did have the competence to adjudicate the case. Art. 22 of the regulation regards the international aspects of jurisdiction of the courts of member states, and not the internal division of competence between the national courts within the member state.[92] At the same time, the fact that the property was located in an area

[90] *Apostolides*, para. 31.

[91] *Ibidem*, paras. 32 ff.

[92] *Ibidem*, paras. 48-50. The provision reads: "Article 22. The following courts shall have exclusive jurisdiction, regardless of domicile:

1. in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated.

However, in proceedings which have as their object tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months, the courts of the Member State in which the defendant is domiciled shall also have jurisdiction, provided that the tenant is a natural person and that the landlord and the tenant are domiciled in the same Member State;

2. in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or of the validity of the decisions of their organs, the courts of the Member State in which the company, legal person or association has its seat. In order to determine that seat, the court shall apply its rules of private international law;

3. in proceedings which have as their object the validity of entries in public registers, the courts of the Member State in which the register is kept;

4. in proceedings concerned with the registration or validity of patents, trademarks, designs, or other similar rights required to be deposited or registered, the courts of the Member State in which the deposit or registration has been applied for, has taken place or is under the terms of a Community instrument or an international convention deemed to have taken place.

Without prejudice to the jurisdiction of the European Patent Office under the Convention on the Grant of European Patents, signed at Munich on 5 October 1973, the courts of each Member State shall have exclusive jurisdiction, regardless of domicile, in proceedings concerned with the registration or validity of any European patent granted for that State;

5. in proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced."

not under the effective control of the Cypriot government might actually mean that such judgments could not be enforced in practice in that area. This, however, does not preclude that such judgments may be recognized and enforced in another member state (in the *Apostolides* case – in the UK).[93] The national court may not refuse to recognize a judgment of a court from another member state solely on the basis that it considers that in such judgment the national or community law was misapplied. The public-policy clause as grounds for refusal would apply in such case solely if that error of law meant that the recognition or enforcement of the judgment in the member state where the enforcement was sought would be qualified as a manifest breach of an essential rule of law in the legal order of that state.[94] Furthermore, with respect to the enforceability of the judgments in question, the CJEU reiterated that the fact that Mr. Apostolides had difficulties with the execution of these judgments in the area of northern Cyprus did not deprive them totally of their enforceability. According to the Court, it does not prevent the courts of the member state in which enforcement is sought – namely the UK – from declaring such judgments enforceable.[95]

Meanwhile Mr. and Mrs. Orams tried to challenge the Supreme Court judgment before the ECtHR on the basis of the alleged incompatibility of the Cypriot proceedings in their case with the standards required under Art. 6 of the ECHR concerning the right to fair trial, and under Art. 13 concerning the right to an effective remedy. In an application of 13 June 2007, supplemented by a memorandum of 8 August 2007, they raised a number of complaints under Art. 6(1) and Art. 13, including, *inter alia*, that the Supreme Court had not properly examined their case; that the Supreme Court was not composed in accordance with the applicable constitutional provisions; and that the applicants had been denied a fair hearing. The ECtHR examined each of the complaints very thoroughly, finding that in respect of every charge the proceedings and activities of the Supreme Court in Nicosia had met the Convention standards. Thus on 10 June 2010 the ECtHR declared the application inadmissible on the grounds of being manifestly ill-founded, and that the allegations in the memorandum were raised outside the six-month time-limit.

The mere fact that such a case arose is a result of the long-term functioning of the TRNC as an unrecognized territorial entity. On one hand, the more or less peaceful persistence and actual administration of the area of Northern Cyprus may lead individuals (such as Mr. and Mrs. Orams) to a certain conviction with respect to the stability, or even legitimacy, of the authorities of the TRNC and the legal order established by it. Such a conviction may encourage individuals to engage in various kinds of relations within this legal order. However, on the other hand the consistent non-recognition of the TRNC on the international plane makes this stability illusory. Acts and arrangements of the TRNC administration and its legal order become, in their trans-border dimension, legally non-effective and non-opposable to other legal subjects, public and

[93] *Ibidem*, paras. 53 ff.
[94] *Ibidem*, paras. 59-60.
[95] *Ibidem*, paras. 65 ff.

private. In effect individuals are deprived of any legal protection where their situation transgresses the borders of territory administered by the TRNC.

What is interesting about this "double case" – as the same facts constituted the subject matter of both cases – from the perspective of judicial dialogue is that in the *Apostolides* judgment there are no explicit, substantial references either to the TRNC as such, or to the issue of its non-recognition by the international community and the consequences thereof, including the international and CJEU jurisprudence on these matters. The *Orams v. Cyprus* judgment refers only briefly to the ECtHR case law and the principles of the application of the European Convention resulting therefrom, instead engaging in an extensive examination of the activities of the Cypriot Supreme Court. So one may ask: Where did judicial dialogue come in, especially in light of the potential and substantial risk of conflicting judgments? It is worth noticing that both applications reached the respective courts at a similar time (between June and September 2007), and both rulings were issued within a period of about 13 months from each other – first the CJEU preliminary ruling on 28 April 2009, and second the ECtHR decision on 10 June 2010. The CJEU *Apostolides* judgment is not referred to in the reasoning and operative part of the *Orams v. Cyprus* decision, although it is extensively presented therein as part of section A, "The circumstances of the case." This clearly demonstrates that both Courts were informed about the parallel proceedings and took notice of each other's actions. This indicates not only a dialogue through jurisprudence, but a kind of informal, comity-based institutional dialogue, which may turn out to be a decisive tool for minimising the risk of contradictory rulings in same-subject-matter-based cases.

CONCLUSIONS

It seems incontrovertible to state that international courts have a vital role to play in safeguarding the rights of individuals involved in various relations with unrecognised entities. For the most part they are acting as guides for the members of the international community – in particular for states and international organisations – in that, through interpretation and application of relevant international law, they set the standards and shape the principles to be followed in dealing with unrecognised entities. Through their interpretation and application of the relevant international law, they set the standards and shape the principles to be followed in dealing with unrecognised entities. By its *Namibia* opinion, the ICJ performed precisely this function. But there are also cases, like those discussed above, where the international courts (due to their jurisdictional characteristics) become direct makers of law by ruling on the rights of concrete individuals. At the same time however, through their individual judgments they may develop more general concepts and policies that also serve the former function.

Indications of both functions can be observed in the presented case law of the ECtHR and the CJEU with respect to the interpretation and application of the *Namibia* exception. At the beginning both Courts adopted the same approach: following the

non-recognition of the TRNC as a state under international law, they declared the invalidity and non-opposability of its acts, in particular of the TRNC "constitution." They acknowledged the *Namibia* exception, but found no space to apply it in *Loizidou* and *Anastasiou*, respectively. However, subsequently their models of interpretation have evolved in opposite directions.

The ECtHR, which after *Loizidou* had become the court of first and only instance for cases concerning violations of individual rights by the TRNC and Turkey, was facing an overload of such complaints. The only possible solution was for the Court to take a more flexible approach to the application of the *Namibia* exception and accept the redress mechanism established by TRNC as a "local remedy" within the meaning of the present Art. 35(1) ECHR. This was a gradual process, within which the ECtHR entered into a kind of dialogue with Turkey and the TRNC, setting out the requirements to be met by the TRNC measures in order to fulfil the Convention criteria of effectiveness. The culmination of this process was the *Demopoulos* decision, by which the ECtHR actually closed the path for all claimants seeking enforcement of their property rights against the TRNC who did not avail themselves of the redress measures provided by TRNC legislation, and in addition giving such an interpretation retrospective effect so as to include applications submitted before the redress mechanism was established.

While accepting the TRNC redress measures as legitimate local remedies for the benefit of individuals, the Court continued to insist that this did not in any way imply recognition or legitimisation of the TRNC as such. This reservation seems at least a little schizophrenic though, if we bear in mind that the redress mechanism was based on the TRNC "constitution", which the ECtHR in *Loizidou* found invalid under international law. The reasoning presented in *Demopoulos* shows more weaknesses. Firstly, it is premised on a linguistic falsification: what so far had been known as the *Namibia* exception is described as the "so-called *Namibia* principle." This blurs the difference between the rules of interpretation of principles and of exceptions and "allows" the Court to depart from the rigours of the strict and narrow interpretation applicable to exceptions. In this regard the ECtHR developed an extensive argumentation on how to understand when the acts of the unrecognised entity served to the benefit of individuals, taking into account just its own and Turkey's (in the light of the ECHR obligations) perspective, while ignoring the perspective of the individuals concerned. Furthermore, by extending the obligation to exhaust the local TRNC remedies to non-residents of the occupied territory, the Court put itself in contradiction with the rationale of the ICJ reasoning in the *Namibia* opinion. The ICJ's idea was to grant protection to individuals in a no-win situation, as those living under an unrecognised authority do not have any other way to manage their personal affairs than to deal with this authority. The ECtHR actually forces the individuals who are not subjects to such authority to enter into relations with it and to use measures provided by it which are unlawful under international law. How this can be regarded as "to their benefit" remains a mystery.

The ECtHR seems to follow – in its interpretation of the *Namibia* exception – the philosophy of "illegal but legitimate", an interpretation which in itself is incoherent

and internally contradictory. The beneficiaries thereof are just the Court itself and the parties responsible for the violation of international law, i.e. Turkey and the TRNC. How unpredictable and serious are the effects such approach may have been illustrated by a quite recent case, *Güzelyurtlu and Others v. Cyprus and Turkey*,[96] where Cyprus was found responsible for a violation of procedural rights under Art. 2 ECHR in that it did not (allegedly) sufficiently cooperate with the TRNC organs. The philosophy behind *Demopoulos* was extrapolated by the ECtHR Chamber onto the international obligations of Cyprus, suggesting that the state injured by Turkish aggression was obliged under the ECHR to cooperate with the unrecognised puppet regime of its aggressor. Fortunately the Grand Chamber reversed the judgment with respect to any responsibility on the part of Cyprus, but the seeds of uncertainty have been planted.

In contrast to the developments of the ECtHR, the model of interpretation of the *Namibia* opinion adopted by the CJEU in *Anastasiou* has not been revised. There the Court – and along with it the national courts and the Union institutions – upheld its consequent and coherent approach, according to which the scope of an exception to a principle of non-recognition should be determined narrowly, both with regard to the situation of individuals under the unrecognised entity's governance and to the entirety of international obligations binding upon the Union and its member states, in particular those stemming from EU law. The key rule followed by the CJEU in this respect was to avoid any circumstances that could be regarded as an indication of recognition or legitimisation of an unrecognised regime. This model is successfully applied by the Court also with regard to other unrecognised situations.[97]

Interestingly, in cases which shared some similarities both European Courts entered into a dialogue with ICJ with respect to the *Namibia* exception, but avoided a dialogue with each other, although they have done so before many times with regard to other issues. Only when forced by the circumstances of a specific pair of cases based on the same facts did they decide to regard to their actions as limited to this particular double-case, rather than to put it in the more general context of their TRNC jurisprudence. Nevertheless, the *Apostolides/Orams* saga indicates the possible threats raised by the lack of a coherent approach by both Courts, including the danger of contradictory rulings. And I cannot get one question out of my mind: If the claim before the ECtHR were from Mr. Apostolides against Turkey concerning execution of his Cypriot court judgment, would he also be required to exhaust the TRNC "local remedies"?

The ICJ, in formulating the *Namibia* exception, provided neither any exhaustive list of recognisable acts or activities, nor any duty of automatic recognition, leaving the deciding actors (international or national courts, state authorities) a fair margin of appreciation as to its interpretation and application. However this cannot be understood

[96] ECtHR, *Güzelyurtlu and Others v. Cyprus and Turkey* (App. No. 36925/07), 4 April 2017 (Chamber judgment), 29 January 2019 (Grand Chamber judgment).

[97] *See e.g.* Case C-386/08 *Brita GmbH v. Hauptzollamt Hamburg-Hafen*, ECLI:EU:C:2010:91; Case C-363/18 *Organisation juive européenne, Vignoble Psagot Ltd v. Ministre de l'Économie et des Finances*, ECLI:EU:C:2019:954.

as full discretion. Especially the international courts, in their role as guides and standard setters, are bound by the general principles of law, by the rules of interpretation of international law, and by the postulate of cohesion and coherence in the application thereof. In the light of the presented case law of the ECtHR and CJEU, it is very disturbing to observe that it is not the protection of the rights of individuals and of the international rule of law that is in put in first place, but that sometimes the interests of the court itself, or even (though usually as a "collateral benefit") of the state responsible for violation prevail. It seems that judicial dialogue, which was considered to be a perfect tool for achieving consistency in the interpretation and application of international law, thus strengthening the protection of rights of individuals, does not always serve these goals, but rather is trumped by more prosaic ones.

The conclusions of the analysis of the presented jurisprudence reveal the need for a deeper reflection on questions of a more general nature: How should the rights of individuals involved in relations with unrecognised entities be protected? Are we really satisfied with a system of international protection of human rights where a pivotal judicial organ welcomes a redress mechanism provided by an unrecognised entity in a situation which is unlawful under international law? Is such protection really "legal protection"?

Putting aside political goals and considerations, from just a legal perspective it seems clear that in internationally unrecognised situations it is judicial protection on the international level that gives the best prospects for effectively defending the rights of individuals. This is the model that should be promoted by the international community, where the legal protection is safeguarded by international judicial bodies (courts, tribunals, internationalised/hybrid bodies, claims commissions etc.) and supported by national courts, cooperating and engaging in a conclusive dialogue, the legality and legitimation of which should be unquestionable.

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INTERNATIONAL LAW AT THE SAINT VOLODYMYR IMPERIAL UNIVERSITY OF KYIV IN THE 19TH AND EARLY 20TH CENTURIES

Abstract: *This article is devoted to the science of international law at the Saint Volodymyr Imperial University of Kyiv, a major centre for the teaching and study of international law in Tsarist Russia. It examines the international legal views propounded by Vasilii Andreevich Nezabitovskii (1824–1883), Roman Ivanovich Baziner (1841–?), Nikolai Karlovich Rennenkampf (1832–1899), Otton Ottonovich Eikhel'man (1854–1943), and Petr Mikhailovich Bogayevskii (1866–1929). Scientists working at the Saint Volodymyr Imperial University contributed considerably to the development of the science of international law, although their work is not widely known due to the fact they did not produce many works in "western" languages. The large majority of these scholars' writings represent a perfect development of international legal theory. These works advanced the concepts of the legal nature of international law (Nezabitovskii, Eikhel'man); proposed a new spatial concept of territory that was further developed in international legal science (Nezabitovskii); and explored the laws and customs of war and the role of the Red Cross in the development of humanitarian norms in international law (Baziner, Rennenkampf, Bogayevskii).*

Keywords: history of international legal science in Ukraine, Nikolai Karlovich Rennenkampf, Otton Ottonovich Eikhel'man, Petr Mikhailovich Bogayevskii, Roman Ivanovich Baziner, Saint Volodymyr Imperial University, Vasilii Andreevich Nezabitovskii

INTRODUCTION

Investigation of the history of international law and international legal teachings has always been one of the main tasks of the modern science of international law. But whereas numerous fundamental works have covered different aspects of the development of international legal doctrine in Western countries, Western specialists are seldom well versed in the history of international legal science in Russia, let alone Ukraine.

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One of the few exceptions is the work of the prominent Polish international lawyer Manfred Lachs, "The Teacher in International Law",[1] who mentions the significant contribution of Russian and Ukrainian scholars to the development of the science of international law. In recent decades though, several essential works in this field have been published in English. Foremost among them are a translation of a foundational work by a celebrated historian of international legal science, the academician Vladimir Emmanuilovich Grabar,[2] and works by such authors as William Elliott Butler[3] and Lauri Mälksoo.[4] Among Soviet scholars, the contributions of pre-revolutionary Kyiv specialists to the development of the science of international law was, alongside the work of the above-mentioned V.E. Grabar, also investigated by D.B. Levin,[5] N.N. Ul'ianova, Iu'Ia. Baskin,[6] and L.G. Zablotskaia.[7] Contemporary Ukrainian international lawyers pay much more attention to the study of the history of the development of the science of international law in Ukraine in general and at Kyiv University in particular. Thus the science of international law at Kyiv University has become the subject of research by such contemporary Ukrainian lawyers as O.O. Merezhko[8] and O.V. Bytkevych.[9] The author of this article also dealt with these issues both in sole publications[10] and in

[1] M. Lachs, *The Teacher in International Law*, Martinus Nijhoff Publishers, Dordrecht, Boston, Lancaster: 1987.

[2] V.E. Grabar, *The History of International Law in Russia, 1647–1917*, translated and edited with an Introduction and Bibliographies by W.E. Butler, Clarendon Press, Oxford: 1990.

[3] W.E. Butler, *On the Origins of International Legal Science in Russia*, 4(1) Journal of the History of International Law 1 (2002).

[4] L. Mälksoo, *The Science of International Law and the Concept of Politics: The Arguments and Lives of the International Law Professors at the University of Dorpat/Iur'ev/Tartu 1855-1985*, 76(1) British Yearbook of International Law 383 (2005); L. Mälksoo, *The History of International Legal Theory in Russia: A Civilizational Dialogue with Europe*, 19(1) European Journal of International Law 211 (2008); L. Mälksoo, *Russian Approaches to International Law*, Oxford University Press, Oxford: 2015.

[5] Д.Б. Левин, *Наука международного права в России в конце XIX и начале XX в.: Общие вопросы теории международного права* [The science of international law in Russia in the late XIX and early XX centuries: General issues of the theory of international law], Наука, Москва: 1982.

[6] Н.Н. Ульянова, Ю.Я. Баскин, *Василий Андреевич Незабитовский как международник* [Vasilii Andreevich Nezabitovskii as an internationalist], Советский ежегодник международного права 335 (1965).

[7] Л.Г. Заблоцька, *Розвиток науки міжнародного права вченими Університету Святого Володимира* [The development of the science of international law by scholars of the University of St. Volodymyr], 1 Український часопис міжнародного права 117 (1993).

[8] O.O. Merezhko, *On the Origins on the Ukrainian Science of International Law*, 2(2) JUS GENTIUM: Journal of International Legal History 443 (2017).

[9] O.V. Bytkevych, *The Nezabytovskyi Concept of the Law of International Community*, 2(2) JUS GENTIUM: Journal of International Legal History 485 (2017).

[10] К.О. Савчук, *Життєвий шлях і наукова біографія професора Василя Андрійовича Незабитовського* [The life pass and scientific biography of professor Vasilii Andreevich Nezabitovskii], 21 Правова держава. Щорічник наукових праць 415 (2010); К.О. Савчук, *Отон Отонович Ейхельман – біографічний нарис та міжнародно-правові погляди* [Otton Ottonovich Eikhel'man – biographical sketch and international legal views], 2 Науково-практичний фаховий журнал "Міжнародне право" 237 (2012).

co-authorship with V.N. Denisov.[11] But in general, as rightly noted by O.O. Merezhko, "the Ukrainian school of international law is not well-known outside Ukraine and sometimes is perceived as existing in the shadow of post-Soviet Russian international legal thought."[12] In my opinion, this statement is also applicable to pre-revolutionary Ukrainian legal science. Thus this article constitutes an overview of the contribution of Kyiv internationalists of the 19th and early 20th centuries to the development of the science of international law, an overview that might be interesting for Polish and other Western experts in the history of international law.

1. INTERNATIONAL LAW IN KYIV: THE LONG 19TH CENTURY

In what is now Ukraine the modern science of international law began to develop in the second quarter of the 19th century. It would eventually achieve much success, becoming an integral part of the world's science of international law and flourishing throughout the later 19th and early 20th centuries. It was mainly concerned with ideas of international law elaborated under the influence of the revolutionary changes taking place in Europe and the United States of America at the time. After the Napoleonic era, the old conceptions of absolute monarchy were gradually being overcome and ideas of democracy spread alongside concepts of a Europe reorganized on a firmer basis as well as the prospect of the political organization of the entire world. At the same time, scientific and technical progress was bringing changes in the structure of industry, means of communication, and transportation.

The resulting internationalisation of the economic and social interests of states necessitated new forms of legal regulation of international relations. These materialized in international conferences on economic and social issues, which significantly broadened the sphere of states' joint interests in their mutual relations, which earlier had been restricted exclusively to political problems, as well as in special state-organized "unions" of a permanent nature that provided a continuous basis for managing their particular interests. Politicians and international law experts of various nations began to set out their visions of a world law organized according to a system of voluntary cooperation between sovereign independent states, which eventually would regulate the wide array of their joint interests.

However, at the beginning of the 20th century the international community faced a paradox: its political structure remained unstable, even though states were clearly cooperating to advance their economic and social interests. At the Hague Conferences of 1899 and 1907, states attempted to agree on joint measures aimed at preventing war, but their efforts proved insufficient. In that historical moment, their failure to

[11] V.N. Denisov, K.O. Savchuk, *Development of International Law Science in XIX – first half of XX century in Ukraine*, Ukrainian Yearbook of International Law 293 (2008).

[12] Merezhko, *supra* note 8, pp. 448-449.

politically organize the international community for the purpose of maintaining law and order resulted in international law's recognition of war as a lawfully permitted act, a decision that subsequently led to worldwide disaster in the First World War (1914–1918).

This transitional epoch swelled the ranks of highly-qualified representatives of the science of international law in Ukraine. They elaborated ideas about the nature and substance of international law and made interesting suggestions for its development, including the prevention of war. The bulk of these scholars' writings represent the comprehensive development of an international legal theory whose level of practical significance places it among the best examples of the world's scientific thought, a theory which is often distinguished by its originality.

The science of international law arose on the territory of the Russian Empire later than in Western Europe. As V.E. Grabar rightly emphasized, "in Kievan Rus', despite lively relations with states of Western and Eastern Europe and the existence of progressive institutes of international law, and in the feudal principalities of the thirteenth to the fifteenth centuries it is difficult to find definitive indications that enable one to confirm that there existed a developed doctrine concerning the norms of international law."[13] The first original theoretical work on international law appeared in Russia only at the beginning of the 18th century.[14] The further development of the science of international law in the Russian Empire in general and in Ukraine in particular is primarily associated with universities. Thus in the 19th century the main centres of scientific studies in Ukraine were Kharkiv University, Saint Volodymyr University (Kyiv) and Novorossiysk University (Odessa). The law faculties at these universities established departments of international law (or the all-people's law, to use the Russian terminology of the time) that conducted studies on topical problems and tendencies in conformance with the highest standards of scientific research in Europe at that time and became an integral part of that scholarly sphere. Of course Ukraine was part of the Russian Empire during this period, so the science of international law in Russia was interconnected with that of Ukraine. Moreover, the international legal teachings of professors at Kharkiv, Saint Volodymyr and Novorossiysk Universities were certainly also integral to the united imperial science of international law. International law at Kharkiv University, established in 1804, was represented by such scholars as Tykhon Fedorovich Stepanov (1795-1847), Dmitrii Ivanovich Kachenovskii (1827-1872), Andrei Nikolaevich Stoianov (1831-1907) and Vsevolod Pievich Danevskii (1852-1898). Novorossiysk University, founded in 1865, was home to such scientists as Ignatii Aleksandrovich Ivanovskii (1858-after 1926) and Petr Evgen'evich Kazanskii (1868-1947).

The Kyiv University, bearing the name of Saint Volodymyr, was founded in accordance with an 8 November 1833 decree of Emperor Nicholas I. The name was not chosen by chance. Saint Volodymyr, or Volodymyr the Great (958–1015), Grand

[13] Grabar, *supra* note 2, p. 3.
[14] Butler, *supra* note 3, p. 1.

Prince of Kyiv, was the ruler known for Christianizing Kyivan Rus. Naming the newly created university after him was a way of emphasizing Kyiv's importance as the cradle of Orthodox Christianity in the Russian Empire. The University's opening ceremony was held on 15 July 1834. The special charter granted to the University upon its founding provided for the existence of two faculties – philosophical and legal – but did not extend to teaching at a faculty of international law, so the department of the law of nations was not established at the University until a new charter was granted in 1842. The inception and development of the Kyiv school of international law is generally attributed to Konstantin Aleekseevich Nevolin (1806–1855), a well-known lawyer, historian of Russian law, and lecturer who taught a review of jurisprudence that also covered some international legal issues. K.A. Nevolin was born in Orlov, in the Vyatka Governorate (now the Kirov region of the Russian Federation) in a priest's family. He first received religious education at Vyatka Theological Seminary and Moscow Academy. Even at that time, the future scholar showed great abilities to learn. Thus, while studying at the Academy, together with some other students from universities and theological academies he was chosen to continue his studies in jurisprudence. In 1828, together with other gifted young fellows, he began studying jurisprudence in the Second Section of His Imperial Majesty's Own Chancellery under the direct guidance of M.A. Baluhianskii, according to the curriculum of M.M. Speranskii. After passing the exam in 1829, Nevolin was sent to study at the University of Berlin, where during three years he studied Encyclopedia of law and the philosophy of the law, history and theory of public law, Roman Law, Law of Germany and General State Laws for the Prussian States, as well as European International Law under the guidance of Friedrich Carl von Savigny. After graduation in Germany, he continued working for a time in the Second Section of the Imperial Chancellery, developing a set of privileges and laws of the Baltic governorates, but in February 1835 he defended his thesis "On the Jurisprudence Philosophy in the Ancient Times" at the Saint Petersburg University and obtained the degree of doctor of law. Shortly after the defence of his thesis, Nevolin joined the newly-founded Saint Volodymyr University in Kyiv, occupying the position of full professor of Encyclopedia of Law and Institutions of the Russian Empire. In the period 1837-1843, Nevolin was the Rector of the Saint Volodymyr Royal University. He stayed at this University until 1843, and then he was transferred to the Department of Russian Civil Laws at the Saint Petersburg University. In 1847, Nevolin became the Vice-rector and Dean of the Law Faculty of this University. During the Saint Petersburg period of his academic and scientific activities, his fundamental three-volume work "The History of Russian Civil Laws" came out. In 1853, Nevolin was elected a corresponding member of Saint Petersburg Academy of Sciences for the Department of Russian Language and Literature. In 1854 he was elected an Honorary Member of the Saint Volodymyr Royal University, which he had done his utmost to help establish and develop. Unfortunately, the life of this outstanding scholar was cut short. On 6 October 1855, he died in Brixen im Thale, Austria, where he had undergone medical treatment.

In 1839–1840 Nevolin published his fundamental work "Encyclopedia of Jurisprudence,"[15] which featured several commentaries on issues of international law and its teachings. Nevolin distinguished five stages of social life: family, generation, civil society, state, and alliance of nations, noting that the state is also a member of the latter. He wrote that the state "has links with other states like with individual units similar to it," emphasizing that "in mutual relations, each state recognizes each other as autonomous and independent, which serves as the basis for their behaviour towards each other."[16] Since there is no supreme authority over the states, then in cases which cannot be resolved successfully by peaceful means, war remains the only sustainable way to resolve conflicts between states. In analysing the term "law", Nevolin defined state and internal laws, civil laws, and laws of the union of nations or law of nations (external state laws). Since, from the standpoint of Nevolin all laws were divided into those that define rights and responsibilities (i.e. defining laws), and those that protect them (i.e. protecting laws), so too laws of the union of nations were also divided into two categories. Thus according to Nevolin laws of the union of nations or law of nations are divided into two categories of regulations: defining laws (or law of nations in time of peace), and protecting laws (or law of nations in time of war). The first category "defines the essence of the union of nations and law that arises from it'; while the second category 'contains the regulations according to which the union of nations and law arising from it remain in action by taking enforcement measures, and especially by war."[17] In his work, Nevolin attached great importance to the history of international legal doctrines, although he addressed them in the context of the common history of political and legal thought (history of the philosophy of law in his terminology). Nevolin actively analysed the international legal concepts of Plato, Aristotle, and Cicero, pointing out that in the papers of the latter "for the first time, we find the true concept of truth (that is, law. – K.S.) between the nations."[18] In reviewing the history of the philosophy of law of the new era, Nevolin drew attention to the role played by philosophy in the evolution of international law and its science. He rightly pointed out that: "[e]verlasting wars and distractions between European nations caused by uncertain relations between them provided the impetus for determining these relations more precisely, assisted by scientific searches."[19] The second volume of the Encyclopedia of Law is devoted to the consideration of "the history of positive legislation" (i.e. history of the state and law in modern terminology). In terms of the subject being analysed here, one can find other more interesting papers in which Nevolin explores the legal regulation of international relations in the laws of different countries, since these contributions finalize the histori-

[15] К.А. Неволин, *Энциклопедия законоведения* [Encyclopedia of Jurisprudence], Унив. тип., Киев: 1839-40, 2 vols.

[16] К.А. Неволин, *Энциклопедия законоведения* [Encyclopedia of Jurisprudence], in: К.А. Неволин, *Полное собрание сочинений*, Т. 1, Тип. Эдуарда Праца, Санкт-Петербург: 1857, p. 65.

[17] *Ibidem*, pp. 71-72.

[18] *Ibidem*, p. 213.

[19] *Ibidem*, p. 228.

cal research of the positive legislative development of each nation. Nevolin was of the opinion that international law is a product of the New Time, since it "assumes that people realize the uniformity of their nature and, accordingly, the equality of their common humanity," while the nations of the Ancient World "did not recognize the mutual rights of each other" and "each of them ... placed themselves above other nations."[20] According to Nevolin, the main precondition on which international law was established directly in Western Europe was firstly the unity of faith and church power in the nations. He believed that other such preconditions were continuous wars and peaceful relations between them, as well as "the uniformity of the grounds of all social and private everyday life."[21] As rightly pointed out by Nevolin, this situation contributed to the fact that irrespective of whether the nations of Europe were in peaceful relations or in a state of war, they were guided by the same principles in their mutual relations. In terms of the scope of international law, Nevolin's considerations were in line with the dominant paradigms of his time, and he noted that international law emerged in the relations of Western European states, but in the 18th century Russia began to take an active part in the common causes of Europe, and subsequently the newly-emerged states of America joined them. The scholar did not express his opinion on the possibility of applying international law to relations with the nations of Africa and Asia. On the subject of sources of international law, Nevolin pointed out that it emerged as a custom, but "we sipped knowledge of it from treaties that were entered into between European states at different times."[22]

As mentioned above, the department of international law was founded in 1842. Prior to that, international law was taught by professors from other chairs, namely Aleksandr Aleekseevich Fedotov-Chekhovskii (1806–1892) and Nikolai Dmitrievich Ivanishev (1811–1874). The talented scholar Platon Lukich Tutkovskii (1820–1849) then held the chair, but only for a few years as he died very young.

2. VASILII ANDREEVICH NEZABITOVSKII: ORIGINATOR OF THE SPATIAL CONCEPT OF TERRITORY

From 1853 until his death in 1883, Vasilii Andreevich Nezabitovskii (b. 1824) held the chair of international law at Saint Volodymyr University. He is still regarded as one of the most distinguished figures in the Russian and Ukrainian science of international law. Nezabitovskii was born in Radomyshl', near Zhytomyr, to a family of petty clerks. After graduating from the Second Kyiv Gymnasium, he earned a law degree in 1846 from the Law Faculty of the University of Kyiv. From 1846 to 1848 he worked as an assistant department head in the civil chamber of the Kyiv District Court. For the next

[20] К.А. Неволин, *Энциклопедия законоведения* [Encyclopedia of Jurisprudence], in: К.А. Неволин, *Полное собрание сочинений*, Т. 2, Тип. Эдуарда Праца, Санкт-Петербург: 1857, p. 511.

[21] *Ibidem.*

[22] *Ibidem*, p. 512.

two years he taught jurisprudence at the Second Kyiv Gymnasium. Then, from 1850 to 1853, he held the chair of administrative law at Nizhyn Lyceum, where he taught the history of Russian law, and state and financial law. In 1853, he obtained a master's degree in state law with his thesis "On the Financial System of Moscow State from the Establishment of Monocracy until the Introduction of Poll Tax by Peter the Great."[23] From 1853 until his death, he was a professor of international law and also served three times as Dean of the Law Faculty (in 1863–1865, 1870–1873 and 1876-1879) and once as Vice-Rector (1865–1867). In 1858 he was made an associate professor, and in 1863 he became a full professor. In 1858 and 1859 he travelled to Germany, France, England, Belgium and Switzerland to engage in research and for other academic purposes.

In 1862, he defended his doctoral thesis, "Publicists' Teachings on International Possession",[24] concisely weighing in on the topic in his relatively short (only 40 pages) yet exceptionally in-depth study. According to Nezabitovskii, both international law as a system of legal rules governing international relations and international legal studies as a branch of the legal sciences had emerged relatively recently, i.e. in the mid-17th century. It was during that period, after the end of the Thirty Years' War and the 1648 Peace of Westphalia, that the idea of a universal Christian monarchy was abandoned and the "fragmentation of Europe into many independent states elevated itself to the new supreme foundation of political life in the European world."[25] Even though the various links between European states so substantially intensified thereafter that those states considered themselves parts of a common political system, the idea of state independence became the fundamental law of the European system of international relations.

These developments in international relations also defined the subject matter of the science of international law. Nezabitovskii opined that "[the science] should define what is right and what is wrong in external relations between states."[26] To that end, Nezabitovskii schematically encapsulated the development of international law scholarship from the 17th to the mid-19th century and differentiated between two of its directions: the theoretical and the positivist. The theoretical approach predominated in the 17th century, but since the end of the 18th century the positivist approach to the science of international law had come to prevail. Nezabitovskii explained this switch of perspectives by observing that in the 17th century "the life of European states in all its emanations was failing to catch up with the new foundation" and legal science faced the challenge of "providing advice and guidance for it."[27]

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[23] В.А. Незабитовский, *О податной системе в Московском государстве, со времени установления единодержавия до введения подушного оклада Петром Великим* [On the financial system of Moscow State from the establishment of monocracy until the introduction of poll tax by Peter the Great], in: В.А. Незабитовский, *Собрание сочинений*, Тип. Е.Я. Федорова, Киев: 1884, p. 2.

[24] В.А. Незабитовский, *Учение публицистов о междугосударственном владении* [Publicists' teachings on international possession], in: В.А. Незабитовский, *Собрание сочинений*, Тип. Е.Я. Федорова, Киев: 1884, p. 105.

[25] *Ibidem.*

[26] *Ibidem*, p. 106.

[27] *Ibidem*.

It was the evolution of the legal system that regulated the relationships between states that determined the positivist direction in the development of international legal science. However, Nezabitovskii stressed that both directions started from the same foundation – state independence – and that as a result, the "idea of state independence diverted the attention of politicians and publicists from thoughts on inter-state union."[28] Therefore, Nezabitovskii concluded, the then-prevailing state of international legal theory failed to meet the realities of international life, and many of its core provisions required in-depth revisions focused on unity and union between states. He thus declared that revision of the teachings on international possession would be the main task of his research.

In his work, Nezabitovskii objected to the practice of automatically importing categories and notions of civil law into the sphere of international relations – an approach that was widespread in the legal science of the 17th, 18th, and even 19th century. From a civil law standpoint, Nezabitovskii noted, possession (i.e. power over things) may belong to a person individually, to several persons jointly (*dominium*), or to humankind (*communio*). He defined the essence of the civil law approach to possession as follows: "I. Human rule over the outward world takes two forms: private possession and communion. Private possession means unconditional and unlimited dominion over a thing. II. Physical possibility limits private possession. Only those things that are absolutely impossible to keep in exclusive dominion remain within the communion."[29]

In Nezabitovskii's opinion, however, the transplantation of such concepts into the sphere of international relations does not correspond to real international life. The subject matter of international possession is state territory or, as he termed it, "governmental area (territory)", by which he meant a "defined area of terrestrial surface."[30] It comprises two substantially different parts: land and maritime territory. In his doctoral thesis, Nezabitovskii thoroughly elucidated the main evolutionary stages of the freedom-of-the-sea principle in the doctrine and practice of international law, and ardently upheld the freedom of the sea for all states. Regarding the issue of access to and exit from state territory, Nezabitovskii pointed out a clear pattern in the history of international legal scholarship. Whereas 17th-century international lawyers – and Hugo Grotius in particular – argued for the right of a foreigner to enter the territory of a state, international law doctrine since Samuel von Pufendorf had shifted toward the position that the state should have an unlimited right, emanating from the principle of territoriality, to restrict foreigners' access to its territory. Nezabitovskii differentiated between international and intra-state relations, defending the unlimited right of a state to restrict foreign politicians' access to its territory, but upholding the right of private persons to enter the foreign territory. Based on the civil-law concepts of territorial possession prevailing at his time, he opined that it was impossible to settle the issue of lawful entry into foreign territory.

[28] *Ibidem*, p. 107.
[29] *Ibidem*, pp. 113-114.
[30] *Ibidem*, p. 114.

In his view, "international possession represents the exclusive power of a state over a certain part of territorial surface that comprises the governmental area."[31] This assessment reflects what is understood in civil law as *dominium*, but in international law *dominium* acquires rather the meaning of a State's ultimate title to the territory. At the same time, a state exercises power over the population, that is, *imperium*. Hence, in the sphere of international relations imperium and dominium merge into the general concept of international possession, despite being at the same time completely different and mutually independent conceptions by their legal nature. Nevertheless, international legal scholars mechanically transplanted the civil-law notion of possession into international law, producing a theoretically and practically untenable understanding of international possession as composed of two elements that are completely alien by their legal nature. Therefore, Nezabitovskii concluded, "territory cannot be a thing in state's possession, but only an area where governmental authority exists and functions. This is a governmental area, a circuit, the boundaries of governmental power. The state rules within the territory but not over the territory, and territory means not the subject but the limit of state power."[32] Hence Professor Nezabitovskii rejected the civil-law understanding of state territory and, after extensive study of myriad doctrinal sources ranging from Hugo Grotius and Alberico Gentili to the international law scholars of his own day, proposed a new spatial concept of territory that was further recognized and developed in the international legal science. This theory has been further developed in the works of such well-known scientists as Georg Jellinek, Leon Duguit, Nikolai Mikhailovich Korkunov, and Franz Eduard Ritter von Liszt. According to the modern international legal concepts state territory is defined as the sphere of a state's domination, territorial supremacy and sovereignty, part of the surface of the earth where the sovereign state exercises jurisdiction.

Western international lawyers usually regard Carl Victor Fricker – a renowned German jurist, statesman, and professor at the Universities of Tübingen and Leipzig (1830–1907) – as the founder of this theory. Without in any way downplaying Fricker's achievements in the elaboration of legal questions relating to state territory, I would note that the Ukrainian scientist's work "Publicists' Teachings on International Possession" was published in 1860, whereas Fricker's work "State Territory"[33] appeared only in 1867. Unfortunately, the works of Nezabitovskii have not been translated into Western European languages and today are a bibliographic rarity even in Russian, so his international legal views are little known in the modern Western science of international law.

Nezabitovskii's writings stand out not only in terms of the scale of the problems he researched, but also in their originality, clarity, and simplicity of explanation. The scholar also examined the problem of determining the place and the role of the rules and customs of war in international law, and the prospects for the creation of a universal international organization of states. As emphasized by O.V. Bytkevych, Nezabitovskii

[31] *Ibidem*, p. 136.

[32] *Ibidem*, p. 140.

[33] K.V. Fricker, *Vom Staatsgebiet*, Tübingen: 1867.

"considered an international system where war is a rare and exceptional fact to be an ideal for international law."[34] In his work "International Customs at the Time of War", Nezabitovskii came forward as a fervent opponent of war and the arms race: "What is war? It is the domination of force. What is education aimed at? Its aim is the rule of law. But it is generally known that force is not the law."[35] While acknowledging the significant developments in the international legal regulation of military operations, which in his opinion was certainly a positive tendency, the scientist also rightly pointed out that developments in technology had made war increasingly murderous. He singled out two methods with a potential to limit the scope of war: force reduction and the prohibition of maritime blockades. In recognizing that the ideas of gradual limitation of war and eventually its total prohibition as a means of settling international disputes would promote progress in education and the development of industry and trade, Nezabitovskii was confidently optimistic that "the time when the hope for a constant peace becomes a reality is close."[36]

It is worth noting here that the scholar was by no means detached from life or an idealist and dreamer. In a public lecture dedicated to the well-known project of the codification of international law led by the American lawyer D. Field, whom the scholar from Kyiv regarded highly, Nezabitovskii drew attention to the complexity and protracted nature of this process, in particular insofar as it concerned the need to establish an international court on a permanent basis. In his words: "Efforts to establish an international court are clear to me and the Court is possible without the registry and positive law: there is a law for the court which lies in a natural sense of justice. But today I personally find the composition of an international statute, of a complete statute, impossible."[37]

3. ROMAN IVANOVICH BAZINER AND NIKOLAI KARLOVICH RENNENKAMPF: STUDYING LAWS AND CUSTOMS OF LAND AND MARITIME WAR

When V.A. Nezabitovskii headed the Department of International Law, one of his students, Roman Ivanovich Baziner (1841-?), worked as a privatdozent during the period 1871-1880. R.I. Baziner was born on October 13, 1841 in Saint Petersburg in a teacher's family and studied at the Second Odessa Gymnasium. In 1866 he graduated from the Law Faculty of the Saint Volodymyr University and received a proposal to stay at the University to prepare to obtain his professorial title. At the same time, he was

[34] Butkevych, *supra* note 9, p. 499.

[35] В.А. Незабитовский, *Международные обычаи во время войны* [International customs at the time of war], in: В.А. Незабитовский, *Собрание сочинений*, Тип. Е.Я. Федорова, Киев: 1884, p. 147.

[36] *Ibidem*, p. 251.

[37] В.А. Незабитовский, *Новейшие проекты международного устава* [Latest projects of international charter], in: В.А. Незабитовский, *Собрание сочинений*, Тип. Е.Я. Федорова, Киев: 1884, p. 151.

working as a court investigator in Kyiv. After the thesis defence pro venia legendi "On the Inviolability of the Private Property in International Wars,"[38] he was approved as a privatdozent of the Department of International Law. He was teaching a number of international legal disciplines, in particular The History of Treaties of Vienna of 1815 and Law of Neutrality. However, in 1880 he left his scientific and academic activities to focus on advocacy work as an attorney-at-law in the district of Kyiv Trial Chamber. Baziner's scientific papers are devoted primarily to the law of war, and like the papers of his teacher and mentor Nezabitovskii, are based on the positivist approach to understanding the essence of international law. His thesis contains a detailed historical and legal analysis of the main stages of the formation and development of the principle of the inviolability of private property in maritime wars. Describing rather accurately the essence of maritime war as "robbery of the enemy's property,"[39] Baziner highlighted the following trend: the development of progressive rules of international law aimed at protecting the private property of the citizens of the public enemy in the law of land war was growing much faster than that in the law of maritime war. In his opinion, this could mainly be attributed to the fact that the key objective in maritime war is to destroy the maritime trade of the enemy, which is impossible without interrupting the trade of this public enemy with neutral states. Thus, the logic of maritime war leads to a situation in which "in order to get neutral states to cease violations of their duties not to interfere with the military activities of the belligerent powers, and in order to make them respect the imagined rights of the latter, any neutral vessel which was deemed to be at fault was declared a legal prize."[40] In his thesis, Baziner provided a brief, but at the same time reasonably comprehensive historical background of the development of the provisions of positive international maritime law, with due regard to the legal status of enemy property on a neutral vessel and the neutral property of the enemy vessel, as well as the opinions of prominent representatives of the international law doctrine of the 18th and 19th centuries in this respect, and open-mindedly analysed the arguments of both supporters and detractors of the reservation of the right to seize the private property of enemy citizens in the open sea. In considering the possibility of realizing in full the principle of the inviolability of private property in maritime war, Baziner drew attention to the utopianism and even unfairness of the opinion according to which "future wars will be the combats between enemy armies and navies, while maintaining full observance of the commercial interests and ownership rights of individuals." He rebelled and asked: "Is it fair that one part of the citizens would enjoy all the benefits of a comfortable life, while the other should have to be miserable, exposing both their life and ownership to the contingencies of war?"[41] Thus, according to Baziner, a definitive

[38] Р.И. Базинер, *Неприкосновенность частной собственности в международных войнах* [On the inviolability of the private property in the international wars], in: *Наука міжнародного права в університеті Святого Володимира*, Том 1, Видавничий дім "Промені", Київ:, 2004, p. 166.

[39] *Ibidem*, p. 168.

[40] *Ibidem*, p 169.

[41] *Ibidem*, p. 220.

solution to the problem of respecting the private property of the citizens of belligerent powers during maritime war would be possible only if the most important problem of international law is solved: the prohibition of war itself, which in his opinion would inevitably occur sooner or later.

Baziner's writings also include one small, but quite comprehensive article devoted to the study of the legal content and significance for the development of international law of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field of 22 August 1864,[42] which was the first multilateral international legal instrument aimed at protecting war victims and one of those that subsequently laid the foundations for modern international humanitarian law. It is worth noting that according to Baziner, the significance of this international legal instrument was not only the establishment of humane rules for the treatment of the wounded and sick in armies in the field, but in "the incomparably greater humanity of the fundamental idea of the inviolability of a person, which, however unspoken, provides the basis for the agreement itself, and which is to be further developed not only in the interstate, but also in state law."[43] Such arguments by the scholar demonstrate his scientifically-based understanding of the basic trends of the international law development in general, as well as the legal regulation of the laws and customs of war in particular, since the principle of respect for human rights is one of the key principles in contemporary international law and is integrated in particular into the principle of humanity, which is a specific principle of international humanitarian law.

In describing the development of the science of international law at the Law Faculty of the Saint Volodymyr University, it should be noted that not only did regular lecturers of the International Law Department carry out international legal research, but so too did specialists in other legal disciplines. In reviewing the early decades of the University's existence it is especially worthwhile to highlight the scientific contributions of the Rector of the University, Nikolai Karlovich Rennenkampf (1832-1899), an outstanding specialist in the field of general theory of law and state, philosophy and encyclopedia of law, as well as the theory and methodology of comparative law. N.K. Rennenkampf was born on 10 September 1832 in Oleksandrivka, in the Chernihiv Governorate, in a noble family. He finished the Chernihiv Gymnasium in 1849 and graduated from the Faculty of Law at the Saint Volodymyr University with a gold medal for his composition "Rights and Duties of Settled Foreigners, and, in Particular, the Jewish People in Russia" in 1855. In November 1856 he was appointed a privatdozent at the Second Kyiv Gymnasium and, at the same time, delegated to the Saint Volodymyr University for preparation for teaching at the Department of Civil and Boundary Laws. After 1858, Rennenkampf began to teach the jurisprudence encyclopedia and in 1859, and following defence of his master's thesis – "The History of the Publicists' Doctrines

[42] Р.И. Базинер, *Женевская конвенция 1864 года (война и гуманность)* [Geneva Convention of 1864 (war and humanity)], in: *Наука міжнародного права в університеті Святого Володимира*, Том 1, Видавничий дім "Промені", Київ: 2004, p. 245.

[43] *Ibidem*, p. 259.

about the Right to Visit and Search Vessels during War"[44] – he was appointed as an adjunct in the Jurisprudence Encyclopedia Department. In the years that followed all his long-standing academic and scientific activities were associated with the Saint Volodymyr University, where in 1862 he became an extraordinary professor; and in 1868, following defence of his doctoral thesis "The Essays Of The Legal Encyclopedia", he became a full Professor in the Jurisprudence Encyclopedia Department. In 1880 he was transferred to the Department of Encyclopedia of Legal and Political Sciences. In addition to lecturing at the University, Rennenkampf also taught history at the Kyiv Institute for Noble Maidens. In the years 1863-1866, 1870-1871 and 1881-1888 he was a Member of the University court; and in 1872 he became an Honourable magistrate judge of the Kyiv District; in 1875-1879 he became a mayor of Kyiv; and he ended his career as Rector of the Saint Volodymyr University (1883-1887). He died in 1899 and was buried in the Baikove Cemetery in Kyiv.

As can be seen, this outstanding scholar and politician did not deal mainly with international law, although he obtained his master's degree in the specialty of all-people's law and his master's thesis was devoted to the history of international legal doctrines regarding the right to visit and search vessels during war. In considering the emergence of the science of international law during his times, Rennenkampf associated it with the works by Alberico Gentili and Hugo Grotius, noting at the same time that certain institutes of international law dealt with scientific developments in the past. While these developments did not in the main apply to the doctrine of the right to visit and search vessels during war, nevertheless the topic attracted the attention of some international lawyers in the times just little later than that those of Hugo Grotius. Thus according to Rennenkampf there were two stages which could be clearly observed in the development of international legal doctrines on the visits and searches of vessels during war: 1) from the emergence of international law science in the early 17th century to the advent of the work on the capture of neutral ships by Martin Hübner (1723-1795), a famous Danish international lawyer; and 2) from the advent of the above-mentioned work by Hübner to the middle of the 19th century. Rennenkampf noted that the first period was "remarkable with the predominance of the rights of the belligerent powers over the neutral ones, and the necessary consequence of this benefit [was] the uncertainty of the right to visit and search, which provided for arbitrary requirements", while the second period "represents an implicit willingness to restrict the arbitrary power of the belligerent powers in the best interests of neutral powers, and at the same time to exercise the right visit and search in the most precise framework possible in order to eliminate the restrictions."[45] In general, in his paper Rennenkampf supported restrictions on the rights of the belligerent powers in the best interests of the neutral states and the identification, as clearly as possible, of

[44] Н.К. Ренненкампф, *История учения публицистов о праве осмотра кораблей во время войны* [The history of the publicists' doctrines about the right to visit and search vessels during war], in: *Наука міжнародного права в університеті Святого Володимира*, Том 1, Видавничий дім "Промені", Київ: 2004, p. 114.

[45] *Ibidem*, p. 118.

the legal framework in which a vessel under a neutral flag could be visited and searched by the vessels of belligerent powers.

4. OTTON OTTONOVICH EIKHEL'MAN: THEORIST OF DOMESTIC INTERNATIONAL LAW

Professor Otton Ottonovich Eikhel'man (1854–1943) of the University of Kyiv also made great contributions to the development of the science of international law. As a positivist and follower of August Michael von Bulmerincq, he saw a need to study international law as applicable to separate states. He was born on 27 April 1854 in the village of Heorhievskii near Saint Petersburg into a family of Baltic Germans. He finished high school in Revel (now Tallinn, the capital of Estonia). In January 1873 he entered the Law Faculty at the University of Dorpat (now Tartu), from which he graduated in 1875 having defended his candidate thesis "On the International Legal Relationships under Peter the Great." In 1876, he passed his master's exam at the University of Dorpat in the Department of International Law, and in 1878 he defended his master's thesis "On War Captivity."[46] This thesis, drawn up shortly after the approval of the draft Brussels Declaration concerning the Laws and Customs of War (1874), provided details of both the rules of international law and the domestic law of Russia in force at that time that regulated the prisoner-of-war status. In that same year he took the position proposed to him as associate professor of State and Administrative Law at the Demidov Legal Lyceum in Yaroslavl. While continuing to study the laws and customs of war, on April 13, 1880 Eikhel'man defended his doctoral thesis "On the Military Occupation of an Enemy Country" at the Saint Volodymyr University. Later, he became an extraordinary professor of the Department of State and Administrative Law Demidov Legal Lyceum. His doctoral thesis was based on an extensive research into the international law of that time of the military occupation institute, which examined the concept of military occupation of enemy territory, focused on the issue of the occupier state's powers towards state life in the enemy territory it occupied, including their attitude towards the legislative, governmental, and judicial authorities; the occupier's law with regard to property of the enemy state; as well as the duties of the occupier state. In sum the scholar worked for a relatively short time in Yaroslavl, and after 1882 his life and scientific activities became linked to Kyiv for a long time. In 1882 he was elected an extraordinary professor at the Saint Volodymyr University in the Department of Major Foreign Legislation, and in 1883 he became a full professor in the same department. After January 1884 he began working in the Department of International Law, where he worked for more than thirty years. In 1905-1909, Eikhel'man was the Dean of the Law Faculty at the University. In 1907, he was awarded the title of Distinguished

[46] O.O. Eichelmann, *Über die Kriegsgefangenschaft. Eine völkerrechtliche Studie*, Druck von C. Mattiesen, Dorpat: 1878.

Professor of the University. Eikhel'man combined his teaching activities at the Saint Volodymyr University with lecturing at other higher education institutes in Kyiv. For example, during 1908-1913 he was the Director of Kyiv Commercial Institute while still working full time at Saint Volodymyr University. He also took an active part in the public and political life of Kyiv, serving as a councillor of Kyiv City Duma in 1898-1906. In 1902 he was even elected mayor of Kyiv, but his candidacy was not approved by the Russian government.

Following the independence of Ukraine in 1918, he became actively engaged in the state-building process by committing his long-term scientific and practical experience to his new homeland. Ya. B. Turchyn, a modern Ukrainian researcher into Eikhel'man's political and legal heritage, has emphasized that "being a German by descent, he became a Ukrainian by vocation,"[47] while H.O. Korol'ov noted that "the combination of German ethnic identity and Ukrainian political awareness"[48] prevailed in the scholar's activities within the period described. According to O.O. Merezko, Eikhel'man "is an interesting case of a person who, being of German ethnicity, took an active part in in building the new Ukrainian nation and State after the demise of the Russian Empire and became a convinced Ukrainian patriot."[49] In 1918-1919, Eikhel'man was a member of the Council of the Ministry of Commerce and Industry and the Ministry of Foreign Affairs; in 1920-1922, he was a Deputy Minister of Foreign Affairs and was involved in many international negotiations on the part of Ukraine, and was also a member of the government committee of the Ukrainian People's Republic for the development of the draft Constitution. The Ukrainian politicians of that time repeatedly mentioned that Eikhel'man actively dealt with the public authorities during the regime of the Central Rada of Ukraine, the Ukrainian State of Hetman P. Skoropadskii, and the Directorate of Ukraine. Thus, in May-November 1918 Dmytro Doroshenko, the Minister of Foreign Affairs of the Ukrainian State, noted in his "My Memoirs about the Recent Past" that Eikhel'man was the only adviser to the Ministry of Foreign Affairs during the regime of the Central Rada of Ukraine who continued to work after the Hetman's coup,[50] adding that during his involvement in the intricate and controversial negotiations conducted by the Ukrainian State with Bolshevik Russia in May-October 1918,[51] – the only tangible result of which was the signing of a preliminary peace treaty on 12 June

[47] Я.Б. Турчин, Обґрунтування політико-правових передумов української державності та основних етапів її становлення в науково-теоретичних працях Отто Ейхельмана [Analysis of political and legal grounds of Ukrainian stateness and its evolution in scientific and theoretical works of Otto Eikhel'man], 15 (861) Вісник ХНУ імені В.Н. Каразіна «Питання політології» 81 (2009), p. 82.

[48] Г.О. Корольов, *Українська біографія Отто Ейхельмана*: *імперська лояльність та служіння "іншій" або "своїй" нації* [The Ukrainian biography of Otto Eikhel'man: The imperial loyalty and the service for the "another" or "own" nation], 1(289) Архіви України 156 (2014), p. 157.

[49] Merezhko, *supra* note 8, p. 449.

[50] Д.І. Дорошенко, *Мої спомини про недавнє минуле (1914-1920)* [My memoirs about the recent past (1914-1920)], Мюнхен: 1969, p. 263.

[51] *Ibidem*, p. 288.

1918 – negotiations were also ongoing with the Romanian government on entering into commercial treaty, in which the young Ukrainian diplomacy achieved significant progress by agreeing on petrol supplies with the Romanian government.[52] On the other hand Vasilii Zen'kovskii, a well-known religious philosopher and professor of the Philosophy Department of the Saint Volodymyr University, who was a Minister of Religious Confession in 1918 and left interesting recollections of that period in a work entitled "Five Months in Power", was highly critical of Eikhel'man's diplomatic activity. He noted that "O.O. Eikhel'man was a perfect professor of international law, but he had never been a diplomatic official, and if he could do anything to help Doroshenko, he would provide various statements for certain "precedents."[53] Zen'kovskii even accused Eikhel'man of excessive loyalty to Ukrainian stateness, pointing out that he tried to be *plus royaliste que le roi* in this regard.[54] These assessments could however be attributed to the political position of Zen'kovskii himself who, although was a member of the Government of the Ukrainian State of Hetman P. Skoropadskii, remained a devotee of the federation of Ukraine and the future non-Bolshevik Russia, while Eikhel'man consistently supported the principle of a fully independent Ukraine.

After the final defeat of the Ukrainian People's Republic and the extension of the Soviet regime to Ukraine, Eikhel'man was forced to emigrate to Prague, where he continued researching, teaching, and his public and political activities. In 1921, the draft Constitution, the main state laws of the Ukrainian People's Republic based on the people's sovereignty and the principle of federalism, was published in Tarnów (Poland). As has been rightly pointed out in the national political literature, he "proposed to take federalist ideas based on M. Drahomanov's opinions, state and legal practice of the United States and Switzerland as a principle of democratic constitutional Ukrainian state building."[55] Together with other Ukrainian jurisprudents who were in exile in Czechoslovakia, Eikhel'man was actively engaged in the activities of the Ukrainian legal society in Czechoslovakia and became a lecturer at the Ukrainian Free University in Prague and the Ukrainian Economic Academy in Poděbrady. In 1924 he was elected a Full Member of the Shevchenko Scientific Society. Eikhel'man died on February 21, 1943 in Prague.

While holding to positivistic views, Eikhel'man also believed that international law should be studied from the point of view of its application to separate states. In 1887–1889, he published his "Chrestomathy of Russian International Law,"[56] as he

[52] *Ibidem*, p. 299.

[53] В.В. Зеньковский, *Пять месяцев у власти (Воспоминания)* [Five months in power (Memoirs)], Regnum, Москва: 2011, p. 211.

[54] *Ibidem*.

[55] Я.Б. Турчин, *Розвиток української політико-правової думки у Чехословаччині: період між війнами 1918-1945* [The development of Ukrainian political and legal thought in Checho-Slovakia: Period between the wars 1918-1945], 14 (839) Вісник ХНУ імені В.Н. Каразіна «Питання політології» 220 (2009), p. 224.

[56] О.О. Эйхельман, *Хрестоматия русского международного права* [Chrestomathy of Russian international law], Унив. тип., Киев: 1887-89, 2 vols.

called the law regulating relations between Russia and other states, which in addition to the international treaties to which Russia was a party included Russian legislation concerning issues of international law. Eikhel'man set out his views on the general problems of international law in his work "Extracts from Lectures on International Law."[57] He considered international law a legal order defining the international relations of states that are independent from one another. In his opinion, international law consists of two main categories of legal norms: those that apply to all states (absolute, necessary and natural international law); and these that apply only to particular states. The former group of norms includes the fundamental rules of international law that establish the prerequisites for the peaceful coexistence of states. Eikhel'man included in this first category the right of states to independence; states' equality; person-state mutual respect; the right of states to defend themselves by means of sanctions and war against the breach of their rights; the international responsibility of states; the freedom of the high seas; the inviolability of frontiers; and the laws and customs of war.

Eikhel'man's second category of norms comprises the absolute majority of international law substance as contained in the treaties and legislations of particular states. Each state at its own discretion independently decides whether to adhere to these types of norms. Thus, each state's own domestic international law also has a legal effect: for Russia it was Russian international law; for Germany, German; for France, French, etc. Moreover, Eikhel'man maintained that there also existed general principles of international law that studies of comparative jurisprudence have produced through generalization of the practice of international treaties and national legislation. Legally speaking, these principles have no binding effect; rather they represent the positivist concept of customary practice in international legal relations of states. He noted that: "Comparative legal studies provide the opportunity of observing general concepts in this quantitative practice of international treaties (and the laws of different countries), which represents a broad framework. It is extremely interesting theoretically, but also practically, in terms of the practical style of international legal life of this era, is quite important."[58] Thus, the concept of Eikhel'man's "nationalized" international law differs substantially from the concept of "external state law", which was quite popular in Germany in the second half of the 19th century (its representatives were, in particular, Ph. Zorn and A. Zorn). In a sense, Eikhel'man can be considered as a predecessor of the comparative approach to the study of international law which has developed in today's modern science of international law. Although Eikhel'man classified the majority of international law norms as "domestic international law", he acknowledged the crucial importance of principles of international legal communication between states. He also upheld the notion that general and particular norms exist in international law, as he explained in his work "Common Foundations, Legal Form and the Modern Cultural

[57] О.О. Эйхельман, *Очерки из лекций по международному праву* [Extracts from lectures on international law], Тип. И.И. Чоколов, Киев: 1909.

[58] *Ibidem*, p. 7.

Progress of International Law",[59] which he wrote in Ukrainian and published in 1931 while in exile in Czechoslovakia.

5. PETR MIKHAILOVICH BOGAYEVSKII: THE RED CROSS IN INTERNATIONAL LAW

Eikhel'man's successor to the chair of international law was Petr Mikhailovich Bogayevskii. Born into a noble family on 23 August 1866 in Moscow, Bogayevskii graduated from the Law Faculty of Moscow University in 1891. Upon graduation, he was invited to join the University's International Law Department by Leonid Alekseevich Kamarovskii, one of the most influential pre-revolutionary Russian international lawyers. Following his master's examination Bogayevskii was sent abroad to continue his scientific research, as was the established practice at that time. He spent the better part of his academic mission in Geneva, pursuing research in the Red Cross archives under the direction of the eminent Swiss lawyer Gustave Moynier, one of the founders of the Red Cross. The young scholar published his first scientific papers devoted to legal issues of the Red Cross during this academic mission. From 1904 to 1906 he held the position of privatdozent at the University of Tomsk.

In 1905 Bogayevskii defended his master's thesis, "The Red Cross in Developing International Law, Part I: National Societies of the Red Cross and the Geneva Convention of 22 August 1864"[60] at Moscow University. In its preparation he rigorously-researched the details of the premises, preparation, and legal content of the 1864 Geneva Convention. The thesis opens with a concise review of the existing ideas for helping wounded combatants prior the 1864 Geneva Convention. After further exploring the principles of governmental and international aid to wounded combatants, it concludes that by the sixtieth year of the 19th century the need for profound reform of the legal regime in this area had become apparent. The work provides additional details and results of the Geneva Conference, which was convened on 26–29 October 1863 by the Geneva Society for Public Welfare. The participants at the Conference – initiated by Jean Henri Dunant and Gustave Moynier, among others – solemnly agreed to undertake to establish national relief societies for wounded soldiers in various states, and presented to the Swiss Government their recommendations on convening an international congress to guarantee neutrality and protection for societies providing medical aid to soldiers wounded in armed conflicts. Bogayevskii included a detailed account of the process of

[59] О. Ейхельман, *Побутові підстави, правничий уклад і сучасний культурний поступ міжнародного права* [Common foundations, legal form and the modern cultural progress of international law], 3(1) Записки Української господарської академії в ЧСР 108 (1931).

[60] П.М. Богаевский, *Красный крест в развитии международного права; Ч. 1: Национальные общества Красного креста и Женевская конвенция 22 авг. 1864 года* [The Red Cross in developing international law, Part I: National societies of the Red Cross and the Geneva Convention of 22 August 1864], 28 Известия Томского университета 1 (1907).

establishing national Red Cross societies in various European and non-European states after the 1863 Geneva Conference. He also devoted a special place in his magisterial thesis to a legal analysis of the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field of 22 August 1864 – the first multilateral legal instrument on the protection of victims of armed conflict.

From 1906 to 1908, Bogayevskii held the position of director at the Petrovsko-Alexandrovsky Asylum in Moscow, coupling this work with a position as privatdozent at Moscow University, where he taught a special course on international law. In 1908 he was appointed a privatdozent on the international law faculty at the University of Tomsk, where he worked until 1912. On 13 October 1912 he was made an associate professor of international law at Saint Volodymyr University of Kyiv. In 1913, he defended his doctoral thesis at Kharkiv University. It represented the second part of his foundational research on the history of the Red Cross: "The Red Cross in Development of International Law, Part II: International Union of the Red Cross."[61] Thereafter he became a full professor.

In 1916 the *Juridical Reports* of the Moscow Law Society published his short but instructive article "The Red Cross at Key Points of Its Life and Organization",[62] a scientific paper devoted to the 50th anniversary of the 1863 Geneva Conference that had initiated the Red Cross social movement. According to Bogayevskii, "until the mid-19th century the civilian population was not engaged in relief for the victims of armed conflict and the latter were the responsibility of the military medical administration"; noting however that a "prudent observer of 19th century life could not help but note that only under the condition of organized aid of civil society could the fruitful nursing of wounded soldiers be thinkable."[63]

The Geneva movement benefited from a general trend acknowledging the need to alleviate human suffering in armed conflicts, a trend that prevailed in the public opinion in many European states and the United States. Bogayevskii underlined that the primary task of the Geneva movement was to ensure that a Red Cross society was established in every state. Nevertheless, some among the military command distrusted civilian interference into allegedly purely military matters, a distrust substantial enough to impede the functioning of these societies. Bogayevs'kyj noted, though, that "till the time of Franco-Prussian campaign [i.e. the Franco-Prussian War of 1870–1871 – K.S.] due to persistent propagation and work with the public opinion in Europe, except for Greece, Hungary and the Balkan states, far and wide the civil society rallied around the white banner with the Red Cross."[64] Little by little, the activities of Red Cross societies expanded to the Bal-

[61] П.М. Богаевский, *Красный крест в развитии международного права;* Ч. 2: *Международный союз Красного креста* [The Red Cross in development of international law, Part II: International Union of the Red Cross], 34 Известия Томского университета 1 (1913).

[62] П.М. Богаевский, *Красный крест в главных моментах его жизни и организации* [The Red Cross at key points of its life and organization], 13(1) Юридический вестник 57 (1916).

[63] П.М. Богаевский, *Красный крест в главных моментах его жизни и организации* [The Red Cross at key points of its life and organization], in: *Наука міжнародного права в університеті Святого Володимира*, Том 2, Видавничий дім "Промені", Київ: 2004, p. 347, 349.

[64] *Ibidem*, p. 351.

kan states, South American nations, and other non-European countries, affirming the idea that "modern culture demands that there be a Red Cross society in each state."[65]

Bogayevskii's article analysed the activities of the Russian Red Cross Society founded in 1867, explicating not only its virtues but also its drawbacks, such as excessive bureaucracy. In summing up the 50 years of the Red Cross's work, he noted that its founding fathers had "launched such a wonderful and powerful cause that nowadays, when their demands resurface anew above the bottomless sea of cruelty and legal defiance, the moral solidarity of Red Cross representatives, even those from belligerent powers, shines with the bright light of humanity and mercy."[66] While working in Kyiv, Bogayevskii also composed other works that merit mention, such as the pamphlet "Bosporus and Dardanelles", a special course on international law focusing on trade treaties; and a pamphlet on U.S. federalism.

Like many others in the juridical elite of the Russian Empire, Bogayevskii did not accept the 1917 October Revolution. He continued working at the university in Kyiv until 1919. That autumn he moved to Odessa, but in 1920 he had to leave for Bulgaria, where he headed the international law faculty of Sofia University. He was also active in the Russian People's University, a cultural and educational establishment of Russian émigrés in Bulgaria.

The spectrum of Bogayevskii's scientific interests expanded considerably during his time in Bulgaria. The eminent historian of international law V.E. Grabar noted that Bogayevskii, during the periods he spent in Tomsk and Kyiv, "acquired a reputation at home and abroad as the leading expert on the history of Red Cross", while noting that at that time "other questions were of little interest of Bogaevskii."[67] By contrast, in his Sofia period he engaged in numerous research projects and publications on the theory and history of international law, including works on the Küçük Kaynarca Peace Treaty and the legal implications of the Pereyaslav Agreement. The lectures he delivered at Sofia University were also published. In addition, he was active in public life via the émigré press and was one of the founders of the *Russian Gazette* in Varna. Bogayevskii taught at Sofia University until he passed away in Sofia on 29 January 1929.

Thus, certain conclusions and generalizations can be drawn. In the pre-revolutionary history of the Saint Volodymyr Royal University of Kyiv, international law had been taught as an independent discipline for 75 years, of which the first 10 years of lecturing in this discipline were carried out by professors from other departments, and beginning in 1853 the department employed professional international law scholars. The foregoing has shown that international lawyers from the Saint Volodymyr University have contributed significantly to the development of the science of international law, producing works that advanced original concepts of the legal nature of international law; offered a new spatial concept of territory that was further recognized and developed in international legal science; and explored the rules and customs of land and maritime war, the

[65] *Ibidem*, p. 352.

[66] *Ibidem*, p. 369.

[67] Grabar, *supra* note 2, p. 421.

codification of international law, and the role of the Red Cross in the development of humanitarian norms in international law. The international law scholars who worked at the University had a positivistic understanding of the legal nature of international law, in contrast to the scholars of Kharkiv University (represented by D.I. Kachenovskii and V.P. Danevskii), in which the concept of natural law retained a great influence. In our view, this can be explained by the fact that the teaching and study of international legal disciplines in Kharkiv had begun several decades earlier than in Kyiv, and among the first lecturers in international law at Kharkiv University was Johann Baptist Schad, an outstanding German classical philosopher (1758-1834). He was the author of a fundamental course of natural law,[68] which, *inter alia*, contained a quite detailed doctrine of the legal nature and major institutes of international law at that time. J.B. Schad's doctrine had a great influence on the formation of the methodological foundations of Kharkiv School of International Law, in which for most of the 19th century the natural law approach to the understanding of the essence and the legally binding force of international law clearly dominated. Tykhon Fedorovich Stepanov (1795-1847) was a student of J.B. Schad. He was an eminent economist and lawyer and professor of the University of Kharkiv, who was the author of the first course in international law in the Russian Empire based on the combination of natural law and positivistic approaches. At the same time, K.A. Nevolin, the founder of Kyiv School of International Law, acted as a fervent advocate of the positivistic trend in jurisprudence. All the lecturers in international law at the University (probably with the exception of N.K. Rennenkampf, who belonged to the upper classes) belonged to the social stratum which is today called the middle class. The Kyiv international law scholars who worked at the University at the beginning of the 20th century did not accept the 1917 October Revolution. However, while O.O. Eikhel'man, an ethnic German, unconditionally took the position to support the Ukrainian statehood (although he altered it in exile and dealt mostly with purely Ukrainian educational and scientific institutions), P.M. Bogayevskii, a Russian, was a clear supporter of a united Russia, both during his stay in Kyiv and in exile. The one thing that united the scholars of the 19th and early 20th centuries was that the vast majority of their works were published in Russian, and thus they remained (and remain today) almost inconspicuous in the Western science of international law. This statement is true almost for all international law scholars who worked in the Russian Empire. The few exceptions (D.I. Kachenovskii, F.F. Martens, V.E. Grabar) only confirm this, inasmuch as the only works of theirs which became popular in the West were those which had either been written in, or subsequently translated into, French, German or English. This problem still remains highly topical for the modern Ukrainian science of international law, since contemporary Ukrainian law scholars publish their works mainly in Ukrainian, which causes their scientific knowledge to be almost unknown outside Ukraine.

[68] J.B. Schad, *Institutiones juris naturae. Conscripsit in usum Auditorum suorum*, Typis Universitatis, Charcoviae: 1814.

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LEGAL OBLIGATIONS OF POLAND REGARDING THE RESTITUTION OF PRIVATE PROPERTY TAKEN DURING WORLD WAR II AND BY THE COMMUNIST REGIME IN LIGHT OF THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

Abstract: *The Polish Government's proposal, submitted in autumn 2017, for a comprehensive reprivatisation bill revived the international discussion on the scope of Polish authorities' obligations to return property taken during World War II and subsequently by the communist regime. However, many inaccurate and incorrect statements are cited in the discussions, e.g. the argument that the duty of the Polish authorities to carry out restitution is embedded in the European Convention on Human Rights and its Protocol No. 1. This article challenges that claim and analyses the jurisprudence of the Convention's judicial oversight bodies in cases raising issues of restitution of property taken over in Poland before the accession to both of the above-mentioned international agreements. In the article I argue that there is no legal basis for claiming that there exists a legal obligation upon the Polish State stemming directly from international law – in particular human rights law – to return the property and that the only possibly successful legal claims in this regard are those that can already be derived from the provisions of the Polish law applicable to these kinds of cases. In its latest rulings, issued in 2017–2019, the European Court of Human Rights determined the scope of responsibility incumbent on Polish authorities in this respect.*

Keywords: communism, European Court of Human Rights, European Convention on Human Rights, nationalization, restitution of private property

INTRODUCTION

The Polish Government's proposal, submitted in autumn 2017, for a comprehensive reprivatisation bill has revived the ongoing international discussions on the ques-

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tion of whether the current Polish authorities are obliged, and if so to what extent, to remedy damage caused to the property of individuals during World War II and by the subsequent communist regime.[1] However, many incorrect and inaccurate claims and arguments are used in the debates. Firstly, the arguments simultaneously raise issues of a varied nature: political, moral, and legal. The least attention has been paid to the analysis of possible legal obligations existing on the part of the Polish State. Secondly, the discussions generally do not distinguish between the historical and legal circumstances that led to the loss of property. This distinction is of key importance in order to establish the existence, *vel non*, of any obligations. In the discussion, at least two legal situations must be distinguished: an alleged obligation to return property seized or destroyed by the German Third Reich and the USSR in the occupied Polish territories during World War II; and an obligation to return the property taken over after the war by the communist authorities as a result of nationalisations and mass expropriations. Of course, in many cases the property seizure was first executed by the German authorities, and then the property was taken over by the communist authorities. However, this "legal succession" does not change the fact that the circumstances and the legal bases (or lack thereof) for taking over the property determine the scope of possible liability of the current authorities. Thirdly, the discussions wrongly assume that under the provisions of current Polish law there are no possibilities to recover former property. Fourthly, in the discussions surrounding the reprivatisation processes the argument was raised that the duty of the Polish authorities to carry out these processes is embedded in the field of human rights law, which guarantees property rights, including the Convention for the Protection of Human Rights and Fundamental Freedoms (Convention or ECHR) and its Protocol No. 1.[2]

In this article I challenge the latter claim and analyse the jurisprudence of the Convention's judicial bodies with regard to cases raising issues of restitution of property taken before Poland became bound by the provisions of the Convention and Protocol No. 1. Having in mind the weaknesses of the current public discussions on reprivatisation indicated above, the focus of the article is only on legal arguments and is based on the jurisprudence of the European Commission on Human Rights (Commission

[1] The draft of the Act on the compensation for certain harm caused to natural persons as a result of the takeover of real estate or movable monuments by the communist authorities after 1944 was prepared by the Ministry of Justice and presented for inter-ministerial consultations in October 2017, available at: https://bip.kprm.gov.pl/kpr/form/r29335531,Projekt-ustawy-o-zrekompensowaniu-niektorych-krzywd-wyrzadzonych-osobom-fizyczny.html (accessed 30 June 2020). The draft provided for *ex lege* discontinuation of all pending reprivatization proceedings. At the same time, the draft introduced the right to compensation in the amount of 20% of lost property, indicating that the individuals entitled to receive it would include children, spouses and parents of the former owners. Due to the introduction of the abovementioned discontinuation of pending proceedings and due to the very narrow circle of potential beneficiaries marked out, the project met with very wide criticism both in Poland and abroad.

[2] Convention for the Protection of Human Rights and Fundamental Freedoms, Journal of Laws of 1993, No. 61, item 284, as amended; Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Journal of Laws of 1995, No. 36, item 175.

or EComHR) and subsequently the European Court of Human Rights (Court or ECtHR). Additionally, I briefly present the legal possibilities available in Polish law to claim restitution or damages for the property taken during the years 1939-1989. In the article I argue that there is no legal basis for claiming that there exists a legal obligation upon the Polish State stemming directly from international law – and in particular from human rights law – to return the property, and that the only possibly successful legal claims in this regard are those that can already be derived from the provisions of Polish law applicable to these kinds of cases. In its most recent judgments and decisions, issued in 2017–2019, the ECtHR finally determined the scope of responsibility incumbent on Polish authorities in this respect.

1. GENERAL PRINCIPLES CONCERNING THE RESTITUTION OF PROPERTY DERIVING FROM THE ECTHR CASE LAW

The principles on which the rulings have been based in cases against Poland regarding the return of or compensation for property looted or destroyed in Polish territories by Nazi and Soviet authorities during World War II and property taken over by the communist authorities after the war were essentially worked out in the previous jurisprudence of the Commission, and subsequently the Court. Therefore, before conclusions with respect to Poland are drawn, it is necessary to briefly present the basic principles of protection of property rights developed in the case law involving other states.

The first complaints concerning property transformations during and after World War II were directed, starting from the 1950s, against Germany,[3] and then from the beginning of the 1990s against other Central and Eastern Europe states which acceded to the Convention system.[4]

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[3] EComHR, *A. and Others v. Germany* (App. No. 899/60), 9 March 1962; *A.,B.,C.,D.,E.,F.,G and I. v. Germany* (App. No. 5573/72 and 5670/72), 16 July 1976; *X. v. Germany* (App. No. 6742/74), 10 July 1975; *X., Y., Z v. Germany* (App. Nos. 7655/76, 7656/76, 7657/76), 4 October 1977.

[4] For discussions concerning the ECtHR case law *see generally*, S. Djajic, *The Right to Property and the Vasilescu v. Romania Case*, 27 Syracuse Journal of International Law and Commerce 363 (2000); E. Brems, *Transitional Justice in the Case Law of the European Court of Human Rights*, 5(2) International Journal of Transitional Justice 282 (2001); M. Karadjova, *Property Restitution in Eastern Europe: Domestic and International Human Rights Law Responses*, 29(3) Review of Central and East European Law 325 (2004); M. Krzyżanowska-Mierzewska, *Problem wywłaszczonej własności w orzecznictwie Europejskiego Trybunału Praw Człowieka i jego odniesienie do niemieckich roszczeń majątkowych wobec Polski* [The problem of expropriated property in the jurisprudence of the European Court of Human Rights and its reference to German property claims against Poland], in: W.M. Góralski (ed.), *Transfer - obywatelstwo - majątek. Trudne problemy stosunków polsko-niemieckich. Studia i dokumenty***,** PISM, Warszawa: 2005; P. Macklem, *Rybna 9, Praha 1: Restitution and Memory in International Human Rights Law*, 16 European Journal of International Law 1 (2005); C. Lebeck, *Rights in Transitions: The European Court of Human Rights' Judgment in Jahn and Others v. Germany*, 17(2) King's Law Journal 359 (2006); L. Garlicki, *L'application de l'article 1er du Protocol No. 1 de la Convention Européene des Droits de l'Homme dans l'Europe Central et Oriental. Problems de transition*, in: H. Vandenberghe et al. (eds.), *Propriété et droits de l'homme. Property and Human Rights*, Die Keure, Brugge:

Firstly, according to the general principles of international law regarding the non-retroactivity of treaties,[5] the jurisprudence has formulated the rule that states are not responsible – at least under the Convention – for actions they committed before the Convention and Protocol No. 1 entered into force in the respondent state. While there are exceptions concerning "continuing violations" in some areas of human rights law, this principle is rather strictly applied in cases concerning property rights. In the case of Poland, the relevant date from which the judicial authorities of the ECHR have temporal jurisdiction to assess the actions of the Polish authorities on the basis of Protocol No. 1 is 10 October 1994, the date of the entry into force of the Protocol in Poland.

Secondly, Protocol No. 1 to the Convention protects only existing possessions and does not guarantee the right to acquire property. Therefore, it does not impose on States an obligation to return property which was taken away by them before ratification of the Convention and Protocol No. 1.[6]

Thirdly, the jurisprudential bodies of the Convention apply an autonomous concept of ownership, independent of a formal assessment in national law. "Property" may be either "existing property" or assets, including claims in which the claimant may assert at least a "legitimate expectation" of obtaining the effective use of property rights.[7] However, the hope of recognizing a right of ownership that could not be effectively exercised, or a conditional claim that fails to be recognised because of non-fulfilment of the conditions stipulated in domestic law, cannot be regarded as "property" within the meaning of Art. 1 of Protocol No. 1.[8]

2006; L. Garlicki, *Transformacja ustrojowa a ochrona prawa własności (Aktualne tendencje w orzecznictwie ETPCz)* [Political transformation and protection of property rights (Current tendencies in the jurisprudence of the ECtHR)], in: J. Góral (ed.) *Ratio est anima legis. Księga jubileuszowa ku czci Profesora Janusza Trzcińskiego*, NSA, Warszawa: 2007; L. Damsa, *The Transformation of Property Regimes and Transitional Justice in Central Eastern Europe. In Search of a Theory*, Springer, Heidelberg: 2016; U. Deutsch, *Expropriation without Compensation: The European Court of Human Rights Sanctions German Legislation Expropriating the Heirs of "New Farmers"*, 6(10) German Law Journal 1367 (2005); A. Mężykowska, *Procesy reprywatyzacyjne w państwach Europy Środkowo-Wschodniej a ochrona prawa własności w systemie Europejskiej Konwencji Praw Człowieka* [Reprivatisation procedures in the countries of Central and Eastern Europe and protection of property in the system of the European Convention for Human Rights], Wydawnictwo UG, Gdańsk: 2019.

[5] Art. 28 of the Vienna Convention on the Law of Treaties (signed 23 May 1969, entered into force 27 January 1980), 1155 UNTS 331.

[6] ECtHR, *Ballerstedt and Others v. Germany* (App. No. 54998/00), 17 November 2005; *Beshiri and Others v. Albania* (App. No. 7352/03), 22 August 2006; *Bergauer and 89 Others v. Czech Republik* (App. No. 17120/04), 13 December 2005. *See also* S. Sołtysiński, A. Nowicka, *Skutki nacjonalizacji może zrekompensować tylko polski parlament* [The effects of nationalization can only be compensated by the Polish parliament], Rzeczpospolita 22.2.2007.

[7] ECtHR, *Pine Valley Developments and Others v. Ireland* (App. No.12742/87), 29 November 1991, para. 51; *Pressos Compania Naviera S.A. and Others v. Belgium* (App. No. 17849/91), 20 November 1995, para. 31; *Beshiri and Others v. Albania,* para. 78; *Gratzinger and Gratzingerova v. Czech Republic* (App. No. 39794/98), 10 July 2002, para. 69.

[8] *Gratzinger and Gratzingerova v. Czech Republic,* para. 69; ECtHR, *Von Maltzan and Others v. Germany* (App. Nos. 71916/01, 71917/01 and 10260/02), 2 March 2005, para. 74; *Beshiri and Others v. Albania*, para. 78.

Although the assessment of the nature of the interest is independent of national law, a property claim that is not based on national law will not be protected under Protocol, as the Court is not entitled to create property rights. At the same time, the applicants cannot derive any legitimate expectation of property restitution from the fact that after 1989 there were parliamentary debates on the enactment of a reprivatisation law.[9] A hope that the applicable law would be changed in favour of the applicants cannot be treated as a form of legitimate expectation under Art. 1 of Protocol No. 1.[10] The Court considers that the act of nationalisation/expropriation or other action resulting in the deprivation of property is, in principle, of an instantaneous nature and does not give rise to a situation of continuing infringement of the right.[11]

Fourthly, when introducing restitution solutions, states have a wide margin of appreciation.[12] This margin allows them to take into account the state's financial capabilities as well as allows for the implementation of specific political objectives, also by excluding restitution in relation to certain categories of former owners.[13] States are not limited in determining the extent of any return of property and the choice of conditions that must be met in order for property to be returned to former owners.[14] Moreover, states are not obliged to establish any legal procedures to demand restitution of property.[15]

However, states' margin of appreciation is not unlimited, and it is subject to control by the Convention bodies, which must also take into account the principle of non-discrimination.[16] As soon as a State party to the Convention ratifies Protocol No. 1 and enacts provisions providing for total or partial restitution of property confiscated under previous regimes, such provisions may be assessed as creating new, hitherto previously non-existent, property rights protected by Art. 1 of Protocol No. 1.[17] The same principle applies to legislation providing for restitution or compensation adopted prior to the ratification of Protocol No. 1, provided that the legislation remains in force after the date of the ratification,[18] and in addition the possibility of obtaining compensation is confirmed by subsequent authorities.[19]

Fifthly, the Court's jurisprudence establishes the principle that one cannot claim recognition of a legitimate expectation of a property right in cases where there is a dis-

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[9] *Von Maltzan and Others v. Germany,* para. 67.

[10] *Ibidem*, para. 112; *Gratzinger and Gratzingerova v. Czech Republic,* para. 73.

[11] EComHR *Weidlich, Fullbrecht, Hasenkamp, Golf, Klausser and Mayer v. Germany* (App. Nos. 19048/91, 19049/91, 19342/92, 19549/92 and 18890/91), 4 March 1996; ECtHR *Blečić v. Croatia* [GC] (App. No. 59532/00), 8 March 2006, para. 86.

[12] ECtHR, *Jahn and Others v. Germany* (App. No. 46720/99, 72203/01 and 72552/01), 30 June 2005, para. 91; *von Maltzan and Others v. Germany,* para. 74(d), *Beshiri and Others v. Albania,* para. 81.

[13] ECtHR, *Weber v. Germany* (App. No. 55878/00), 23 October 2006.

[14] ECtHR, *Jantner v. Slovakia* (App. No. 39050/97), 4 March 2003, para. 34.

[15] ECtHR, *Beshiri and Others v. Albania,* para. 61.

[16] ECtHR, *Vajagić v. Croatia* (App. No. 30431/03), 20 July 2006.

[17] ECtHR, *Slavov and Others v. Bułgaria* (App. No. 20612/02, 42563/02, 42596/02, 16059/03, 32427/03), 2 December 2008, para. 78.

[18] *von Maltzan and Others v. Germany*, para. 74.

[19] ECtHR, *Bata v. Czech Republic* (App. No. 43775/05), 24 June 2008, para. 77.

pute as to the correct interpretation and application of domestic law and the applicant's submissions are subsequently rejected by the national courts.[20] A general issue that is revealed on the basis of cases in which the applicants challenge the domestic courts' decisions is whether the Court has the right to control the content of the decision of the national authorities, in particular whether it has the right to challenge the interpretation of national law applied by the national authority.

In addition, it should be noted that the Court sees its role as limited to ensuring that the decisions of the national authorities are not arbitrary, and leaves the assessment of the factual and legal circumstances primarily to the national authorities. Due to the fact that the jurisdiction of the ECtHR is subsidiary to the national one and its role is not to replace the views formulated by national courts with its own, when deciding whether there has been an interference with the applicants' rights the Court essentially bases its understanding on the applicable national law and the way in which it is interpreted and applied by national authorities.[21]

2. APPLICATION OF GENERAL PRINCIPLES REGARDING RESTITUTION OF PROPERTY IN CASES AGAINST POLAND

1.1. General rules for restitution of property in Poland after 1989

At the outset, a short introduction is required to explain the existing legal possibilities to recover property that was taken over in the period from WWII to 1989. Above all, it is a misunderstanding to say that in Poland there have been no possibilities to regain property taken under previous regimes. While the issue of the application of national measures is not the subject of this article, nevertheless a brief explanation of the existing legal venues is of key importance for the correct presentation of the EComHR and ECtHR case law.

One important issue that casts a shadow over the effectiveness of the legal regulations applied in the context of assessing the possibilities of recovering properties, including movable objects such as works of art, is the fact that ownership changes made by the communist authorities were often preceded by the German authorities, who looted the property. Although during and after World War II the Polish authorities adopted a whole range of regulations aimed at invalidating the acts of confiscation of property carried out by the occupation authorities, the legal situation concerning properties that met this fate was extremely complicated.[22] It should be noted that situations of this

[20] ECtHR, *Kopecký v. Słowacja* (App. No. 44912/98), Grand Chamber, 28 September 2004, para. 50.

[21] *Bata v. Czech Republic*, para. 80, *Jantner v. Slovakia*, paras. 29-33.

[22] Dekret o mocy obowiązującej orzeczeń sądowych wydanych w okresie okupacji niemieckiej na terytorium Rzeczypospolitej Polskiej [Decree on the validity of judicial decisions made during the German occupation in the territory of the Republic of Poland], Journal of Laws of 1945, No. 25, item 151; Dekret o majątkach opuszczonych i porzuconych [Decree on derelict and abandoned property], Journal of Laws of 1945, No. 9, item 45; Ustawa o majątkach opuszczonych i porzuconych [Law on derelict and abandoned

type occurred in all the countries of occupied Central and Eastern Europe[23] and are not specific only to Poland.

Despite the fact that the Polish authorities did not enact a comprehensive restitution act, the legal system that was created enables, in certain cases, restitution or compensation through the so-called "judicial reprivatisation" proceedings.[24] If in an individual case the nationalisation had been carried out by the communist authorities in breach of the then-applicable law, it is legally permissible to initiate legal action before the administrative and civil courts (depending on the legal circumstances) in order to obtain a ruling declaring that the nationalisation in a concrete individual case was illegal. To understand the legal situation in Poland, it is crucial to take into account that the general concept of reprivatisation laws which was applied in different CEE countries was based on an assumption that nationalisation without compensation was illegal *per se*. Unlike some others, the discussed Polish regulations does not contest the legality of the laws of communist State aimed at taking over property, but allows for the possibility to reverse individual acts on nationalisation that were carried out in violation of the nationalisation provisions. Following the systemic transformation which took place in 1989, the possibility to challenge the legality of administrative decisions, which had been introduced into the legal system in 1980, has been more and more frequently used by persons affected by nationalisation and expropriations.

Allegations made by international public opinion regarding the ineffectiveness of the restitution provisions available in Poland refer precisely to the above-mentioned legal possibility of challenging legality of individual nationalisation decisions.[25] No doubt part of the criticism is justified, particularly bearing in mind the protracted length of many proceedings. On the other hand, however, the critics do not take note of the fact that for years the jurisprudence of administrative bodies and courts (both civil and administrative) was very favourable to claimants, causing a great burden on the state budget.[26]

Secondly, it should not be forgotten, that in the years 1948–1971 Poland concluded with some West European countries, the United States and Canada a series of so-called

property], Journal of Laws of 1945, No. 17, item 97; Dekret o majątkach opuszczonych i poniemieckich [Decree on derelict and former German properties], Journal of Laws of 1946, No. 13, item 87.

[23] R. Crowder, *Restitution in the Czech Republic: Problems and Prague-nosis*, 5(1) Indiana International and Comparative Law Review 237 (1994), pp. 237 et seq.

[24] *See* L. Bosek, K. Krolikowska, *Constitutional Dimensions of the Judicial Restitution of Wrongfully Expropriated Property in Poland*, 41(3) Loyola of Los Angeles. International and Comparative Law Review 369 (2018), p. 371.

[25] *See* US Department of State, Country Reports on Human Rights Practices for 2011 and 2012 (Poland), available at: https://2009-2017.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm#wrapper (accessed 30 June 2020).

[26] B. Zdziennicki, *Reprywatyzacja w świetle zasad prawa* [Reprivatization in the light of the principles of law], 3 Studia Prawnicze 5 (2015), pp. 21-28; E. Łętowska, *Orzecznictwo sądowe jako instrument reprywatyzacji zdekoncentrowanej* [Jurisprudence as an instrument of fragmented reprivatization], in: M. Pilich (ed.), *Studia i Analizy Sądu Najwyższego. Materiały Naukowe. Reprywatyzacja w orzecznictwie sądów*, vol. 3, Sąd Najwyższy, Warszawa: 2016, p. 97.

"lump sum agreements", aimed at satisfying the claims of foreigners and foreign legal persons deprived of property as a result of nationalisations in Poland. In the implementation of these agreements the countries with which they were concluded had the responsibility for distributing the compensation.[27] According to the prevailing view presented in the literature, the conclusion of the lump sum agreements cannot be assessed as an acknowledgment on the part of the Polish State of any legal international obligation toward foreign citizens to pay compensation for nationalised property.[28] This assessment reflects the idea, widely accepted in the socialist doctrine, according to which nationalisation was regarded as the right of a sovereign state and did not entail any compulsory compensation.[29] Regardless of the motivation that prompted the conclusion of the agreements, the Polish state had to allocate significant resources in their implementation.

Thirdly, the Polish authorities enabled restitution of immovable property to churches and other religious associations, a process which was carried out through the work of property restitution commissions, i.e. the so-called regulatory commissions.[30] A total of five such commissions were established (some of which are still functioning) to deal with the restitution of the property of 13 churches and religious denominations.[31] The restitution of church property in Poland took place according to the principle of a

[27] *See generally* M. Pilich, *Międzynarodowe umowy indemnizacyjne w praktyce sądów* [Lump-sum agreements in judicial practice], in: M. Pilich (ed.), *Studia i analizy Sądu Najwyższego. Materiały naukowe. Reprywatyzacja w orzecznictwie sądów*, vol. 3, Sąd Najwyższy, Warszawa: 2016; J. Barcz, *Opinia prawna w sprawie relacji między układami indemnizacyjnymi zawartymi przez Polskę z dwunastoma państwami zachodnimi a dekretem z dnia 26 października 1945 r. o własności i użytkowaniu gruntów na obszarze m.st. Warszawy, ze szczególnym uwzględnieniem aspektów międzynarodowoprawnych* [Legal opinion on the relationship between the lump-sum agreements concluded by Poland with twelve western states and the Decree of 26 October 1945 on the Ownership and Use of Land within the Capital of City Warsaw, with particular emphasis on international law aspects], available at: https://bit.ly/3iAERd7 (accessed 30 June 2020).

[28] *See* W. Dudek, *Regulowanie odszkodowań wynikających z roszczeń na tle ustawodawstwa nacjonalizacyjnego (zagadnienia prawno-międzynarodowe*) [Regulation of damages arising from claims based on nationalization legislation (international legal issues)], 6 Państwo i Prawo 971 (1968), pp. 972-973.

[29] *See* M. Lachs, *Nacjonalizacja i rozwój międzynarodowych stosunków gospodarczych* [Nationalization and development of international economic relations], 10 Państwo i Prawo 513 (1958), p. 521.

[30] *See generally* P. Borecki, *Reprywatyzacja nieruchomości na rzecz gmin wyznaniowych żydowskich* [Reprivatisation of real estate for the benefit of Jewish religious communities], 9 Państwo i Prawo (2011).

[31] Ustawa o stosunku Państwa do Kościoła Katolickiego w Rzeczypospolitej Polskiej [Act on the Relations between the State and the Catholic Church in the Republic of Poland], Journal of Laws of 2018, item 380 and 1169 (consolidated text); Ustawa o stosunku Państwa do Polskiego Autokefalicznego Kościoła Prawosławnego [Act on the Relations Between the State and the Polish Autocephalous Orthodox Church], Journal of Laws of 2014, item 1726 (consolidated text); Ustawa o stosunku Państwa do Kościoła Ewangelicko-Augsburskiego w Rzeczypospolitej Polskiej [Act on the Relations Between the State and the Evangelical-Augsburg Church in the Republic of Poland], Journal of Laws of 2015, item 43 (consolidated text); Ustawa o stosunku Państwa do gmin wyznaniowych żydowskich w Rzeczpospolitej Polskiej [Act on the Relations Between the State and the Jewish Religious Communities in the Republic of Poland], Journal of Laws of 2014, item 1798 (consolidated text); Ustawa o gwarancjach wolności sumienia i wyznania [Act on the Guarantees of the Freedom of Conscience and Creed], Journal of Laws of 2017, item 1153 (consolidated text).

full return, and the laws regulating the functioning of the commissions provides for a return in nature as a basic solution, followed by the granting of a substitute property or payment of compensation.

Fourthly, for people who as a result of the frontier changes in the aftermath of World War II had to leave their properties which remained outside the new Polish borders, there existed a possibility to claim compensation under the Law of 8 July 2005 on Exercising the Right to Compensation for Immovable Property Left outside the Borders of the Republic of Poland.[32]

Each of above-mentioned legal procedures was aimed at granting satisfaction for material losses, and require the interested party to take appropriate legal actions. However, it should be borne in mind that over the passage of time – and in particular the changes in ownership, changes of law, and changes of the economic and political system that took place during the systemic transformation at the turn of 1989 and 1990 – it was often difficult to determine the current legal status of the properties in question in order to regain property or receive compensation. In many cases, it has turned out that despite the theoretical possibility of regaining old property, practical implementations have encountered considerable difficulties for a variety of reasons.

2.2. Claims concerning the confiscation of property during World War II

One of the claims raised in the complaints brought in the initial period of Poland's participation in the Convention system concerned lack of compensation from the German or Polish authorities for material damage caused by the confiscation of property during World War II.

In the circumstances of the case *I.G. v. Germany and Poland*, movable property belonging to the applicant's legal predecessors was confiscated in 1942 by Nazis during the war.[33] In the 1990s, the complainant turned to German authorities to obtain compensation, but received a reply stating that the German authorities had no obligation to pay compensation to Polish citizens as Polish authorities renounced any reparations against Germany in 1953, a fact which was further confirmed by them in the Agreement between Poland and Germany concluded in 1970. According to German authorities there was no legal basis for the applicants' claims.

When adjudicating the complaint, the EComHR determined that the confiscation of the applicant's parents' movable property was carried out by Germans in occupied Poland in 1942. These were, therefore, actions taken before the entry into force of the

[32] Ustawa o realizacji prawa do rekompensaty z tytułu pozostawienia nieruchomości poza obecnymi granicami Rzeczypospolitej Polskiej [Law on Exercising the Right to Compensation for Immovable Property Left outside the Borders of the Republic of Poland], Journal of Laws of 2005, No. 169, item 1418, as amended. Current information about the progress in the implementation of the said provisions are provided on monthly basis at the Government's website: https://www.gov.pl/web/mswia/rekompensata-2020 (accessed 30 June 2020). According to information presented therein, until the end of May 2020, the State Treasury paid under this title compensation in amount of PLN 4.673 billion (USD 1.06 billion).

[33] EComHR, *I.G. v. Germany and Poland* (App. No. 31440/96), 7 January 1997.

Convention towards Germany, which took place on 13 February 1957. At the same time, the Commission emphasized that it was not possible to derive from Art. 1 of Protocol No. 1 the right to compensation in cases concerning facts which took place before the entry into force of the Convention. The Commission assessed the complaint in that regard as inadmissible *ratione temporis*. Thus in its decision the Commission explicitly stated that the Convention and the Protocol could not constitute a basis for compensation claims for damage caused by Germany during World War II.

In turn, in the application *Sokołowski v. Poland*,[34] the Court had to consider whether the applicant could derive from Polish law an expectation of obtaining compensation for the destruction of property of his legal predecessors during World War II effectuated by Germany. The applicant unsuccessfully sought compensation for this property, indicating two grounds for the existence of a compensation obligation on the part of the Polish State. First of all, he derived such an obligation from the fact that Poland obtained reparations from Germany, which in his opinion should also have been passed on to individuals who lost their property; secondly he claimed that such an obligation stemmed directly from Polish law, namely from the Act of 2 July 1947 on the Economic Reconstruction Plan,[35] which in his opinion required the state to pay compensation to individuals who lost property as a result of the World War II, and which obligation had not been implemented. The Court declared the complaint inconsistent *ratione materiae* with the provisions of the Convention and the Protocol No. 1. It shared the view of the domestic courts that the applicant's claim for damages was not based on any statutory provision or court ruling, because the purpose of the Act of 1947 was to repair the damage caused to the national economy as a result of the war, and its legal force expired with the implementation of the objective. Therefore, the Act of 1947 could not be interpreted as creating a claim or an entitlement belonging to an individual. Moreover, the interpretation made by the domestic courts dealing with the applicant's case was neither arbitrary nor manifestly unjustified as those terms were understood in the case law of the ECtHR.

The Court additionally referred to one more argument which seems to be valid also for other matters. In assessing the applicant's allegation that his right to compensation was based on international law, the Court emphasized that the applicant had not indicated any specific grounds in public international law for his claims, and moreover the Court, in light of Art. 1 of the Convention, has no jurisdiction to adjudicate on claims based solely on international law.

Thus, in the above-discussed rulings the Strasburg judicial review bodies definitively excluded the possibility to assess the responsibility of Germany and Poland for any acts of deprivation of individual property that were effectuated in relation to inhabitants of Polish territories occupied during the war by Germany.

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[34] EComHR, *Sokołowski v. Poland* (App. No. 39590/04), 7 July 2009.

[35] Ustawa o Planie Odbudowy Gospodarczej [Act on the Economic Reconstruction Plan], Journal of Laws of 1947, No. 53, item 285.

2.3. Claims concerning the state's non-fulfilment of compensation commitments made before the fall of communist regime

Another legal issue requiring examination concerns the situation of deprivation of property effectuated long before Poland became bound by Protocol No. 1, but for which the authorities assumed at the relevant time an obligation to make compensation and even began to implement it. The problems raised in the cases directed to the Court concerned the issue whether the state was obliged to continue to fulfil this obligation.

The case *Broniowski v. Poland*, extensively discussed in the literature,[36] concerned the practical ineffectiveness of legal mechanisms offered by the national system to enforce compensation for property left behind the Bug River during and after World War II. In September 1944, Poland concluded agreements with three Soviet republics – Ukraine, Belarus and Lithuania – which sanctioned the new territorial shape of Poland. These "republican" agreements constituted the legal basis for the displacement of people and the kind of compensation for lost property which could be made available. Detailed rules for the implementation of the compensatory rights were accordingly specified in the laws adopted by the Polish authorities immediately after war, during the communist rule, and after the ratification by Poland of Protocol No. 1. The basic problems that had to be considered by the Court concerned a two-pronged question: (a) whether the compensatory right called "right to credit" could be treated as a property right within the meaning of Art. 1 of Protocol No. 1; and (b) whether the state could be held liable before the ECtHR for the promises of compensation it made before ratification of the said Protocol. While defining the legal basis of the underlying right, the Court emphasized that while the sources of entitlement were republican agreements, they were confirmed in the subsequent legislation and in the case law of domestic courts, including the Supreme Court. Further, it assumed that the exact content and scope of this right was clarified in the case law of the national authorities, and therefore it considered "the right to credit" as a property interest protected by Protocol No. 1.[37] The problem revealed in the applicant's complaint was that both before 1994 and after that date, the State adopted a number of provisions introducing restrictions on the exercise of this right, in consequence of which the entitled persons encountered a number of obstacles preventing them from benefiting from such rights.[38] Considering the above-mentioned elements, the Court stated that it

[36] *See generally* G. Bieniek, *Mienie zabużańskie* [Property beyond the Bug River], in: G. Bieniek, S. Rudnicki (eds.), *Nieruchomości. Problematyka prawna*, Wolters Kluwer, Warszawa: 2006, P. Filipek, *Sprawa mienia zabużańskiego przed Europejskim Trybunałem Praw Człowieka. Raport* [The case of property beyond the Bug River before the European Court of Human Rights. Report], 1 Problemy Współczesnego Prawa Międzynarodowego, Europejskiego i Porównawczego 162 (2003); L. Garlicki, *Broniowski and after: On the Dual Nature of the "Pilot Judgments",* in: S. Breitenmoser, M. Sassoli, B.W. Pfeifer (eds.), *Human Rights, Democratie and the Rule of Law. Liber amicorum Luzius Wildhaber*, Nomos, Kehl: 2007, A. Młynarska-Sobaczewska, *Odpowiedzialność państwa polskiego za mienie zabużańskie* [The responsibility of the Polish State for the property beyond the Bug River], 2 Państwo i Prawo 57 (2010).

[37] ECtHR, *Broniowski v. Poland* (App. No. 31443/96), 19 December 2002, paras. 98-102, ECtHR, *Broniowski v. Poland* (App. No. 31443/96), 22 June 2004, paras. 129-133.

[38] *Broniowski v. Poland* (2004), paras. 136-154.

had temporal jurisdiction (*ratione temporis*) to deal with complaints, since some of the actions of the State interfering with the applicant's rights were taken after Poland's accession to Protocol No. 1, and that it had material jurisdiction (*ratione materiae*) because the applicant was able to prove the existence of a property right covered by the protection of Art. 1 of Protocol No. 1. The restrictions which affected the applicant in the exercise of his rights were then assessed by the Court as violations of Art. 1 of Protocol 1.

The multiplicity of applications lodged with the Court by the Bug river claimants, the number of potential applicants (estimated at 80,000), and the fact that the State's interference resulted from the systemic inefficiency of the compensatory mechanism, prompted the Court to issue, in this case, its first ever pilot judgment. The actions taken by the Polish authorities in the implementation of the judgment and the closure of the pilot procedure initiated by it are considered to be the most representative example of a government's proper cooperation with the Court and the Committee of Ministers of the Council of Europe in the implementation of the ECtHR's judgments.[39]

The *Czajkowska and Others v. Poland* case constitutes another example of the Court's recognition of a violation of property rights through the failure to perform compensation obligations that started under the communist rule.[40] The property, which belonged to the legal predecessors of the applicants, was taken over by the State Treasury in 1950. The former owner of the property asked for compensation and in subsequent years, including also after 10 October 1994, decisions were issued granting her, and later her legal successors, partial compensation. These decisions included promises of granting further sums of money in later periods. Until 2010, i.e. until the Court's judgment was issued, the applicants had not obtained all their damages. When assessing whether the applicants possessed property rights protected by Protocol No. 1, the Court found that the regulations in force both before and after the date of ratification provided for the payment of appropriate compensation to the owners of the nationalized property. These provisions were applied in practice, including in the applicants' individual situations. In addition, the authorities, when issuing decisions and determining the amount of compensation for each part of the property, confirmed the applicants' right to subsequent payments of compensation, informing them that all claims would be satisfied at a later stage.[41] The Court took the view that the combination of the indicated legislative acts and the administrative decisions issued in the case of the applicants pointed to the existence of a legal interest protected by Protocol No. 1, thus constituting a situation of a continuous nature, which took place both before and after 10 October 1994. Failure to implement the claim during the period covered by the Court's jurisdiction, i.e. over 15 years, constituted a violation of the applicants' property rights.

In the light of the judgments in *Broniowski v. Poland* and *Czajkowska and Others v. Poland*, it can be concluded that in cases where a deprivation of property occurred

[39] Final Resolution CM/ResDH(2009)89, Execution of the judgments of the European Court of Human Rights Broniowski against Poland, adopted on 30 September 2009.

[40] ECtHR, *Czajkowska and Others v. Poland* (App. No. 16651/05), 13 July 2010.

[41] *Ibidem*, para. 51.

before Poland acceded to Protocol No. 1, and in which the domestic law provided for damages or other property rights and this right was confirmed in judicial rulings and other actions of public authorities, the Polish State bears responsibility for the effective enjoyment of property rights. However, it should be clearly stressed that in cases where both the deprivation of property and the total payment of compensation took place before the entry into force of Protocol No. 1, the ECtHR has no temporal jurisdiction to assess the amount of compensation.[42]

2.4. Claims concerning nationalisation carried out after World War II in contravention of the law

Another group of the Court's verdicts consists of complaints concerning the course and results of domestic proceedings initiated after the fall of communist rule in which the applicants questioned the very legality of the communist nationalisation decisions in light of the domestic provisions biding at the time of their issuance. In these complaints, the Commission and the Court have resolved a whole range of legal issues raising doubts under Protocol No. 1.

The first general issue that needed consideration was whether, in the event of the property taken by the communist authorities, the Polish applicants had an unconditional right to restitution and whether there existed national remedies necessary which needed to be exhausted before turning to Strasbourg justice.

In the aforementioned case of *I.G. v. Germany and Poland*, the Commission adjudicated an applicant's complaint in which he demanded compensation from the Polish authorities for immovable property taken over from his predecessors on the basis of the so-called "Bierut decree" issued in 1945.[43] An essential aspect of the case was that the applicant did not initiate appropriate domestic legal proceedings aimed at recovery of the possessions. In its decision, the Commission settled two issues. Firstly, it rejected the claim directed against Poland concerning deprivation of property, arguing that it took place before Poland became bound by Protocol No. 1 and therefore the act of deprivation occurred outside its temporal jurisdiction. Secondly, it noted that the applicant did not make use of available legal means in order to recover the property. In consequence he was not in possession of a domestic decision recognising his claims, and the property rights extinguished with the moment of nationalisation. In this respect, the Commission recalled, in line with its previous case law, that deprivation of property is an instantaneous act that does not produce continuous effects which would allow it to assume that an applicant's proprietary interest still exists. Consequently, the Commission considered that the applicant had no grounds to claim compensation under Protocol No. 1 for the seized property, since this legal act does not guarantee a right to acquire new property, i.e. to restitution.

[42] EComHR, *Solidarność Trade Union at Fresco Plant and at Zgoda Co-operative v. Poland* (App. No. 25481/94), 6 April 1995.

[43] Dekret o własności i użytkowaniu gruntów na obszarze m. st. Warszawy [Decree on the Ownership and Use of Land within the Capital of City Warsaw], Journal of Laws of 1945, No. 50, item 279, as amended.

Having confirmed that the institution of domestic proceedings aimed at challenging the nationalisation decision is necessary for the exhaustion of domestic remedies, the Strasbourg judicial review organs had to consider the legal situation of those applicants who initiated the said proceedings, but at the time of lodging the application the proceedings were still pending. The legal question that arose was whether the mere institution of such proceedings could be regarded as exhaustion of domestic remedies and as conferring on the applicant a proprietary interest protected by Protocol No. 1.

This legal issue was the background of the case *Pełka and Others v. Poland*, in which the applicants lodged their application with the Commission while the case was still pending before domestic organs and argued that the failure of the administrative authorities to declare the nationalisation decision of 1950 null and void violated their rights guaranteed in Art. 1 of Protocol No. 1.[44] The Commission observed that in the light of the Polish law, the applicants did not have at their disposition "existing possessions" at the moment of lodging the application, since the property was formally and with immediate effect taken from their predecessors in 1949 and nationalised in 1950, and the effects of those acts were not reversed in administrative proceedings. The Commission concluded that the mere fact of instituting proceedings was not enough to state that they possessed legally recognisable claims which could be regarded as "legitimate expectations" of the enjoyment of property rights protected by Protocol No. 1. Simultaneously, the Commission reiterated that the said agreement did not guarantee a right to acquire new property, including the restitution of property.[45]

This decision contained a clear conclusion: that applications lodged with the Strasbourg authorities while domestic proceedings are still in progress will be considered *ratione materiae* incompatible with the provisions of the Convention. A person alleging interference with their property rights must be able to demonstrate the existence of a confirmed proprietary interest at the time of submitting the application. The existence of a mere hope that the appropriate organs will decide in their favour and reverse the effects of a nationalisation decision does not constitute such an interest.

Thus only a final domestic ruling declaring that given properties were not subject to the nationalisation rules and in consequence that the nationalisation was carried out contrary to the law should be regarded as giving the complainant a legal interest falling within the notion of "property" within the meaning of Art. 1 of Protocol No. 1. It is worth noting that later on the Court expressly found that a supervisory decision declaring the invalidity of the previous administrative decision "confers" on the applicant a proprietary interest protected by the Convention system.[46]

As a result of obtaining a decision declaring that the assets in question were not subject to the nationalisation regulations, the owner obtains under Polish law a whole range of procedural entitlements enabling the effective enjoyment of the newly confirmed

[44] EComHR, *Pełka and Others v. Poland* (App. No. 33230/96), 17 January 1997.

[45] For similar conclusions, *see* EComHR, *Kitel v. Poland* (App. No. 28561/95), 17 January 1997, *Szyszkiewicz v. Poland* (App. No. 33576/96), 9 December 1999.

[46] ECtHR, *Bennich-Zalewski v. Poland* (App. No. 59857/00), 22 April 2008, para. 90.

rights (e.g. the right to institute compensation proceedings or proceedings to hand over the property[47]). The Court clearly indicated that in such a situation it is the State's duty pursuant to Art. 1 of the Convention to ensure the effective exercise of all rights pertaining to the applicant. The commitments upon the State consist not only of not arbitrarily interfering with the applicant's rights, but also often include the obligation to take positive action. In the last two decades, the case law of the ECtHR has seen a significant development of the concept of positive obligations.[48] The Court assessed the degree of fulfilment by Poland of its positive obligations under Art. 1 of the Protocol No. 1 in the context of the implementation of the decisions confirming the invalidity of nationalisation decisions while examining the case of *Tarnowski and Others v. Poland*.[49] In the proceedings before the Court, the applicants alleged that despite obtaining a final ruling annulling the nationalisation decision, they had to pursue further proceedings aimed at obtaining effective use of the rights arising from that decision. The Court found, however, that the Polish legal system ensures effective enforcement of rulings declaring the nationalisation invalid by creating a legal framework enabling applicants to recover their property and resolve all legal disputes between them and other private entities remaining in the possession of the disputed properties.[50] Consequently, the Court found that Polish law provided a legal framework under which the applicants could demand the recognition in practice of the economic value of their rights arising from the domestic decisions. Therefore, it did not find a violation of Art. 1 of Protocol No. 1 in the case at issue.

Bearing in mind that the Court's role in assessing the application by national authorities of domestic legal provisions is rather limited due to its subsidiary character, interesting questions have been raised in cases in which the Court was requested to overrule the results of domestic proceedings by ruling in favour of the applicants. For example, in the case *Romer and Dmowska-Baculewska v. Poland*, the applicants questioned the

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[47] R. Pessel, *Rekompensowanie skutków naruszeń prawa własności wynikających z aktów nacjonalizacyjnych* [Compensating the effects of infringements of property rights resulting from nationalization acts], Wolters Kluwer, Warszawa: 2003, p. 124.

[48] *See generally* A.R. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, Hart Publishing, Portland: 2004; D. Xenos, *The Positive Obligations of the State under the European Convention of Human Rights*, Routledge, New York: 2012; J. Czepek, *Zobowiązania pozytywne państwa w sferze praw człowieka pierwszej generacji na tle Europejskiej Konwencji Praw Człowieka* [Positive obligations of the state in the sphere of first-generation human rights against the background of the European Convention on Human Rights], Wydawnictwo UWM, Olsztyn: 2014. With regard to the rights guaranteed under Art. 1 of Protocol No. 1, the performance of positive duties entails the necessity to organize the legal system in such a way so that individuals can effectively claim realisation of their property rights. In some cases, it may entail the need to take steps to protect property rights, even in matters that take place between private parties. *Cf.* ECtHR, *Anheuser-Busch Inc. v. Portugal* (App. No. 73049/01), 11 January 2007, para. 83; *Sovtransavto Holding v. Ukraine* (App. No. 48553/99), 2 October 2003, para. 96; *Bennich-Zalewski v. Poland*, para. 92.

[49] ECtHR, *Tarnowski and Others v. Poland* (no. 1) (App. No. 33915/03), 29 September 2009; *Tarnowski and Others v. Poland* (no. 2) (App. No. 43934/07), 29 September 2009.

[50] *Tarnowski and Others v. Poland* (no. 2), para. 86.

decision of the national authorities as to whether the conditions of the nationalisation laws were met, thus disputing the correctness of the interpretation made by the domestic court.[51]

In the case at issue the administrative organs consistently refused to issue a decision annulling the former expropriation decision, despite the fact that, as claimed by the applicants, the plots taken over by the State were not subject to the Decree of 6 September 1944 of the Polish Committee of National Liberation on the Introduction of the Agrarian Reform (the Decree on the agrarian reform).[52] In the applicants' opinion, in doing so the authorities acted in contravention to the jurisprudence of the Constitutional Court. The ECtHR communicated the case to the Government and decided to consider whether, despite the lack of a domestic ruling confirming their entitlement, the applicants could be treated as having a "legitimate expectation" to restore their property rights. Eventually, the adjudication of the case was closed, because in the course of the proceedings before the ECtHR the applicants obtained a satisfactory ruling at the domestic level and withdrew their application.

The above rulings demonstrate that in the Court's opinion the acts of nationalisation or expropriation or other actions of the Polish authorities resulting in the deprivation of property were of an instantaneous nature and did not give rise to situations of a continuous violation of property rights. The ECtHR clearly confirmed that the deprivation of property occurred at the moment of issuance of a nationalisation decision or the *ex lege* acquisition of property, thus long before Poland became bound by Protocol No.1. Until a competent national authority rules that the deprivation of property occurred contrary to the then applicable law, the applicant does not have property rights that would be protected under Protocol No. 1.[53] Additionally, the Court assessed that the law in force in Poland provides for an appropriate legal framework for the effective enforcement of domestic rulings reversing the effects of unlawful nationalisation or expropriation.

2.5. Claims concerning deprivation of property after World War II carried out in accordance with nationalisation laws: old promises of damages

In cases of nationalisation or expropriation carried out in accordance with the law then in force, there are no possibilities under the current Polish law to regain property or receive compensation. Nevertheless, many of the injured parties unsuccessfully undertook different legal steps in order to challenge the effects of the authorities' actions. As their efforts ended in failure, they turned to the ECtHR, hoping to have the domestic decisions reversed because, as they argued, of their incompatibility with fundamental rules of the principle of protection of property. The key decisions that put an end to the hopes of obtaining compensation at the European level were issued in the

[51] ECtHR, *Romer and Dmowska-Baculewska v. Poland* (App. No. 72166/01), 8 November 2011.

[52] Dekret Polskiego Komitetu Wyzwolenia Narodowego z dnia 6 września 1944 r. o przeprowadzeniu reformy rolnej [Decree of 6 September 1944 of the Polish Committee of National Liberation on the Introduction of the Agrarian Reform], Journal of Laws of 1944, No. 4, item 17.

[53] Garlicki (*Transformacja ustrojowa*), *supra* note 4, p. 395.

cases *Marie Izabella Zamoyski-Brisson v. Poland* and *Lubelska Fabryka Maszyn i Narzędzi Rolniczych "Plon" v. Poland*.

The application in the case *Marie Izabella Zamoyski-Brisson v. Poland*[54] was made by successors of individuals deprived of property under the provisions of the Decree on agrarian reform (the act already discussed in the case *Romer and Dmowska-Baculewska v. Poland*). The applicants unsuccessfully demanded compensation from the domestic courts for the forests that were taken over in accordance with the provisions of the decree. The applicants based their claim primarily on the provisions of the Act of 6 July 2001 on Preserving the National Character of the Country's Strategic Natural Resources (Act of 2001),[55] which contains a general provision providing for compensation in a case of expropriation. The courts assessed that the purpose of the adoption of the Act of 2001 was quite different from the way the applicants perceived it. The purpose of the act was not to establish a legal basis for compensation claims for property lost in the past, but to safeguard for the future the country's strategic resources against privatization. The provisions of the act did not specify either the objective or subjective scope of the right to compensation, did not specify the compensation mechanism and the conditions for compensation, and therefore could not be regarded as imposing on the State Treasury an obligation to provide payments of individual monetary amounts to individual entities.

In turn, the complaint *Lubelska Fabryka Maszyn i Narzędzi Rolniczych "Plon" v. Poland*[56] concerned a situation of taking over the assets of the applicant company in accordance with a nationalisation decision issued on the basis of the Act of 3 January 1946 on Taking Over the State's Basic Branches of National Economy (Act of 1946).[57] The legislator provided that pursuant to Arts. 5 and 7 of the Act of 1946 implementing regulations would be issued, which would regulate the question of the procedure for granting and estimating the compensation for companies that were nationalised. As the government never intended to keep their promises, the indicated executive acts were never issued. The legal successors of the applicant company's shareholders unsuccessfully demanded damages for the property taken over, claiming that they had not received compensation because the national authorities had committed a legislative omission by not issuing executive acts pursuant to the Act of 1946. Their claims were

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[54] ECtHR, *Marie Izabella Zamoyski-Brisson and 3 cases v. Poland* (App. No. 19875/13, 19906/13, 19921/13 and 19935/13), 3 October 2017. The same legal issues were resolved in the following cases: ECtHR, *Adam Stefan Zamoyski v. Poland and 23 others* (App. No. 19912/13), 16 January 2018; *Stanisław Jan Piotrowski v. Poland* (App. No. 56553/15), 12 December 2019; *Izabela Julia Emilia Chłapowska-Trzeciak v. Poland* (App. No. 20177/13), 26 June 2018.

[55] Ustawa o zachowaniu narodowego charakteru strategicznych zasobów naturalnych kraju [Act on Preserving the National Character of the Country's Strategic Natural Resources], Journal of Laws of 2001, No. 97, item 1051.

[56] ECtHR, *Lubelska Fabryka Maszyn i Narzędzi Rolniczych "Plon" v. Poland and 2 other applications* (App. Nos. 1680/08, 3117/08 and 46309/13), 3 October 2017.

[57] Ustawa o przejęciu na własność Państwa podstawowych gałęzi gospodarki narodowej [Act 1946 on Taking Over the State's Basic Branches of National Economy], Journal of Laws of 1946, No. 3, item 17.

dismissed by the courts because even if it was assumed that the omission to issue such acts actually took place (which can also be called into question considering the fact that the authorities never intended to compensate for damages), the omission still occurred in the 1940s, when the authorities issued other executive regulations to this act. On the other hand, the Polish courts emphasized that the provisions introducing into the Polish legal system the institution of legislative omission clearly stated that the concept cannot be applied to situations that took place before 1 September 2004, i.e. before the institution entered into force.

In both of the above-discussed cases, the conclusion of the domestic courts was that the applicants' claims for damages based on the allegation of an unlawful seizure of property under the legislation on agrarian reform and on the nationalisation of industry did not have any basis in Polish law and consequently had to be dismissed.

Before the ECtHR, the complainants claimed that in light of the national law and contrary to the domestic courts' conclusions, they had "legitimate expectations" of being granted compensation. In the context of the *Lubelska Fabryka* case an important question that arose was whether the non-fulfilment of an old promise of compensation could constitute a basis for asserting that there has been an interference with the property rights of the applicants which could be assessed by the Court.[58]

In settling both of the above-mentioned complaints, the Court held that the allegations concerned mainly the issue of interpretation and application of national law. In this regard the Court has clearly indicated that it has limited possibilities to verify whether national law has been properly implemented, because this is primarily the role of national courts. The Court's competences are limited to ensuring that the decisions of national courts are not arbitrary and manifestly unjustified. In the Court's view, the circumstances of both cases examined did not reach such a level. On the contrary, the decisions of the national courts consistently concluded that the compensatory actions brought by the applicants did not have grounds under national law. Referring to the hope of the applicants derived from the political promises to introduce a general restitution act, the ECtHR pointed out that the Polish legislature has so far not realised its intentions. The Court emphasized that the national legislator was free to adopt solutions in response to changes in the political and economic system and it was entirely within its discretion whether it intended to introduce the socially-expected restitution provisions.[59]

The Court noted that the issue of receiving compensation based on the provisions indicated by the applicants was widely discussed and led to some discrepancies in the case law, but the arguments of the applicants and other persons in the same situation were rejected by the domestic courts. Therefore, the Court could not treat the applicants as having legitimate expectations to be granted compensation under domestic law. In

[58] The legal question of validity of "old" compensation promises was raised firstly in the case *Pikielny and Others v. Poland* (App. No. 3524/05), 18 September 2012. The case was found inadmissible for non-exhaustion of domestic remedies.

[59] *Mutatis mutandis*, *Kopecký v. Slovakia,* para. 35 and *von Maltzan and Others v. Germany,* para. 77.

consequence, they could not claim to have "ownership of property" within the meaning of Protocol No. 1, and thus the complaints were rejected as being inadmissible *ratione materiae*.

The Court clearly distinguished the legal situation of the applicants from that of the Bug River claimants, settled in the aforementioned *Broniowski v. Poland* judgment. In that case the right to compensation in the form of the "right to credit" was anchored in both the pre-ratification and post-ratification legislation and recognized in the jurisprudence of national courts.[60]

The dismissal of the above-discussed applications based on the lack of a domestic basis for compensation for properties nationalised in accordance with relevant legal acts has multiple and significant consequences. First of all, the Court expressly confirmed, both in relation to Poland and also in relation to other countries,[61] that old nationalisation acts containing compensation provisions that were not put into practice did not create financial obligations unless these obligations were confirmed or legally recognised after the states' accession to Protocol No. 1. The lack of a national legal basis for compensation and restitution claims in connection with the expropriations and nationalisations carried out after World War II thus precludes the possibility of pursuing them in proceedings before the ECtHR. Further, the Court expressed its acceptance of the ultimately established case law of Polish courts with respect to this matter. The Strasbourg rulings emphasized that the divergences in the jurisprudence pointed out by the applicants are, under certain conditions, immanent features of a constantly developing and evolving legal system.

2.6. Claims concerning loss of ownership through acquisitive prescription

Another group of complaints consists of applications concerning the definitive loss of property as a result of the State acquiring possession by acquisitive prescription of property left behind by people who fled Poland after war, and whose real estate were covered by municipal management.[62] In the cases *Borenstein v. Poland* and *Weitz and Others v. Poland* the original court's decisions – declaring the acquisitions of the real estate in question by acquisitive prescription by the State Treasury – were issued in 1962 and 1978 respectively. But in the 1990s the applicants, who decided to initiate legal steps in order to regain the property of their predecessors, managed to achieve annulment of these prescription decisions. However, in 2002 and 2004 respectively, the Polish courts issued final decisions stating that the State acquired the real property in question, but only in 1988 and 1985. They treated as the starting date of the period

[60] *Broniowski v. Poland* (2004), para. 100.

[61] *Bata v. Czech Republic*.

[62] *See* A. Mężykowska, *Problematyka jurysdykcji czasowej i przedmiotowej ETPCz – glosa do decyzji z 24.06.2008 r. w sprawie Borenstein i inni v. Polska oraz decyzji z 23.06.2009 r. w sprawie Weitz v. Polska* [Issues related to the temporal and subject jurisdiction of the ECtHR – a commentary to the decision of 24.06.2008 in the case of Borenstein and Others v. Poland and the decision of 23.06.2009 in the case of Weitz v. Poland], 11 Europejski Przegląd Sądowy 45 (2010).

of acquisitive prescription the dates on which the original decisions on acquisitive prescription became final. The position taken by the domestic courts was based on settled case law of the Polish Supreme Court. The question raised by the applicants before the ECtHR was whether the decisions of the national authorities – which were "unfavourable" for the applicants' claims but consistent with the established case law in such cases – were not characterized by arbitrariness and lack of reliability. The ECtHR assessed both complaints as manifestly ill-founded. It stressed that in the circumstances of the cases the applicants were not formally deprived of their property (neither under the communist rule nor later), but rather that the decisions of the public authorities (including courts) were of a regulatory nature and amounted to a "control of use" of property within the meaning of the second paragraph of Art. 1 of Protocol No. 1. This conclusion allowed the Court to confirm its temporal jurisdiction over the cases. It then further decided that a violation of Protocol No. 1 did not take place due to the fact that the national authorities, when issuing the decisions on acquisitive prescription, relied on established case law, especially that of the Polish Supreme Court. Therefore the ECtHR did not decide to challenge the domestic decisions, but treated them as an acceptable way to regulate the legal status of real estate properties. However, it is worth pointing out that, contrary to the prevailing practice, the Court's decisions on inadmissibility in both cases were not adopted unanimously.

In rejecting the applicants' arguments based on the alleged arbitrariness of the decisions, the Court again underlined the paramount importance of positive obligations incumbent on states under Art. 1 of Protocol No. 1. In the cases at hand the obligation consisted of the creation of a system in which all disputes concerning property issues, including situations in which the former owner has not been exercising its ownership for a long period of time, could be considered and resolved.

2.7. Claims concerning the State's failure to redeem national bonds issued before 1939

Another group of applications decided by the Court were those of holders of pre-war bonds, which were decided in the cases *Mach v. Poland* and *Woźny v. Poland*.[63]

In the first complaint, the bonds were to have been redeemed in 1995. As a result of a lawsuit against State Treasury for non-redeemed pre-war bonds, the applicant received compensation in an amount constituting 0.1% of the requested sum. The domestic court assessed that the applicant's claims were not time-barred, but the value

[63] ECtHR, *Jolanta and Bogusław Mach v. Poland* (App. No. 68750/11), 15 December 2015; *Zdzisław Woźny v. Poland* (App. No. 70720/11), 15 December 2015. *See also* A. Mężykowska, *Prawo międzynarodowe nie może stanowić wyłącznej podstawy do wywodzenia roszczeń restytucyjnych w braku właściwych przepisów krajowych – postanowienia Europejskiego Trybunału Praw Człowieka w sprawach Jolanta i Bogusław Mach przeciwko Polsce (skarga nr 68750/11) oraz Zdzisław Woźny przeciwko Polsce (skarga nr 70720/11)* [International law cannot constitute the sole basis for restitution claims in the absence of relevant national provisions – decisions of the European Court of Human Rights in cases Jolanta and Bogusław Mach v. Poland (no. 68750/11) and Zdzisław Woźny v. Poland (no. 70720/11)], 6 Europejski Przegląd Sądowy 44 (2016).

of outstanding bonds should be calculated taking into account regulations issued in the 1940s and 1950s concerning, e.g., changes in the value of money. The court stated that due to the legislative and economic changes in Poland that had taken place over the ensuing decades, the value of the bonds was already symbolic only, for which the current State could not bear financial responsibility.

On the other hand, in the case of *Woźny v. Poland*, the applicant's lawsuit for non-redeemed bonds was dismissed as the domestic court assessed that the state bonds in the possession of the plaintiff entirely lost their economic value as a result of the statutory changes introduced in 1949 and 1950.

Based on Art. 1 of Protocol No. 1, the applicants raised two allegations. The first related to the bond's loss of economic value, which in their view was tantamount to a deprivation of property; and the second concerned the failure of the State to take action to meet its obligations and to redeem the bonds. Relying on its previous case law, the Court stated that in both cases the applicants had not been deprived of property in the classic sense. The ECtHR perceived that they still had legal title to the bonds, however it shared the domestic courts' conclusions that the bonds were deprived of their economic value following the entry into force of the post-war regulations. Further, the decline in the value was caused by economic changes which took place in Poland starting from the 1950s and continuing until the 1990s. In consequence, the ECtHR found that the decrease in the value of the applicants' bonds should be assessed as tantamount to depriving the applicants of property, which however took place in 1949-1950, i.e. before the entry into force of Protocol No. 1 in Poland.

Referring to the plea that the democratic State failed to redeem the bonds, the Court found that the bonds owned by the applicants were issued before World War II and were deprived of real value long before Poland entered the Convention system. The Polish authorities did not adopt any provisions revealing its will to compensate the unredeemed bonds. In conclusion, the ECtHR found that Poland had no obligation under Art. 1 of Protocol No. 1 to adopt provisions providing for restitution or compensation for lost property, including for the bonds, if an individual was deprived of their property before Poland became bound by Protocol No. 1. In the absence of claims based on domestic law supporting compensation, the ECtHR found that the complaints were *ratione materiae* inadmissible.

CONCLUSIONS

The above presented analysis of case law in cases against Poland makes it possible to indicate in what circumstances persons who have been deprived of ownership during World War II and/or under the communist rule may lodge effective complaints against the Polish authorities concerning the restitution of property. The possibilities are quite limited, and in fact concern only situations when the applicants face difficulties in enjoyment of their property rights relating to old property titles whose existence has

been confirmed by competent national authorities both before and after the date of the ratification by Poland of Protocol No. 1. Thus paradoxically the only violations of property rights were found in cases in which compensation obligations were guaranteed and at least partially implemented by the communist authorities.

It must be clearly stressed that in the light of the case law of the Court it is not possible to assess, from the point of view of the Convention and Protocol No. 1, the legality of acts of deprivation of property if they occurred prior to Poland's accession to these treaties. The Court treated situations leading to the deprivation of property as instantaneous situations, which did not lead to a continuing infringement of property rights. The very fact of the continuous formal application in the Polish legal system of nationalisation laws issued in the 1940s and 1950s, many of them containing vague promises of damages, cannot in itself constitute the basis for a claim before the ECtHR if the existence of claims was not confirmed by the national authorities. The Court expressly stated that under international law, including the European Convention on Human Rights, it is not possible to derive an obligation on the part of Poland to enforce restitution and compensation claims if such claims do not have a clear basis in national law.

Against the background of the Court's rulings regarding the right to respect for property, the question arises whether the Court's jurisdiction in this regard proves the statement, rightly expressed in the literature, that the Convention cannot be used as an instrument for settling accounts with the past.[64]

The position that the Convention has been developed and adopted to establish guarantees that the tragic events of World War II will not be repeated is unquestioned. It is also largely undisputed that its role was not to correct historical injustices. However, legal contexts have occurred which enabled the ECtHR to establish its jurisdiction over disputes concerning certain "historical situations" preceding the enactment of the Convention and the accession of particular states to its system.

The Convention has been in force for 70 years, and it has been a period of intensive development of the scope of human rights guarantees at the European level. The Commission and the Court, similarly to other human rights protection bodies, has considered, with the passage of time, in great depth the temporal factor[65] that prompted the implementation of certain legal institutions developed in international law, such as the concept of continuous violations. In addition, the CEE countries began to accede to the Convention in the 1990s together with their baggage of complicated experiences and problems arising from the communist times. Many legal and factual situations that subsequently have constituted the subject of complaints to the ECtHR have been difficult to enclose within clearly defined time frames. Some of them began during the communist regime, but continued despite the change of systems. These circumstances could not remain without influence on the Court's approach to past injustices. Hence, the temporal jurisdiction of the Court finally covered allegations concerning lack of

[64] Garlicki (*Transformacja ustrojowa*), *supra* note 4, p. 388.

[65] A.A.C. Trindade, *International Law for Humankind: Towards a New Jus Gentium*, Brill, Leiden-Boston: 2010, p. 34.

efficient investigation submitted under Arts. 2 and 3 in situations that occurred before the date of ratification, cases that involved a continuing situation constituting a violation of a right that commenced before the critical date of ratification and cases concerning historical events linked with the problem of the limits of freedom of speech.[66]

However, it seems that while in cases concerning violations of Arts. 2, 3, 8 or 10, the ECtHR has been inclined to re-consider the limits of its jurisdiction, cases regarding violations of property rights have not prompted the Court to extend the scope of state responsibility. This approach can be justified in several ways. First of all, it should be noted that the Court, operating in specific political and legal contexts, cannot completely isolate itself from the financial arguments that clearly appeared in the discussions in Poland and other CEE countries about the potential scope of reprivatisation and its costs. Secondly, the Court's restrained approach has undoubtedly been the result of the narrow scope of the property rights guaranteed under Protocol No. 1 and, in general, the lack of specific regulations on the protection of the property rights of individuals at the international level. At this point it is worth recalling that Art. 1 of Protocol No. 1 protects only *existing* property and does not provide for a right to *acquire* property. Considering the fact that both in Poland and in other CEE countries private property was transferred under communist rule to the state administration, it would be impossible to maintain the position (regardless of all the nuances of domestic solutions) that such property still belonged to the former owners. Hence, it cannot be excluded that the actual real estate situation prompted the Court to draw the conclusion about the instantaneous nature of nationalisations or expropriations, which in turn significantly limited the application by the Court of the concept of continuous violations with respect to property. Bearing in mind the scale of communist nationalisations and expropriations, the Court has been reluctant to reverse their results. Consequently, the Court's case law deserves full support in this regard.

It is worth mentioning that cases against Poland in which the arguments concerning old compensation promises were raised remained pending before the Court for a relatively long period. Ultimately the Court did not succumb to the temptation to replace the gaps in national legislation with its case law and thereby improve the undoubtedly disadvantageous position of people affected by ownership changes carried out in the distant past and who are not entitled under current Polish law to any kind of compensation. Since the national legislator has not implemented and most likely will not fulfil the political promises of reprivatisation made so far, the Court rightly decided not to cut corners and create, through its case law, proprietary interests that do not exist in Polish law. It must be borne in mind that although the Court's interpretation of the concept of "property" leads to an extension of the scope of rights guaranteed under Protocol No. 1,[67] it cannot lead to the creation of rights that are not rooted in national

[66] 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), p. 60.

[67] M.A. Nowicki, *Wprowadzenie do interpretacji EKPCz* [Introduction to the interpretation of the ECHR], 1 Europejski Przegląd Sądowy 4 (2010), p. 11.

law. The source of the subjective rights protected by Protocol No. 1 may only be the law of the State Party to the Convention.

Unlike the jurisprudence of the ECtHR in relation to cases raising reprivatisation issues against other countries of Central and Eastern Europe, the key complaints against Poland were mainly resolved by the Court by stating its lack of material competence. Undoubtedly, such a result was a consequence of the fact that no general reprivatisation provisions were introduced in Poland, the shape and implementation of which could be subject to evaluation by the ECtHR.

For years the Polish authorities have operated under pressure, mainly created by very active legal representatives, of an upcoming ECtHR ruling that would "change" the course of history and oblige the State to adopt a comprehensive reprivatisation bill. On one hand, these fears were justified by the instability of the national case law and the existence of situations of a pathological or even criminal character surrounding reprivatisation, as well as by the continuous lack of decision-making by the ruling parties as to the need for a comprehensive regulation of the problem. But on the other hand, the fears of the authorities were alleviated by the discernible discouragement on the part of the ECtHR to consider ever new complaints regarding unresolved property issues. However, it seems that with the delivery of the above-discussed rulings, which in a comprehensive manner resolve numerous doubts as to the scope of the obligations incumbent on the authorities in the field of protection of property rights, this period of uncertainty should be considered extinguished. At the same time, the introduction of potential new and sweeping changes to the already applicable provisions, e.g. delineating the circle of beneficiaries or introducing new comprehensive legislation, may be the source of new and finally effective applications.

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RECKONING WITH THE COMMUNIST PAST IN POLAND THIRTY YEARS AFTER THE REGIME CHANGE IN THE LIGHT OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Abstract: *The article discusses the point of interconnection between historical policy and international human rights law standards on the example of a so-called decommunisation Act enacted in Poland in 2016 that reduces retirement pensions and other benefits to individuals who were employed or in service in selected state formations and institutions in 1944-1990, amending the Act adopted in 2009. The Act of 16 December 2016 is analyzed in the light of the standards of the European Convention on Human Rights (ECHR), including relevant standards on coming to terms with the past as an element of transitional justice. The examination concludes that there is a discrepancy between the rationale for adopting this legislation in Poland, namely to reckon with the communist past and as such increase social trust in state institutions, and the legal solutions contained in the 2016 Act.*

Keywords: decommunisation, European Convention on Human Rights, Poland, reduction of retirement pensions, transitional justice

INTRODUCTION

The article discusses whether the legal solutions included in the Act of 16 December 2016 to amend the Law on social security of the functionaries of the Police, Internal Security Agency, Intelligence Agency, Counterintelligence Bureau, Central Anti-corruption Bureau, Border Guards, Government Protection Bureau, National Fire Service and Prison Service and their families[1] (Act of 16 December 2016), which reduced pensions

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[1] Ustawa z dnia 16 grudnia 2016 r. o zmianie ustawy o zaopatrzeniu emerytalnym funkcjonariuszy Policji, Agencji Bezpieczeństwa Wewnętrznego, Agencji Wywiadu, Służby Kontrwywiadu Wojskowego,

and benefits to certain groups of individuals based on place of their service or employment in selected civil and military formations and institutions in Poland from 22 July 1944 to 31 July 1990, comply with applicable standards of the European Convention of Human Rights (ECHR), including notably the relevant standards of reckoning with an undemocratic past, as the European Court of Human Rights (ECtHR) interprets them in its case law.

Almost thirty years after the beginning of Poland's transition to democracy, the Act of 16 December 2016 expanded the scope of and made harsher a mechanism, introduced in 2009,[2] of reducing the retirement pensions paid to those who worked in selected formations and institutions of the communist state, even for a single day, during 1944-1990. The amendment entered into force on 1 October 2017, reducing, in some cases for the second time after the 2009 reduction, the amounts of retirement pensions (*emerytury*). It also set forth reductions of benefits (*renty*).

In the first three months in force alone (from October to December 2017), the new regulation affected more than 56,000 individuals, resulting in almost 25,000 appeals against the decisions to re-calculate pensions and benefits.[3] Since then, these numbers have increased, because the reduction also applied to other persons who retired or were awarded other benefits. This demonstrates a mass character of the reduction for individuals in Poland.

Służby Wywiadu Wojskowego, Centralnego Biura Antykorupcyjnego, Straży Granicznej, Biura Ochrony Rządu, Państwowej Straży Pożarnej i Służby Więziennej oraz ich rodzin [Act of 16 December 2016 to amend the Act on social security of the functionaries of the Police, Internal Security Agency, Intelligence Agency, Counterintelligence Bureau, Central Anti-corruption Bureau, Border Guards, Government Protection Bureau, National Fire Service and Prison Service and their families], Journal of Laws of 2016, item 2270.

[2] Ustawa z dnia 23 stycznia 2009 r. o zmianie ustawy o zaopatrzeniu emerytalnym żołnierzy zawodowych oraz ich rodzin oraz ustawy o zaopatrzeniu emerytalnym funkcjonariuszy Policji, Agencji Bezpieczeństwa Wewnętrznego, Agencji Wywiadu, Służby Kontrwywiadu Wojskowego, Centralnego Biura Antykorupcyjnego, Straży Granicznej, Biura Ochrony Rządu, Państwowej Straży Pożarnej i Służby Więziennej oraz ich rodzin [Act on amendments to the law on old-age pensions of professional soldiers and their families and to the law on old-age pensions of functionaries of the police, the Internal Security Agency, the Intelligence Agency, the Military Counter-Intelligence Service, the Military Intelligence Service, the Central Anti-Corruption Bureau, the Border Guard, the Government Protection Bureau, the State Fire Service, the Prison Service and their families], Journal of Laws 2009, No. 24, item 145.

[3] The Social Insurance Institution of the Ministry of Interior Affairs issued 56,544 decisions about change in from 1 October to 28 December 2017. Source: Minister Spraw Wewnętrznych i Administracji. Odpowiedź na interpelację nr 17033 w sprawie bezczynności dyrektora Zakładu Emerytalno-Rentowego MSWiA dotyczącej odwołań od decyzji o ponownym ustaleniu wysokości emerytur, rent inwalidzkich i rent rodzinnych policyjnych w wyniku wejścia w życie tzw. ustawy dezubekizacyjnej [Minister of Interior Affairs and Administration. Answer to written question no. 17033 regarding inaction of the Director of Social Insurance Institution of the Ministry of Interior Affairs and Administration to appeals against the decisions to re-calculate amounts of retirement pensions, disability benefits and family benefits for members of uniformed forces in result of the so-called *ustawa dezubekizacyjna* entering into force], 9 January 2018.

In the past, the ECtHR found inadmissible as manifestly ill-founded the application of *Cichopek and 1,627 Others v. Poland*[4] that arisen from the implementation of the Act of 23 January 2009. However, against this background, as well as other relevant ECtHR case law, the hypothesis of this article is that the legal solutions included in the Act of 16 December 2016 fail to meet ECHR standards, including those on how to reckon with an undemocratic past in a democratic state ruled by law as time passes since the regime change.

To test the above hypotheses, the remainder of this article proceeds as follows. Part 1 explains the mechanisms of reducing pensions introduced in 2009 and 2016, respectively. Part 2 discusses ECHR standards on reckoning with the past through reduction of retirement pensions to certain categories of individuals. Part 3 analyses the Act of 16 December 2016 in the light of applicable ECHR standards. Part 4 concludes.

1. PENSIONS AND BENEFITS REDUCTIONS AS MEANS OF DECOMMUNISATION IN POLAND

The first mechanism that reduced the amount of retirement pensions paid to certain categories of individuals was adopted later in Poland compared to other former communist neighboring states, including Germany and Czechia, coming two decades after the change of regime.[5] The Act of 23 January 2009 decreased amount of retirement pensions received by individuals who were in service or employed in selected branches of the state in 1944-1990. These were the Military Council of National Salvation (*Wojskowa Rada Ocalenia Narodowego*, WRON), the Government Protection Bureau (*Urząd Ochrony Państwa*, UOP), the Police (including the Citizens' Militia) and organs of state security enumerated in the Art. 2 of the Lustration Act of 18 December 2006:[6] the Department, the Ministry, and the Committee for State Security and its organizational units, the Interior Ministry's central secret security units, the Academy of Interior Affairs, the Intelligence Units of the Border Guards, The Polish Army's Intelligence, the Polish Army's Interior Forces, the Directorate of the II Central Staff of the Polish Army. However, those who could prove that – prior to 1990 – they had cooperated with and actively supported persons or organizations "working for the independence of the Polish State", kept their privileged retirement pensions intact.[7]

[4] ECtHR, *Cichopek and Others v. Poland* (App. Nos. 15189/10, 16970/10, 17185/10, 18215/10, 18848/10, 19152/10, 19915/10, 20080/10, 20705/10, 20725/10, 21259/10, 21270/10, 21279/10, 21456/10, 22603/10, 22748/10 and 23217/10), 6 June 2013.

[5] For a detailed comparative account of pension reduction policies in Central and Eastern Europe, *see* the justification to the judgement of the Constitutional Tribunal, 20 January 2010, no. K 06/09.

[6] Ustawa z dnia 18 października 2006 r. o ujawnianiu informacji o dokumentach organów bezpieczeństwa państwa z lat 1944-1990 oraz treści tych dokumentów [Act of 18 October 2006 on the disclosure of information on state security authorities' documents from 1944–1990 along with their contents], Journal of Laws of 2006, No. 218, item 1592.

[7] Judgement of the Constitutional Tribunal, 20 January 2010, K 06/09.

The Act of 23 January 2009 amended laws enacted in 1993[8] and 1994,[9] which regulated a special system of retirement pensions designed for functionaries (*emerytury policyjne*). In this special system, a more advantageous mechanism was used to calculate the amount of retirement pensions than in the universal system of pensions: a person was entitled to a retirement pension after 15 years of service or work in the amount of 40% of the assessment basis of the pension (usually, the assessment basis of the pension is the amount of the final salary). Moreover, for every additional year of service an additional 2.6% of the assessment basis of the pension was added.[10] The Act of 23 January 2009 decreased the multiplier used to calculate pensions in this privileged system from 2.6% to 0.7%. The rationale was that it was unfair that individuals who were in service or employed in branches of the communist state responsible for or linked to gross human rights violations, continue to be rewarded in democratic Poland by receiving pensions that are considerably higher than the average pensions received from the universal system of pensions.

The Polish Constitutional Tribunal (CT) emphasized that the legislator must always employ means formally and substantially compatible with rule of law standards[11] and that when a democratic state adopts legislation aimed at coming to terms with the legacy of totalitarianism – unless the new state complies with the rule of law requirements – it cannot claim superiority over the previous totalitarian regime[12] and it should especially abstain from introducing legislation that would satisfy the need for revenge rather than aim at justice.[13] Consequently, no desired historical policy warrants disrespecting constitutional and international human rights commitments. The CT underscored that

[8] Ustawa z dnia 10 grudnia 1993 r. o zaopatrzeniu emerytalnym żołnierzy zawodowych oraz ich rodzin [Act of 10 December 1993 on social security of professional soldiers and their families], Journal of Laws of 2004, No. 8, item 66, as amended.

[9] Ustawa z dnia 18 lutego 1994 r. o zaopatrzeniu emerytalnym funkcjonariuszy Policji, Agencji Bezpieczeństwa Wewnętrznego, Agencji Wywiadu, Służby Kontrwywiadu Wojskowego, Służby Wywiadu Wojskowego, Centralnego Biura Antykorupcyjnego, Straży Granicznej, Straży Marszałkowskiej, Służby Ochrony Państwa, Państwowej Straży Pożarnej, Służby Celno-Skarbowej i Służby Więziennej oraz ich rodzin [Act of 18 February 1994 on Social Security of the Police, Internal Security Agency, Intelligence Agency, Counterintelligence Bureau, Central Anti-corruption Bureau, Border Guards, Government Protection Bureau, National Fire Service and Prison Service, amended on 16 December 2016 and 11 May 2017], Journal of Laws of 1994, No. 53, item 214.

[10] *E.g.* if someone was employed for 15 years and the assessment basis of the pension was PLN 1,000, the retirement pension was PLN 400; PLN 26 was added for each one next year or employment.

[11] *See* Justification to Wyrok Trybunału Konstytucyjnego [Constitutional Tribunal Judgment], 24 February 2010, no. K 6/09: "The passage of time from regaining sovereignty by the Polish state in 1989, while not without significance, nevertheless cannot be a decisive criterion for deciding on the constitutionality of regulation adopted by the Legislator to reckon with the past. There is no article in the Constitution that would ban the introduction of such regulation. The Constitution does not set time limits for reckoning with the past concerning the communist regime. It is not a competence of the Tribunal to take a stance whether, how, and when the Legislator in democratic Poland can introduce regulations concerning reckoning with the past. Such limits are set by the principles of democratic state ruled by law."

[12] Judgement of the Constitutional Tribunal, 11 May 2007, K 2/07.

[13] Judgement of the Constitutional Tribunal, 24 February 2010, K 6/09.

while it is "not its competence to take a stance whether, how and when the Legislator in democratic Poland can introduce regulations concerning reckoning with the past" the limitations to such reckoning are "set by principles of democratic state ruled by law."[14] The unique context of the transition period did not dispense with the obligation to also apply the standards of a democratic state ruled by law and human rights to those responsible for the previous undemocratic regime that abused human rights.

In 2010, the CT confirmed that introducing a mechanism of reducing the amount of pensions as a form of reckoning with communist past complies with the democratic Constitution of the Republic of Poland of 2 April 1997 (the Constitution). The CT emphasized that there are no statutory limitations to introduce mechanisms aimed at reckoning with undemocratic past, even as the times passes since the end of the regime. However, the CT stressed that the measures must conform to the principles, standards, and values of a democratic state ruled by law. The CT considered that the means employed in the Act of 23 January 2009 have an objective and reasonable justification in Poland's historical experience during the communist period and they realized a legitimate aim, which was to end the operation of the existing system of unearned retirement pensions privileges. Nonetheless, the CT found that article 15b of the Act of 23 January 2009, that reduced the pensions of professional soldiers who were part of the Military Council of National Salvation (WRON) was incompatible with the principle of equality before the law and the prohibition of discrimination in Art. 32 of the Constitution. The CT found that members of WRON did not receive privileged pensions in a democratic Poland before the Act of 23 January 2009 entered into force, in the sense that they received pensions adequate for all other functionaries of the uniformed services. Therefore the CT contended that the reduction of pension amounts in this context would be discriminatory. This outcome was highly politically sensitive, as members of WRON were high level functionaries of the communist state responsible for introducing martial law that was in force from 1981-1983; a de facto *junta* that ruled the country at the time of some of the most gross human rights violations in the second half of the twentieth century.[15] Other provisions of the Act of 13 January 2009 remained in force. In 2013, the ECtHR found the application *Cichopek and 1,627 others v. Poland* – that had arisen from a pension reduction under the Act of 23 January 2009 – inadmissible. In the decision, the ECtHR referred to the judgment of the CT in a case K 06/09. The system introduced by the Act of 13 January 2009 operated in Poland until the 1 October 2017.

In 2016, lawmakers renewed interest in conducting state historical policy with the means of law[16] and revisited the idea of reckoning with the communist past by

[14] Judgement of the Constitutional Tribunal, 24 February 2010, K 6/09.

[15] *See* W. Kulesza, *The Trial of General Jaruzelski Justice of the Victors, or the Victory of Justice?*, in: *Crimes of the Communist Regimes: Proceedings of an International Conference Held in Prague, 24–26 February 2010*, Ústav pro studium totalitních režimů: 2010, pp. 305-312.

[16] More on the practice: A. Gliszczyńska-Grabias, G. Baranowska, A. Wójcik, *Law-Secured Narratives of the Past in Poland in Light of International Human Rights Law Standards*, 38 Polish Yearbook of International Law 59 (2018).

further reducing pensions – as well as other benefits – to certain categories of individuals. The necessity of amending the relevant existing regulation was framed as a way of finalizing or accomplishing a belated "decommunisation", understood as process of undoing and discarding the remnants of the undemocratic communist regime as a political, economic, and social phenomenon.[17] In 2016-2017, a series of so-called decommunisation laws was adopted in Poland, that included an act compelling the change of names of streets and public buildings on a mass scale, and removal of certain monuments,[18] plus the Act of 16 December 2016 that is subject to analysis in this article.

The legislature argued that the legal solutions included in the Act of 23 January 2009 were not effective enough to achieve the goal of abolishing the remaining privileges in pensions and benefits that related to work in the security apparatus of the communist Poland, and that solutions included in the amending act would result in considerable progress towards this goal.[19] It was also claimed that a legal system in which former functionaries of the state security and members of WRON (who were not subject to reduction of pensions following the CT judgment K 06/09) maintain privileged retirement pensions while many individuals who fought for freedom, independence, and human rights under communism in Poland, are today in a difficult financial situation, is unacceptable. It was also argued that such privileges are commonly perceived in Poland as violating social justice, although this claim was not supported by any empirical evidence, such as results of public opinion polls.

In the Act of 16 December 2016, the legislator put the "decommunisation" element in sharp relief, describing the form of governance in Poland in 1944-1990 as "a totalitarian state." Such wording, which is not typically used in historical or political science to describe the whole of this period – to the contrary, years 1956-1989 are described as post-totalitarian authoritarianism[20] – expresses a very strong negative assessment of a non-sovereign and non-democratic state in that period and implies that any remaining privileges related to it should be abolished.

The Act of 16 December 2016 states that the reduction applies to those entitled to both retirement pensions (*emerytury*) as well as other benefits (*renty*), including disability benefits (*renty inwalidzkie*) and family benefits (*renty rodzinne*). As such, the

[17] More on decommunisation: S. Pomorski, *Meanings of Decommunization by Legal Means*, 22(3) Review of Central and East European Law 336 (1996); A. Czarnota, *Decommunisation and Democracy: Transitional Justice in Post-communist Central-Eastern Europe*, in: S. Eliaeson, L. Harutyunyan, L. Titarenko (eds.), *After the Soviet Empire: Legacies and Pathways*, Brill, Leiden: 2005, p. 166.

[18] Ustawa z dnia 1 kwietnia 2016 r. o zakazie propagowania komunizmu lub innego ustroju totalitarnego przez nazwy jednostek organizacyjnych, jednostek pomocniczych gminy, budowli, obiektów i urządzeń użyteczności publicznej oraz pomniki [Act of 1 April 2016 on prohibiting the propagation of communism or other totalitarian regime through names of buildings, objects, and public service devices], Journal of Laws of 2016, No. 744.

[19] Justification to the draft Act of 16 December 2016, p. 5.

[20] *See* L. Mażewski, *Posttotalitarny autorytaryzm w PRL 1956–1989. Analiza ustrojowo polityczna* [Post-totalitarian authoritarism in PPR 1956-1989], Arte, Warszawa-Biała Podlaska: 2010.

regulation diminishes the amount of benefits available not only to those who were "in service to the totalitarian state" themselves, but also to their family members: spouses and descendants.

The Act of 16 December 2016 entailed reductions of pensions and benefits to those who served or were employed from 22 July 1944 to 31 July 1990 in military and civilian formations and institutions of the so-called "totalitarian state" in Poland, such as:

- the communist state security organs, notably the Department, the Ministry, and the Committee for State Security with its subordinated formations and organizational units, such as the Citizens' Militia;
- the Interior Ministry, its units and agencies, including those involved in intelligence and counter intelligence and fulfilling various tasks for the state security services (such as Investigative Office or Department for Protection of the Constitutional Order of the State), as well as providing state security services with technical equipment and data, responsible for education, training and human resources for the state security services;
- organization units of the Ministry of National Defense, including army intelligence units, borders protection units, units of the General Staff of the Polish Armed Forces (importantly, the Act does not apply to persons who were compulsory drafted to the Polish Army);
- those employed in the Ministry of Interior Affairs, managerial staff of various local units of the state security services, as well as those in vocational schools, undergoing training to join the state security services; state security functionaries on official or secret postings abroad.

The pensions and benefits reductions also applied to technical or auxiliary staff of these institutions. Similarly to the Act of 23 January 2009, the Act of 16 December 2016 also made exemptions for all those able to prove their "active cooperation with persons or organizations acting in favor of the independence of the Polish State" as well as for those who received a prison or detention sentence for their political activity (an information provided by the Institute of National Remembrance – the Commission to Investigate Crimes Against the Polish Nation, the INR, or a court judgment or decision are considered to be adequate proofs). An exemption was included for persons who were drafted to the indicated institutions and formations within the framework of the compulsory defense service (which applies, among others, to doctors and other medicine professionals). Furthermore, the Interior Minister has been granted special powers to exclude a person from a diminished amount of pension or benefits under two circumstances: when a person could prove they were only briefly in the service of the "totalitarian state" (*służba krótkotrwała*) or if they performed exemplary service for the democratic Poland after 12 September 1990, in particular in service dangerous for health and life. However, those two exemptions depend on an assessment by the Interior Minister; they are not automatic. Moreover, there is no agreement on what counts as "a brief period of service."

The regulation sets the multiplier used to calculate pensions at 0.00% of the assessment basis of the pension for each year in service to the "totalitarian state" from 22 July 1944 to 31 July 1990 for all who were in service to the "totalitarian state", also for those who continued service before 2 January 1999 (a multiplier of 2.6% of the assessment basis of the pension is used for all years of work *outside* of formations and institutions enumerated in Act of 16 December 2016 and for years of work after 2 January 1999). The assessment basis of the pension is 40% of the salary during 15 years in service.

Therefore under the Act of 16 December 2016, persons receive a retirement pension, but in some individual cases persons affected by this reduction suffered a drastic decrease in the amount of pensions or benefits received, which may even cause their destitution, in the context of individual personal situations and costs of living in today's Poland. In some cases this reduction applied to elderly, vulnerable people, with no possibilities to earn additional income. The Act of 16 December 2016 also eliminated a mechanism that those who acquired disabilities because of their service in 1944-1990 are entitled to an increase by 15% of the assessment basis of the pension.

Moreover, the Act of 16 December 2016 introduced a cap on the amounts of pensions and benefits, which cannot in any case exceed the average amount of retirement pensions or benefits paid from the universal system of pensions in Poland in a given year.[21] As a result, those, who on the basis of their contributions to social insurance system after 1990 were entitled to a retirement pension higher than an average one, have their pensions reduced to the average amount, which is removed from the stated purpose of the legislation to eliminate only privileges in relation to work in 1944-1990.

Furthermore, recall that some individuals had already had their pensions reduced under the Act of 23 January 2009, which lowered the multiplier used to calculate pensions from 2.6 to 0.7% of the assessment basis of the pension for service in 1944-1990. Therefore, under the Act of 16 December 2016, the amounts of their pensions were reduced for the second time, without new facts or circumstances being provided to justify it.

Importantly, the reduction is conditional only upon documented service or employment in the selected institutions and formations of the "totalitarian state." The Institute of National Remembrance – the Commission to Investigate Crimes Against the Polish Nation (INR)[22] prepares the information about the terms of service. On the basis of this

[21] In 2018, this was PLN 2,179.28 for retirement pensions. It is noteworthy that the amount of retirement pensions in Poland varies significantly: a small percentage of people receives pensions of around PLN 5,000.00 per month or more, but the largest group of people receives around PLN 1,100.00 per month. Source: Zakład Ubezpieczeń Społecznych [Social Insurance Institution], *Struktura wysokości emerytur i rent w marcu 2018 roku* [Structure of amount of pensions and benefits in March 2018], available at: https://bit.ly/31NxTvk (accessed 30 June 2020).

[22] On the INR *see* I. Goddeeris, *History Riding on the Waves of Government Coalitions: The First Fifteen Years of the Institute of National Remembrance in Poland (2001–2016)*, in: B. Bevernage, N. Wouters (eds.), *The Palgrave Handbook of State-Sponsored History After 1945*, Palgrave Macmillan, London: 2018; G. Mink, *Is There a New Institutional Response to the Crimes of Communism? National Memory Agencies in*

information, the Social Insurance Institution of the Ministry of Interior and Administration (*Zakład Emerytalno-Rentowy Ministerstwa Spraw Wewnętrznych i Administracji*, ZER MSWiA) issues a decision about changing the amount of pensions or benefits and notifies the recipients. The decision can be appealed to the District Court in Warsaw within thirty days from the day of receiving notification. The burden of proof is on the plaintiff, who is obliged to prove that the character of their work for the state exempts them from the Act of 16 December 2016. Plaintiffs should first issue complaints to the Director of the Pensions and Benefits Department of the Ministry of Interior Affairs and Administration, who is mandated to direct complaints to the XII Department of the District Court in Warsaw.[23] As it was mentioned above, in the first three months of the Act of 16 December 2016 being into force, more than 25,000 appeals were directed to courts against ZER MSWiA decisions about re-calculating the amount of retirement pensions or benefits.

In January 2018, the District Court of Appeals in Warsaw demanded the CT to verify whether the provisions of the Act of 16 December 2016 comply with the principle of a democratic state ruled by law (Art. 2 of the Constitution) and the principle of equality and prohibition of discrimination (Art. 32 of the Constitution).[24] The District Court of Appeals also questioned the legality of the Act, since an investigation was led into the process of its adoption.[25] As of the end of July 2020, the CT has not yet handed down a ruling in the case P 4/18. The protracted proceedings in the CT resulted in courts withholding rulings in particular cases regarding reductions of retirement pensions and benefits. Interpreting the reasons behind the CT's protracted deliberations on the provisions challenged – which have been directly affecting the enjoyment of rights of tens of thousands of individuals – is beyond the scope of this article.[26] Awaiting the CT's ruling, common courts in Poland issued questions related to provision

Post-Communist Countries: The Polish Case (1998–2014), with References to East Germany, 45(6) Nationalities Papers 1013 (2017).

[23] Wystąpienie Rzecznika Praw Obywatelskich do Ministra Spraw Wewnętrznych i Administracji, [Communication of Human Rights Commissioner to Minister of Interior Affairs and Administration], No. WZF.7060.1204.2017.TO, 3 February 2018.

[24] Case in the Constitutional Tribunal, P 4/18.

[25] The Act of 16 December 2016 was voted in during a sitting of Sejm outside of the regular plenary chamber. The Marshal of Sejm and members of the Marshal Guard were investigated over the alleged abuse of power by the Prosecutor's Office, which eventually discontinued its investigations. The case was reopened by the decision of District Court in Warsaw, Sąd Okręgowy w Warszawie, 18 December 2017, VIII Kp 1335/1. *See* R. Balicki, *O sejmowym posiedzeniu, którego nie było – uwagi na marginesie obrad w Sali Kolumnowej w dniu 16 grudnia 2016 r.* [On the Sejm sitting which did not take place – Comments about the meeting in the Column Hall on 16 December 2016], 40 Gdańskie Studia Prawnicze 413 (2018).

[26] On the CT in Poland after 2015, *see* T. Koncewicz, *The Capture of the Polish Constitutional Tribunal and beyond: Of institution(s), Fidelities and the Rule of Law in Flux*, 43(2) Review of Central and East European Law 116 (2018); T. Koncewicz, *Of Institutions, Democracy, Constitutional Self-defence and the Rule of Law: The Judgments of the Polish Constitutional Tribunal in Cases K 34/15, K 35/15 and beyond*, 53(6) Common Market Law Review 1753 (2016); A. Młynarska-Sobaczewska, *Polish Constitutional Tribunal Crisis: Political Dispute or Falling Kelsenian Dogma of Constitutional Review*, 23(3) European Public Law 489 (2017).

of the Act of 16 December 2016 to the Supreme Court,[27] ruled on reversing the decision about retirement pensions and benefits reductions, and engaged with a dispersed constitutional review of the provisions of the Act of 16 December, referring directly to the Constitution and relevant standards of international law, specifically those of the ECHR.[28]

2. THE EUROPEAN CONVENTION ON HUMAN RIGHTS STANDARDS REGARDING RECKONING WITH THE PAST AND REDUCTION OF PENSIONS

The ECHR standards relevant for the analysis of the legal solutions in the Act of 16 December 2016, include – but are not limited to – requirements regarding proportionality of transitional justice measures, especially in the context of the time elapsed from the change of regime, as well as standards concerning interference with property rights in the context of a state deciding to grant welfare provisions such as retirement pensions or other benefits to individuals.

The ECtHR generally considered that national authorities have indispensable knowledge of the historical background and sufficient understanding of context and nuance to be able to introduce necessary and proportionate solutions to reckon with the past, which the ECtHR may lack.[29] The ECtHR usually held that its role is to correct elements of policies adopted by states in transition, but it abstained from significantly reversing such policies or proposing alternatives. It has been willing to grant a wide margin of appreciation to state authorities and, significantly, has never recognized an obligation to introduce any mechanisms of transitional justice. For instance in *Sfountouris and Others v. Germany*,[30] a case regarding a demand from a Greek national to receive compensation from Germany for the World War II wrongdoings, the ECtHR

[27] Court of Appeals in Białystok in a case III AUa 499/19 directed a question to the Supreme Court (III UZP 11/19).

[28] *See* decisions of the courts of appeals: (i) Decision of Court of Appeals in Warsaw, 23 August 2018, AUz 821/18; (ii) Decision of Court of Appeals in Katowice], 8 July 2019, III AUz 236/19; (iii) Decision of Court of Appeals in Kraków], 20 August 2019, III AUz 138/19; (iv) Decision of Court of Appeals in Lublin, 4 October 2019, III AUz 145/19; (v) Decision of Court of Appeals in Łódź, 9 December 2019, III AUz 362/19; (vi) Decision of Court of Appeals in Rzeszów, 30 May 2019, III AUz 41/19; (vii) Decision of Court of Appeals in Gdańsk, 22 October 2019, III AUz 311/19; (viii) Decision of Court of Appeals in Łódź, 23 December 2019, III AUz 131/19; (ix) Decision of Court of Appeals in Warsaw, 16 December 2019, III AUz 594/19; (x) Decision of Court of Appeals in Szczecin, 25 September 2019, III AUz 81/19; (xi) Decision of Court of Appeals in Białystok, 21 November 2019, III AUz 149/19; (xii) Decision of Court of Appeals in Warsaw, 6 December 2019, III AUz 11xx/19; (xiii) Decision of Court of Appeals in Warsaw, 17 January 2020, III AUz 1194/19; (xiv) Decision of Court of Appeals in Poznań, 2 August 2019, III AUz 104/19; (xv) Decision of Court of Appeals in Poznań, 2 August 2019, III AUz 117/19; (xvi) Decision of Court of Appeals in Katowice, 28 August 2019, III AUz 331/19.

[29] ECtHR, *Ždanoka v. Latvia* (App. No. 58278/00), 16 March 2006, para. 96.

[30] ECtHR, *Sfountouris and Others v. Germany* (App. No. 24120/06), 31 May 2011.

confirmed that the ECHR does not impose any specific obligation upon contracting states to redress injustice or damage caused by their predecessors. However, the ECtHR has been supportive of some transitional justice measures, notably restitution of property[31] and awarding compensation to individuals for crimes committed by another state.[32]

While the ECtHR has not disputed the necessity of transitional justice mechanisms adopted in ECHR contracting states, it has frequently ruled on their proportionality under ECHR.[33] Buyse and Hamilton influentially – and rightfully – contested the idea that there has ever been any "transitional justice exceptionalism", understood as a wider margin of appreciation accorded by the ECtHR to states in Central and Eastern Europe that underwent a transition to democracy.[34] Usually the ECtHR considered that even the particular historical context of the transition to full democracy does not warrant any lesser scrutiny against ECHR standards.[35] However, there have been cases, for example *Rekvényi v. Hungary*, where the ECtHR contended that the "particular history" may justify certain restrictions on political freedoms, in order to consolidate and safeguard democracy, when such measures are answering a pressing social need.[36] In *Ždanoka v. Latvia*, a case concerning the prohibition of standing for elections by members of the communist party before 1991, the ECtHR highlighted the "special socio-political context" of such restrictions of political rights.[37] Nonetheless, the ECtHR also underlined that factors, such as historical and political context changing over time, may – and should – influence assessments of the same measure in the years to come. In *Rainys and Gasparavičius v. Lithuania*, the ECtHR described lustration laws adopted a decade after a change of regime as "very belated."[38] At the same time, the ECtHR underscored that the fact that these measures were not introduced immediately after the change of regime does not automatically entail their incompatibility with ECHR and that it was reasonable that the legislator did not rush and took time to reflect on what measures were best to help embed democracy in a newly democratic state.[39] In *Adamsons v. Latvia*,[40] the ECtHR found that restrictions to electoral rights were justified in the specific

[31] ECtHR, *Zvolský and Zvolská v. the Czech Republic* (App. No. 46129/99), 12 February 2003.

[32] For example, in *Epstein and Others v. Belgium*, the ECtHR approved Belgium's awarding of compensation for Jewish and Roma victims of the German Nazi policies implemented during the World War II, provided that claimants were Belgian nationals. *See* ECtHR, *Epstein and Others v. Belgium* (App. No. 9717/05), 8 January 2008, para. 3.

[33] E. Brems, *Transitional Justice in the Case Law of the European Court of Human Rights*, 5(2) International Journal of Transitional Justice 282 (2011).

[34] A. Buyse, M. Hamilton, (eds.). *Transitional Jurisprudence and the ECHR: Justice, Politics and Rights*. Cambridge University Press, Cambridge: 2011, p. 4.

[35] ECtHR, *Affaire Linkov c. République tchèque* (App. No. 10504/03), 7 December 2006, para. 37.

[36] ECtHR, *Rekvényi v. Hungary* (App. No. 25390/94), 20 May 1999, para. 48.

[37] *Ždanoka v. Latvia*, para. 115.

[38] ECtHR, *Rainys and Gasparavičius v. Lithuania* (App. Nos. 70665/01, 74345/01), 7 April 2005, para. 36.

[39] *Ždanoka v. Latvia*, para. 131.

[40] ECtHR, *Adamsons v. Latvia* (App. No. 3669/03), 24 June 2008.

context of the early years of transition, but it also made a far-reaching reservation that with the passage of time, a general suspicion towards a group of persons based solely on their conduct in the past will no longer suffice and the authorities would have to provide further arguments and evidence to justify introducing the restriction of rights. The ECtHR gave the reminder that when it comes to matters affecting property rights, "the public authorities must act in good time and in an appropriate and above all consistent manner."[41]

The ECtHR also found that any rights restrictions must be assessed in the context of the political evolution of the country.[42] In *Ždanoka v. Latvia*, the ECtHR emphasized that an ongoing periodic review of such restrictions should take place to answer whether they are needed for the purpose of building confidence in new democratic institutions.[43] In *Sõro v. Estonia*, the ECtHR considered the passage of several years from restoration of the independence of Estonia to the public disclosure that the applicant was employed as driver in the security services was an important factor for assessing the impugned measure's alignment with ECHR. In this case, the ECtHR held that "any threat the former servicemen of the KGB could initially pose to the newly created democracy must have considerably decreased with the passage of time."[44]

There is no positive obligation placed on states under ECHR to provide welfare benefits and assistance. Reduction of pensions and benefits is a recognized transitional justice[45] measure under ECHR, provided that it meets proportionality standards as well as all procedural standards and is introduced as a means to safeguard and embed democracy and human rights in a country in transition to full democracy. Diverse mechanisms of pension reductions have been adopted within the Council of Europe after 1989 in regard to individuals who held privileged positions in the undemocratic state and in result have been also entitled to advantageous amount of pensions after the change of regime. The reasoning behind such mechanisms is usually that without a certain restriction of rights, in this case the acquired right to pension or benefit, some individuals would continue to unfairly benefit from their past links to certain discredited branches of the undemocratic state. Therefore, the ultimate aim of mechanisms of pension reduction is to increase the fairness of the social security system and thus general social trust in the institutions of a new, and often fragile, democratic state.

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[41] ECtHR, *Bogdel v. Lithuania* (App. No. 41248/06), 26 November 2013, para. 66.

[42] *Ždanoka v. Latvia*, para. 106.

[43] *Ibidem*, para. 134.

[44] ECtHR, *Sõro v. Estonia* (App. No. 22588/08), 3 December 2015, para. 62.

[45] Transitional justice is understood here after Ruti Teitel, who influentially defined it as "the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes." According to the definition in: *Max Planck Encyclopedia of Public International Law*, "transitional justice" involves a set of mechanisms through which a new democratic government that has emerged from a dictatorship or from civil conflicts seeks to deal with its dark past (R. Teitel, *Transitional Justice Genealogy*, 16 Harvard Human Rights Journal 69 (2003); W.-Ch. Chang, Y.-L. Lee, *Transitional Justice: Institutional Mechanisms and Contextual Dynamics*, in: *Max Planck Encyclopedia of Public International Law* (2016), accessible online.

The ECtHR finds it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one. In general, the ECtHR considers that states are the sole judges of the necessity of interference with property rights, and that the ECtHR may supervise only the lawfulness and proportionality of the restrictions. This is because national authorities, for the reason of their direct knowledge of society and its needs, are better equipped to determine social and economic policy "in the public interest,"[46] understood as encompassing "measures which would be preferable or advisable, and not only essential, in a democratic society."[47] The ECtHR typically does not challenge the social and economic policies of national authorities, unless, as in *Stec and Others v. United Kingdoms*, such policies are "manifestly without reasonable foundation,"[48] which means that they are so arbitrary, that they cannot possibly be justified. However, the ECtHR underscored that "there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realized by any measures applied by the State, including measures depriving a person of his or her possessions."[49]

The ECtHR ruled on retirement pensions and benefits in the context of a right to property in several cases that arose in the wider context of transitional justice processes. For instance in 2009 in the case *Andrejeva v. Latvia*, the ECtHR confirmed that the interest of the applicant in receiving a retirement pension from the democratic Latvian state for her years of service for enterprises based in the territory of the former USSR, but outside Latvia, falls within the ambit of Art. 1 of Protocol No. 1 to the ECHR.[50] The ECtHR emphasized that Protocol No. 1 does not limit the freedom of national authorities to decide whether to introduce a social security system, how to structure it, and what types and amounts of benefits to provide for persons that fall under the scope of the system. However, when the state introduces legislation that establishes such a system, it generates a pecuniary interest for persons who satisfy its requirements.[51] The ECtHR confirmed the possibility of reductions in social security entitlements in certain circumstances and noted the significance of the passage of time for the legal existence and character of benefits. Furthermore, in 2016 the ECtHR ruled in *Béláné Nagy v. Hungary*, a case concerning losing a disability pension without a substantial change in health status, but due to a different methodology of calculating pensions,[52] and emphasized that states introduce relevant regulations and amendments in response to changes in society and evolving views on the categories of persons who are considered as needing assistance, and also to the evolution of the situation of individuals. The

[46] W. Schabas, *The European Convention on Human Rights: A Commentary*, Oxford University Press, Oxford: 2015, p. 975.

[47] ECtHR, *Handyside v. United Kingdom* (App. No. 5493/72), 7 December 1976, para. 62.

[48] ECtHR, *Stec and Others v. United Kingdom* (App. Nos. 65731/01, 65900/01), 12 April 2004, para. 55.

[49] ECtHR, *Kozacıoğlu v. Turkey* (App. No. 2334/03), 19 February 2009, para. 63.

[50] ECtHR, *Andrejeva v. Latvia* (App. No. 55707/00), 18 February 2009, para. 75.

[51] *Ibidem*, para. 77.

[52] ECtHR, *Béláné Nagy v. Hungary* (App. No. 53080/13), 13 December 2016.

ECtHR underscored that when a benefit is reduced or discontinued, this may constitute interference with possessions, which requires justification by the state. Importantly, the ECtHR emphasized that the margin of appreciation does not allow the state to completely deprive an individual of the once-granted entitlement and that the overall outcome of the reduction must not leave individual without means of subsistence.

The European Commission of Human Rights (EComHR) and the ECtHR considered applications that arose in Poland in the context of eliminating privileged benefits to certain individuals by various legal acts adopted after 1989. The Strasbourg Court commonly held that that the means employed by the Polish legislator were justified given Poland's historical experience during the communist period and realized a legitimate aim, which was to regulate the operation of the existing system of exceptional privileges to some individuals. Notably, the EComHR decided on applications by former Polish functionaries of "public security apparatus or military information" from the years 1944-1956 relating to Art. 21(2)(4a) and Art. 26 of the Act of 24 January 1991 on Veterans,[53] that deprived them of the so called "veteran benefit", among others for their "participating in the armed struggle to consolidate the people's power" in Poland during and in the aftermath of the World War II.[54] The EComHR, in the decision of 16 April 1998 found the application *Styk v. Poland*[55] inadmissible, highlighting that the loss of additional benefit, while retaining a retirement pension under the universal social insurance system, is only a loss of privileged status and does not affect property rights that result from the social insurance system in a manner contrary to Art. 1 of Protocol No. 1 to the ECHR. In the decision, the EComHR acknowledges that the communist-era provisions concerning war veterans were amended to condemn the political role that the communist security services had played in establishing the communist regime and the repression of political opposition in Poland. Likewise, the EComHR also considered the application *Bieńkowski v. Poland*[56] inadmissible, arguing that the applicant's pension right was not impaired. It also found inadmissible an application by a former functionary in the Ministry of Public Security (*Ministerstwo Bezpieczeństwa Publicznego*) and the Committee for Public Security (*Komitet Do Spraw Bezpieczeństwa Publicznego*) in *Domalewski v. Poland*.[57] According to the EComHR, the loss of "veteran status" did not result in the essence of the pension rights being impaired, and that divesting the applicant of "veteran status" did not amount to discrimination contrary to Art. 14 ECHR. Furthermore, the Commission observed that

[53] Ustawa z dnia 24 stycznia 1991 r. o kombatantach oraz niektórych osobach będących ofiarami represji wojennych i okresu powojennego [Act of 24 January 1991 on war veterans and certain other persons who were victims of war and post-war repression], Journal of Laws of 1991, No. 17, item 75.

[54] *See also* J.A. Sweeney, *The European Court of Human Rights in the Post-Cold War Era: Universality in Transition*, Routledge, London: 2013, p. 106.

[55] ECtHR, *Styk v. Poland* (App. No. 28356/95), 16 April 1998.

[56] ECtHR, *Bieńkowski v. Poland* (App. No. 33889/96), 9 September 1998.

[57] ECtHR, *Domalewski v. Poland* (App. No. 34610/97), 15 June 1999.

> under the Law of 24 January 1991 on Veterans and Other Victims of War and Post-war Repression, the applicant, in the same way and on the same conditions as all other persons who had previously been employed or had served in the former Communist organs of the public security service, was excluded from the privileged group of "veterans" in view of the political role played by those organs in preserving totalitarian rule and combating and eliminating political opposition to the former regime.[58]

The EComHR also emphasized that the "the statutory measures taken by the Polish State in respect of such persons were primarily aimed at an objective verification of whether those who had served in organs commonly regarded as a machinery of repression satisfy the present statutory conditions for being awarded a special honourable status."[59] It stressed that the decision of the democratic legislator to withdraw privileges for policemen who served during the communist and Stalinist regimes were justified by public interest.

In 2009 in *Rasmussen v. Poland*,[60] a case about the loss of status of a retired judge following a court decision that the applicant's lustration declaration did not conform to facts, and subsequent related loss of a special retirement pension equivalent to 75% of the last full salary (*sędziowski stan spoczynku*) every month (which was attached to the status of retired judge), the ECtHR considered that there was no interference with the applicant's right to the peaceful enjoyment of her possessions within the meaning of Article 1 to Protocol No. 1 to the ECHR. The applicant was granted a partial disability benefit (*renta z tytułu częściowej niezdolności do pracy*) and later an ordinary retirement pension. Therefore, the ECtHR found that the applicant was not deprived of a property right.

Importantly, in 2013 the ECtHR found an application originating from a pension reduction following implementation of the Act of 23 January 2009 inadmissible. In the decision regarding *Cichopek and 1,627 others v. Poland* the ECtHR explained that the pension reduction system introduced by the Act of 13 January 2009 in Poland did not impose an excessive burden on the applicants, as they did not suffer a loss of means of subsistence or a total deprivation of benefits, while the scheme remained more advantageous than other pension schemes from the universal system of pensions. Moreover, the ECtHR emphasized that the fact of serving in the secret police forces of the Polish People's Republic – a formation directly responsible for gross violations of human rights protected by the ECHR – is a justifiable criterion for reducing pensions. The ECtHR also stated that the elimination of pension privileges enjoyed by some members of the former communist political police can contribute to greater fairness of the pension system, provided that all procedural guarantees are met throughout the process of reductions' implementation. In the decision of inadmissibility in *Cichopek*, the ECtHR did not raise the issue of right to fair trial, although the reduction of pensions was automatic, based on the place of employment, and not based on court decision.

[58] *Ibidem*.

[59] *Ibidem*.

[60] ECtHR, *Rasmussen v. Poland* (App. No. 38886/05), 28 April 2009.

3. ACT OF 16 DECEMBER 2016 IN THE LIGHT OF THE ECHR

A careful analysis of the Act of 16 December 2016 reveals its numerous shortcomings, which result in the act's incompatibility with the standards of the ECHR.[61] In the justification to the draft bill, the drafters argued that the planned legal solutions would not have a repressive character, but would only to eliminate unearned retirement privileges. It was emphasized that a retirement pension or benefit will not be not annulled, but decreased. An argument was raised that the previous system of reducing pensions did not lead to accomplishing the goal of reducing pensions privileges for those who worked in the state security organs.

The ECtHR emphasized that all measures of reckoning with an undemocratic past must meet all substantial and procedural requirements, including individualized assessment of guilt, responsibility, and proportionate penalty for conduct in the past. Therefore a collective application of restrictions to rights to individuals does not comply with the goals of transitional justice as ECtHR understands it.[62] The fundamental flaw of both the Act of 23 January 2009 and the Act of 16 December 2016 – which the ECtHR did not engage with when deciding on inadmissibility of the *Cichopek* application – is that they entail reductions of pensions or benefits without a prior individualized assessment by an independent court (which would be compliant with fair trial guarantees) of the role performed by, and conduct of, individuals who were in service to "the totalitarian state in Poland in 1944-1990." This infringes upon the right to a fair trial, including the presumption of innocence (Art. 45 of the Constitution and Art. 6 ECHR). The reduction is based solely on information about the place of work in the indicated time period, provided by the INR, which is not a court.[63] The INR transfers the relevant information to the Social Insurance Institution of the Ministry of Interior Affairs and Administration (ZER MSWiA), which does not verify its truthfulness and accuracy, and issues a decision about re-calculating of the amounts of retirement pensions and benefits automatically. The information concerns events that took place in the distant past and may be unreliable and incomplete. Both acts – those enacted in 2009 and 2016 alike – failed to guarantee individualized assessment of responsibility by an independent court. They do not specify any evidentiary criteria or requirements, nor do they require adversarial proceedings or individualized reasoning

[61] *See* Stanowisko Rzecznika Praw Obywatelskich w sprawie odwołań od decyzji Zakładu Emerytalno-Rentowego MSWiA obniżających z dniem 1 października 2017 r. świadczenia emerytalno-rentowe byłym funkcjonariuszom służb ochrony państwa PRL [Position of the Commissioner of Human Rights regarding appeals against decisions of the Social Insurance Institution of the Ministry of Interior Affairs and Administration reducing starting from 1 October 2017 amounts of retirement pensions and benefits to former functionaries of state security of the Polish People's Republic], WZF.7060.1384.2017, 10 June 2019.

[62] *Adamsons v. Latvia*, para. 135.

[63] A. Żygas, *The Legal Status and Investigative Function of the Institute of National Remembrance–Commission for the Prosecution of Crimes against the Polish Nation (IPN) Under the Rule of Law*, 4(4) International Journal on Rule of Law, Transitional Justice and Human Rights 133 (2013).

for decision about re-calculating amounts of pensions and benefits. Instead, a reduction is imposed on entire groups of people who were in the service or employed in the listed civil and military formations at the given time.

In *Velikovi and Others v. Bulgaria* – a judgment regarding several applications of Bulgarian nationals who had different degree of association with the communist regime – the ECtHR gave the reminder that, to assess whether there was an unjustified state interference contrary to Art. 1 of Protocol No. 1 to the ECHR, due account must be taken of the special transitional period at the relevant time and the individual circumstances of each case. In cases about transitional justice measures that interfere with individual's property rights, the ECtHR recalled that domestic courts must establish in each case whether individuals profited from a privileged position to unfairly acquire the property right. The ECtHR emphasized that "where the domestic courts have not made such a finding, the respondent Government cannot rely before the Court on suppositions in the opposite sense. Such an approach would run contrary to the principle of rule of law inherent in the Convention."[64]

The openly declared aim of the Act of 16 December 2016 was to eliminate the remaining privileges in retirement pensions and other benefits of the people who worked in the security services, the political secret police, the Ministry of Public Security, and other formations structurally responsible for gross human rights violations in Poland in 1994-1990. However, the list of formations and institutions in the Act of 16 December 2016 is markedly broader and the Act does not acknowledge that persons who worked in one workplace performed varied tasks. There is no individualized assessment of the existence of an actual link between one's work in the indicated formations and institutions and the preservation of the "the totalitarian regime" or an involvement (of various degrees) in gross violations of human rights. The reduction of retirement pensions and other benefits applies also to individuals who did not occupy privileged positions in communist state and society, and performed auxiliary functions in the indicated institutions (such as mechanics, technicians, or bakers). What is lacking is confirmation in each case of an established and meaningful connection between one's conduct in the past and a present-day reduction of retirement pension and benefit. Furthermore, the reduction applies not only to retirement pensions but also to benefits (*renty*) and family benefits (*renty rodzinne*). As such, it also affects family members and others entitled to pensions and benefits of former functionaries and employees of the undemocratic state – including vulnerable persons, especially persons with disabilities and the elderly.[65]

Moreover, the ECtHR explained that, in order to be compatible with Art. 1 of Protocol No. 1 to the ECHR, a measure of interference in property rights must fulfil three basic conditions: 1) it must be carried out "subject to the conditions provided for by

[64] ECtHR, *Velikovi and Others v. Bulgaria* (App. Nos. 43278/98, 45437/99, 48014/99, 48380/99, 51362/99, 53367/99, 60036/00, 73465/01, and 194/02), 15 March 2007, para. 188.

[65] L. Peroni, A. Timmer, *Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law*, 11(4) International Journal of Constitutional Law 1056 (2013).

law", which excludes any arbitrary action on the part of the national authorities, 2) it must be "in the public interest", and 3) it must strike a fair balance between the owner's rights and the interests of the community.[66] The key provision of the Act of 16 December 2016 is vague, and as such does not exclude an arbitrary action on the part of national authorities: exceptions from reductions can be granted (inevitably, discretionarily) by the Minister of Interior, based on an undefined, imprecise criterion of "a brief period of service" (*służba krótkotrwała*), a term which has not been explained in case law. Such wording does not satisfy the qualitative requirements of clarity and foreseeability of law that the ECtHR employed to describe the demands imposed by Art. 7 ECHR. Although the punishment of reducing pensions is not a criminal one, it is nonetheless a punishment.

Next, the principle of good governance requires that where an issue in the general interest is at stake, in particular when the matter affects fundamental human rights such as those involving property, the public authorities must act in good time and in an appropriate and above all consistent manner.[67] The standard of legal certainty demands that lowering the amount of compensation – an acquired right – should be effectuated without delay, as quickly after the change of regime as possible, to allow individuals to accommodate to the new circumstances and pursue life in a democratic state. Individuals affected by pension reductions following the Act of 23 January 2009 could have had reasonable expectations that, once reduced by law, their pensions would not diminish any further. More severe penalties are usually applied in cases of recidivism. Consequently, the second reduction under Act of 16 December 2016 is contrary to the principles of legal certainty and to *ne bis in idem*, that no legal action can be instituted twice for the same cause of action, derived from Art. 2 of the Constitution and protected by the Art. 4 of Protocol No. 7 to the ECHR. In this aspect, the Act of 16 December 2016 particularly acutely misses the goals of transitional justice, including increasing public trust in state institutions.

Furthermore, the ECtHR confirmed there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of their possessions.[68] In *Velikovi and Others v. Bulgaria*, a series of applications regarding restitution of nationalised property including the compensation schemes, the ECtHR explained that under the Art. 1 of Protocol No. 1 to the ECHR, "deprivation of property must be lawful, in the public interest and must strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights."[69] The ECtHR warned that "the attenuation of those old injuries' cannot create disproportionate new wrongs."[70] Importantly, the ECtHR uses the concept of a certain "threshold of hard-

[66] ECtHR, *Vistiņš and Perepjolkins v. Latvia* (App. No. 71243/01), 25 October 2012, para. 94.
[67] ECtHR, *Rysovskyy v. Ukraine* (App. No. 29979/04), 20 October 2011, paras. 70-71.
[68] ECtHR, *Scordino v. Italy* (App. No. 36813/9), 9 March 2006, para. 93.
[69] *Velikovi and Others v. Bulgaria*, para. 160.
[70] ECtHR, *Pincová and Pinc v. Czech Republic* (App. No. 36548/97), 5 February 2003, para. 58.

ship" that must be crossed to find a breach of the right to property.[71] In *Béláné Nagy v. Hungary*, the ECtHR emphasized that a state cannot completely deprive an individual of the once-granted entitlement, and that the reduction cannot be disproportionate to the point of leaving an individual without any means of subsistence. The ECtHR established general principles of proportionality analysis concerning right to property under Art. 1 of Protocol No. 1 with regard to social benefits. The Court will consider whether interference imposed an excessive individual burden; deprivation of the entirety of a pension is likely to breach the provisions of Art. 1 of Protocol No. 1, conversely, reasonable reductions to a pension or related benefits are likely not to do so. Nonetheless, the ECtHR considered that the balancing test cannot rely solely on the amount or percentage of the reduction in the abstract. The ECtHR takes into account factors including a discriminatory nature of the loss of entitlement, the absence of transitional measures, the arbitrariness of the condition and the applicant's good faith and, crucially, whether the "right to derive benefits from the social-insurance scheme in question has been infringed in a manner resulting in the impairment of the essence of his or her pension rights."[72] Consequently, deprivation of the entirety of a pension is likely to breach the provisions of Art. 1 of Protocol No. 1, but reasonable reductions to a pension or related benefits are likely not to do so. Likewise, in a string of cases concerning permanent reductions of pensions as part of austerity policy, the ECtHR sided with governments, when the reduction of benefits did not pose risk that individuals would have insufficient means to live on.[73] For instance, the ECtHR considered that an applicant was not made to bear an excessive burden because the reduction of her salary was not such as to place her at risk of having insufficient means to live on, even if the reduction permanently lowered the amount of benefits received by the applicant by 20%.[74] However, the Act of 16 December 2016 was enacted not due to the necessity of limiting all welfare benefits to introduce austerity policies – Poland at that time was experiencing a considerable economic growth and the state had introduced a series of generous welfare policies.[75] The reduction of pensions and benefits in the Act of 16 December 2016 was clearly motivated by considerations of other nature than austerity.

The legislative amendment introduced in 2016 only affected future payments of retirement pensions and benefits from 1 October 2017 onwards, not payments that had already been made, and did not terminate the whole retirement pensions or other

[71] S. Roksandić Vidlička, *Possible Future Challenge for the ECtHR? Importance of the Act on Exemption and the Sanader Case for Transitional Justice Jurisprudence and the Development of Transitional Justice Policies*, 64(5-6) Zbornik Pravnogo Fakulteta u Zagrebu 1091 (2014), p. 1105.

[72] *Béláné Nagy v. Hungary*, para. 29.

[73] D. Kagiaros, *In Search of a 'Social Minimum': Austerity and Destitution in the European Court of Human Rights*, 25(4) European Public Law 358 (2019), p. 369.

[74] E. Brems, *Protecting Fundamental Rights during Financial Crisis: Supranational Adjudication in the Council of Europe Context*, in: T. Ginsburg, M. Rosen, G. Vanberg (eds.), *Liberal Constitutionalism in Times of Financial Crisis*, Cambridge University Press, Cambridge: 2019, pp. 163-184.

[75] K. Dobrowolski, G. Pawłowski, *The Condition of Public Finances and Its Impact on the Level of Inflation in Poland in 2011-2017*, 9(4) Contemporary Economy 1 (2018).

benefits, only reduced them. However, while under the Act of 16 December 2016 pensions or benefits were not annulled, in individual cases the severity of pension or other benefit reductions may provoke destitution of individuals. Such interference with the right of individuals is disproportionate with achieving the aim of the regulation, which is the reduction of certain present-day *privileges,* and the rationale underlying that is to sanction those who had profited from their position in the communist regime, in particular in its most discredited branches. A number of such cases where the Act of 16 December 2016 imposed a risk of destitution on individuals were discussed in a report prepared by the Commissioner for Human Rights Office, which criticized the repressive character of the act.[76] In such circumstances, it can be said that the very essence of the applicant's acquired rights were impaired – since in some cases the minimum threshold of hardship has been reached and individuals' situation had worsened to the extent that they risked falling below the subsistence threshold. Therefore the insufficiency of a benefit should be a basis for the ECtHR to conduct a more rigorous scrutiny of the Act of 16 December 2016 than the traditional wide margin of appreciation in transitional justice measures that impact on social welfare policy would suggest. The existing ECtHR case law has prepared the groundwork to argue that under ECHR individuals are protected against state-inflicted destitution, degraded living conditions, or similar manifestations of extreme poverty.[77] The ECtHR stressed that there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised by any measure depriving a person of her possessions.[78] The ECtHR emphasized that it "cannot abdicate its power of review and must determine whether the requisite balance was maintained in a manner consonant with the applicants' right to the peaceful enjoyment of [their] possessions."[79]

Moreover, introducing a cap on the maximum amount of pensions and benefits is discriminatory to those functionaries who were positively vetted after 1990 and allowed to continue working in service for democratic Poland, and as such contrary to Art. 14 ECHR that secures the enjoyment of rights without discrimination on any grounds. Discrimination means treating persons differently in analogous situations without an objective and reasonable justification.[80] The Act of 16 December 2016 was introduced

[76] Rzecznik Praw Obywatelskich [Commissioner for Human Rights], *Sąd: obniżka emerytury policjanta na podstawie tzw. „drugiej ustawy dezubekizacyjnej" z 2016 r. bezpodstawna* [Court: reduction of a policeman's retirement pensions under the so-called druga ustawa dezubekizacyjna of 2016 unfounded], 12 November 2019, available at: https://www.rpo.gov.pl/pl/content/sad-obnizka-emerytury-policjanta-na-podstawie-tzw-ustawy-dezubekizacyjnej-z-2016-r-bezprawna (accessed 30 June 2020).

[77] C. O'Cinneide, *A Modest Proposal: Destitution, State Responsibility and the European Convention on Human Rights*, 30 August 2008, available at: https://ssrn.com/abstract=1370241 (accessed 30 June 2020).

[78] ECtHR, *Pressos Compania Naviera S.A. and Others v. Belgium* (App. No. 17849/91), 20 November 1995, para. 38.

[79] ECtHR, *Jahn and Others v. Germany* (App. Nos. 46720/99, 72203/01 and 72552/01), 30 June 2005, para. 93. *See also* C. Lebeck, *Rights in Transitions: The European Court of Human Rights' Judgment in Jahn and Others v. Germany*, 17(2) King's Law Journal 359 (2006).

[80] ECtHR, *D.H. and Others v. the Czech Republic* (App. No. 57325/00), 13 November 2007, para. 75.

27 years after the regime change, affecting, among others, individuals who were positively vetted and had served for decades in democratic Poland. An exception may be made for them by the Minister of Interior, but it is not automatic. Because of the cap on the amount of pensions, anyone falling under the Act of 16 December 2016 in any case cannot receive a retirement pension higher than the average retirement pension in the universal system of pensions - even in a case when they earned their retirement pension contributions after 1990, often in service with a high risk of endangering health or life. The Act of 16 December 2016 also introduces a reduction of disability pensions. Functionaries who were allowed to continue service after 1990, in addition to passing a test of moral integrity, had to be in good health at that time. Consequently, those among them who continued service and have been entitled to disability pensions, must have acquired disabilities in connection to service performed after 1990 in democratic Poland. Compared to those functionaries of the democratic state who started serving after 1990, the persons affected by the reduction, especially those who served "the totalitarian state" in 1944-1990 only for a short period of time (and were not granted an exception by the Interior Minister), are discriminated against, since persons in similar situations are treated markedly differently. A personal characteristic[81] – the documented fact of working in a certain formation or institution of undemocratic state pre-31 July 1990 – gives thin grounds to justify a differentiation in treatment between individuals regarding their contributions to the retirement pensions system after 1990. As a result of the mechanism of the Act of 16 December 2016, persons who were vetted and allowed to continue serving in a democratic state in this respect are treated markedly differently to those who started their service after 31 July 1990 and also acquired the right to retirement pension, that is after 15 years in service.

Moreover, the ECtHR invites stricter scrutiny of the methods used to achieve the stated and accepted public purposes as time passes since the change of political regime. The ECtHR confirmed that a state, when introducing more repressive mechanisms of transitional justice, especially after a significant lapse of time, must provide very strong justifications for the regulation to pass the test of proportionality (*Adamsons v. Latvia*). The ECtHR underscored that with the passage of time, a general suspicion towards a group of persons based solely on their conduct in the undemocratic regime no longer suffices, and the authorities have to provide clear and strong arguments and evidence to justify introducing any further restriction of the rights of these individuals. For instance in a judgment delivered in 2015 in *Sõro v. Estonia*, the ECtHR held that "any threat the former servicemen of the KGB could initially pose to the newly created democracy must have considerably decreased with the passage of time."[82] These recent considerations fit into reasoning established in the 1960s by the EComHR in one of the early judgments (*De Becker v. Belgium*). The case concerned a journalist who could not exercise his profession in the 1960s Belgium due to conviction for collaborating with Nazis in

[81] *See* J. Gerards, *The Discrimination Grounds of Article 14 of the European Convention on Human Right*, 13(1) Human Rights Law Review 99 (2013).

[82] *Sõro v. Estonia*, para. 62.

Belgium during the World War II. The EComHR clearly established that the abuse of rights clause of Art. 17 ECHR applies to persons who threaten the democratic system of the member states only to an extent strictly proportionate to the seriousness and duration of such threat and "cannot be used to deprive an individual of his rights and freedoms permanently merely because at some given moment he displayed totalitarian convictions and acted accordingly."[83]

The ECtHR supports a periodic review of transitional justice mechanisms and advised that they should be evaluated in the light of political developments by a state (*Ždanoka v. Latvia*). The ECtHR specified that a state should verify whether, with the passage of time, the enacted mechanisms remain necessary and proportionate, especially given that circumstances that previously justified particular mechanisms can cease to exist or be transformed. ECHR standards remind states that they should be mindful to introduce mechanisms that will not answer to the desire of revenge or retribution under the guise of reckoning with the past. While the ECtHR has emphasized in its case law that in assessing transitional justice mechanisms aimed at redressing decades-long injustices, due account must be taken of the special transitional period at the relevant time, a regulation adopted 27 years after the regime change cannot be regarded as adopted in an immediate "transitional period." Moreover, the ECtHR's approach to transitional justice measures have been that "the weight of the circumstance of transition in the balancing exercise was determined on the basis of the general circumstances of the interference with the fundamental right to property."[84] These measures should be assessed without any "exceptionalism." To the contrary, the proportionality analysis should take into account the fact of increasing the severity and expanding of the scope of the regulation adopted in 2016, when looking at the regulation adopted in 2009.

To conclude, the passage of time is but one of the crucial factors that must be taken into account in assessing the legal solutions included in Act of 16 December 2016, next to individualized assessment, prohibition of arbitrariness, stability and predictability of law, protection of legitimate expectations, threshold of hardship (being especially mindful of insufficiency of a benefit in some cases, especially when affected individuals could be regarded as belonging to vulnerable groups in need of special protection, such as the elderly or persons with disabilities), discrimination (difference in treatment which is not objectively and reasonably justified), and proportionality of interference in property rights.

CONCLUSION

The Act of 16 December 2016 is not an appropriate measure of response to a problem defined as the removal of the remaining retirement pensions and benefits provided to

[83] ECHR, *De Becker v. Belgium* (App. No. 214/5), 27 March 1962, para. 279.

[84] M. Varju, *Transition as a Concept of European Human Rights Law*, 2 European Human Rights Law Review 170 (2009), p. 180.

those who worked in state security organs in Poland in 1944-1990 as a means of accomplishing the process of decommunisation, because of the incompatibility of its mechanisms with applicable standards of the ECHR. The solutions included in the Act separate it from the official rationale to achieve social justice by levelling the amounts of retirement pensions to correspond to the average retirement pensions in Poland paid from the universal system of retirement pensions, and are not proportionate to the aim pursued.

First, the legal solutions included in the act entail collective treatment of activities that merited individual evaluation. The Act of 16 December 2016 failed to guarantee individualized assessment of responsibility by an independent court, which is incompatible with Art. 6 ECHR. It also contravenes standards elaborated in the ECtHR case law that with state interference contrary to Art. 1 of Protocol No. 1 to the ECHR, due account must be taken of the special transitional period at the relevant time and the individual circumstances of each case.

Second, the act employs vague wording, which does not satisfy the qualitative requirements of clarity and foreseeability of law that the ECtHR employed to describe the demands imposed by Art. 7 ECHR.

Third, the Act of 16 December introduced harsher penalties for persons who had already been affected by pension reductions under Act of 23 January 2009, without providing additional justification. This contrary to the principles of legal certainty and to *ne bis in idem*, that no legal action can be instituted twice for the same cause of action, derived from Art. 2 of the Constitution and protected by the Art. 4 of Protocol No. 7 to the ECHR. An overtly repressive character additionally puts into question the actual motivations of the legislator.

Fourth, it was not sufficiently justified why harsher penalties apply to individuals as the time passes from the change of regime, which does not meet the requirement of providing strong justification for transitional justice mechanisms with the passage of time, as established in the ECtHR case law.

Fifth, while persons are not deprived of retirement pensions or benefits, in some individual cases a threshold of hardship is crossed due to the introduction of severe mechanisms of re-calculating the amounts of pensions. These reductions particularly affect vulnerable persons, especially persons with disabilities and the elderly. The ECtHR has emphasized in its case law that the reduction of benefit cannot be disproportionate to the point of providing individual without means of subsistence.

Sixth, the legal solutions are also incompatible with prohibition of discrimination in Art. 14 ECHR, because those who were positively vetted and continued service in the democratic state suffer from the cap on retirement pensions and benefits, while their contribution to the social security system after 1990 alone would entail that they are entitled to higher amount of retirement pension than an average one in the universal system of retirement pensions.

Therefore, as it currently stands, the Act of 16 December 2016 cannot be regarded as a means of transitional justice under ECHR.

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THE PRINCIPLES OF SUBSIDIARITY AND EFFECTIVENESS: TWO PILLARS OF AN EFFECTIVE REMEDY FOR EXCESSIVE LENGTH OF PROCEEDINGS WITHIN THE MEANING OF ARTICLE 13 ECHR

Abstract: *The purpose of this article is to determine the relationship between the principles of subsidiarity and effectiveness and an effective remedy for the excessive length of proceedings within the legal order of the European Convention on Human Rights. The article assumes that these key principles of the ECHR's legal order have an impact on such a remedy, both in the normative and practical dimensions. This assumption has helped explain many aspects of the Strasbourg case law regarding this remedy. Concerning the relationship of this remedy with the principle of subsidiarity, it raises issues such as: the "reinforcing" of Art. 6 § 1; the "close affinity" of Arts. 13 and 35 § 1; and the arguability test. In turn, through the prism of the principle of effectiveness, the reasonableness criterion and the requirement of diligence in the proceedings are presented, followed by the obligations of States to prevent lengthiness of proceedings and the obligations concerning adequate and sufficient redress for such an excessive length of proceedings. The analysis shows that an effective remedy with respect to the excessive length of proceedings is not a definitive normative item, as the Court consistently adds new elements to its complex structure, taking into account complaints regarding the law and practice of States Parties in the prevention of and compensation for proceedings of an excessive length.*

Keywords: European Convention on Human Rights, European Court of Human Rights, excessive length of proceeding, principle of effectiveness, principle of subsidiarity, right to an effective remedy regarding a hearing within a reasonable time

INTRODUCTION

The 1950 Convention for the Protection of Human Rights and Fundamental Freedoms – commonly referred to as the European Convention on Human Rights (Convention or ECHR),[1] was the first multilateral treaty signed by the Member States of the

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[1] Convention for the Protection of Human Rights and Fundamental Freedoms, CETS, No. 005.

Council of Europe (CoE).[2] The Convention was designed to give the fullest possible expression to the idea of creating a legally-binding, international instrument whose primary purpose would be to protect the rights and fundamental freedoms of persons within the jurisdiction of the States Parties thereto.[3]

As a result of the gradual expansion of the basic catalogue of human rights and fundamental freedoms and the strengthening of the European Court of Human Rights (Court or ECtHR), the ECHR, characteristic in its conception, has evolved into a complex (expanded) human rights legal order, with the Court being an important element of this order. Established "to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols" (Art. 19 ECHR), the Court has contributed, through a progressive approach and expansive reach, to reinforcing this order. Meanwhile its case law has become a major source of knowledge and findings regarding the nature and content of human rights and fundamental freedoms and the related obligations of the State Parties to the ECHR.

The purpose of the analysis carried out in this article is to show the process of strengthening the legal order of the ECHR through the prism of the right to an effective remedy regarding the length of proceedings, within the meaning of Art. 13 ECHR.

It is important at the outset to clarify the scope of the present study. This study is not intended to provide a detailed description of the ECtHR case law as such, but rather is an attempt to answer the question about the kind of reciprocal relationships that exist between effective remedies against excessive length of proceedings, the subsidiarity principle and the margin of appreciation, the effectiveness principle, and the nature and structure of the obligations to provide with an effective legal remedy for the excessive length of proceedings within the meaning of Art. 13 ECHR. The solution to these research problems required posing several detailed research questions: definitional, praxeological, and explanatory, not least as they are general problems that go beyond implicit concrete facts of the cases in accordance with Art. 34 ECHR. This is because the Court rulings "issued in an individual case will nevertheless at least to some extent establish a precedent (…) valid for all Contracting States."[4]

At this point, it seems necessary to draw attention to an important language disparity. The English version of Art. 13 ECHR employs the term *remedy,* whereas the French version of Art. 13 uses the term *recours*. The problem is not merely terminological if we consider that *remedy* includes not only procedural guarantees but also the right to compensation or just satisfaction, while the same cannot be said of the French term *recours*.

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[2] Statute of the Council of Europe, CETS, No. 001.

[3] P.-H. Teitgen in: *Collected Edition of the "Travaux Préparatoires" of the ECHR*, vol. 1, The Hague: 1975, pp. 292-294; *see also* E.H. Morawska, *Zobowiązania pozytywne państw-stron Konwencji o ochronie praw człowieka i podstawowych wolności* [Positive obligations of States Parties to the Convention for the Protection of Human Rights and Fundamental Freedoms], UKSW University Press, Warszawa: 2016, pp. 30 et seq.

[4] ECtHR, *Pentiacova and Others v. Moldovia* (App. No. 14462/03), 4 January 2005; *Sentges v. the Netherlands*, (App. No. 27677/02), 8 July 2003.

In fact, the recognition that it provides grounds for seeking damages is not unquestionable.[5] In addition, in anticipation of further specific comments, let us note that the term *remedy* is more faithful to the interpretation of Art. 13 ECHR, which requires of the States Parties to establish a remedy that, first, enables "the national authority dealing with the case […] to consider the substance of the Convention complaint, in line with the principles laid down in the Court's case law,"[6] and second, makes possible a decision to grant relief appropriate to the circumstances of the case.[7]

Three general arguments justify the choice of issues identified in the title of the article. First, the effectiveness and credibility of the Convention largely depends on the effectiveness of the remedies provided to redress violations of its provisions, including the right to be heard within a "reasonable time." Secondly, excessive delays in resolving legal disputes constitute a significant danger, in particular for public confidence in the capacity of the States Parties to administer justice. This, in turn, reflects negatively on respect for the rule of law, which is one of the three fundamental pillars of the Council of Europe, the other two being democracy and respect for human rights.[8] Thirdly, the need for an analysis of the problem at hand is further supported by the fact that overstepping the reasonable time requirement of Art. 6 ECHR may result in (procedural) breaches of other conventional human rights or freedoms, such as the right to life or the prohibition of ill-treatment (e.g. in the case of unjustified slow investigations into charges, death or ill-treatment, respectively), the right to liberty and security (in the case of the lack of a speedy decision by a court on a habeas corpus action), or the right to respect for the private and family life (in the case of undue delays in custody proceedings which may result in de facto determination of the issue submitted to court before it has held its hearing). Thus, delays in resolving legal disputes have been "one of the most arguable issues before the ECtHR."[9]

The problem of excessive length of proceedings occurs in all States Parties, albeit to a different degree: for some States it is a generalized, systemic problem, while for others

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[5] J. Raymond, *A Contribution to the Interpretation of Article 13 of the European Convention on Human Rights*, 5 Human Rights Review 161 (1980), p. 165; *see also* A. Randelzhofer, C. Tomuschat, *State Responsibility and the Reparation in Instance of Grave Violations of Human Rights*, Martinus Nijhoff Publishers, The Hague: 1999, pp. 33-34.

[6] ECtHR, *Kiril Ivanov v. Bulgaria* (App. No. 17599/07), 11 January 2018, para. 59; *see* others, e.g. based on the right to respect for private and family life: ECtHR, *Voynov v. Russia* (App. No. 39747/10), 3 May 2018, para. 42.

[7] ECtHR, *Aksoy v. Turkey* (App. No. 21987/93), 18 December 1996, para. 95.

[8] ECtHR, *H. v. France* (App. No. 10073/82), 24 August 1989, para. 58; *see also* F. Tulkens, *The Right to a Trial within a Reasonable Time: Problems and Solutions*, in: Venice Commission, *Can Excessive Length of Proceedings Be Remedied?*, Strasbourg: 2007, pp. 335, 342; F. Sudre, *Droit européen et international des droits de l'homme*, Presses Universitaires de France, Paris: 2006, p. 391.

[9] M.W. Janis, R. Kay, A. Bradley, *European Human Rights Law: Text and Material*, Oxford University Press, Oxford: 2000, p. 454; similarly O. Jacot-Guillarmod, *Rights Related to Good Administration of Justice (Article 6)*, in: R. Macdonald, F. Matscher, H. Petzold (eds.), *The European System for the Protection of Human Rights*, Martinus Nijhoff, Dordrecht: 1993, pp. 381 and 394-395; S. Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects*, Cambridge University Press, Cambridge: 2006, pp. 39 and 76.

it should be seen rather as a sporadic dysfunction of an otherwise effective system of administration of justice. Unfortunately, Poland is one of the States Parties where it is a systemic problem.

The Court data shows that nearly half of the judgments delivered in Polish cases relate to Art. 6 ECHR, including the right to a fair trial or the length of proceedings.[10] Among these cases is *Kudła v. Poland*, a leading length-of-proceedings case in the Court's case law. It was only in 2015 that the CoE's Committee of Ministers terminated supervision over the implementation of its findings.[11] However, the resolution putting an end to this supervision indicates that the CoE's Committee of Ministers did so mostly to allow for supervision over the implementation of other Polish length-of-proceedings cases, most notably, *Rutkowski and Others v. Poland*, ruled upon by the Court in a pilot-judgment procedure.[12]

One can agree with K. Drzewicki that the case of *Kudła v. Poland* of 2000 deserves recognition because "although several years have passed since the Court's judgment, many of the implications of the excessive length of court proceedings remain valid in Poland."[13] Nevertheless, in this article particular topics related to the excessive length of court proceedings in Poland and the Polish provisions on complaints about the breach of the right to have a case examined in judicial proceedings without undue delay of 2004 (the 2004 Act)[14] together with its amendment in 2016 (the 2016 Amendment), are not considered in great detail. However, the *Kudła* case is relatively often cited in the article because of its special significance for the relationship between effective remedies against the excessive length of proceedings within the meaning of Art. 13 ECHR and the principle of subsidiarity. The *Kudła* case was characterised by the Court as having "stressed the importance of the rules relating to the subsidiarity principle so that individuals are not systematically forced to refer to the Court in Strasbourg complaints that could otherwise, and in the Court's opinion more appropriately, have been addressed in the first place within the national legal system."[15] The *Kudła* case therefore seems to be a strong example of the role of the Court in shaping the concept of subsidiarity and its limits.

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[10] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS No.009.

[11] Final Resolution CM/ResDH (2015)248: *Execution of the judgments of the European Court of Human Rights 205 cases against Poland*. Adopted by the Committee of Ministers on 9 December 2015 at the 1243rd meeting of the Ministers' Deputies.

[12] ECtHR, *Rutkowski and Others v. Poland* (App. No. 72287/10), 7 July 2015, paras. 184 *et seq.*

[13] K. Drzewicki, *Sprawa Kudła v. Poland z 2000 r. Istota przewlekłości postępowań sądowych* [Kudla v. Poland case of 2000: The essence of the excessive lenght of judicial proceedings], in: E.H. Morawska (ed.), *Polska przed Europejskim Trybunałem Praw Człowieka. Sprawy wiodące: sprawa Kudła przeciwko Polsce z 2000 r.*, C.H. Beck, Warszawa: 2019, p. 89.

[14] The Act was adopted on June 17, 2004. Originally, it was entitled *Act on Complaint on Infringement of a Party's Right to Examine a Case in Court Proceedings without Unreasonable Delay* (Journal of Laws, No. 179, item 1843); current consolidated text: Journal of Laws of 2018, item 75.

[15] ECtHR, *Luli and Others v. Albania* (App. Nos. 64480/09, 64482/09, 12874/10... *e.a.*), 1 April 2014, para. 188.

1. THE PRINCIPLE OF SUBSIDIARITY WITHIN THE LEGAL ORDER OF THE ECHR

The principle of subsidiarity is one of the basic structural principles of the Convention mechanism.[16]

1.1. Legal basis of the principle of subsidiarity

Having said the above, the principle of subsidiarity is not explicitly mentioned in the Convention. In a sense, therefore, it has an implicit character.[17] Moreover, H. Petzold's research shows that the issue of the principle of subsidiarity was not even raised in discussions during the course of drafting the Convention.[18] If so, then it must be considered to have been formulated by the Convention bodies and is in some sense implied. Its normative foundations were identified by the Convention bodies through the joint reading of Art. 1 (obligation to respect human rights), Art. 13 (right to an effective remedy) and Art. 35 § 1 (admissibility criteria) of the Convention,[19] giving rise over time to a general case law principle which states the following:

> By virtue of Article 1 of the Convention (which provides that "[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of [the] Convention"), the primary responsibility for implementing and enforcing the rights and freedoms guaranteed by the Convention is laid on the national authorities. The machinery of complaint to the Court is thus subsidiary to national systems safeguarding human rights.[20]

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[16] *See e.g.* R. Clayton, H. Tomlinson, *The Law of Human Rights,* Oxford University Press, Oxford: 2000; R.S.J. Macdonald, F. Matscher, H. Petzold, *The European System for the Protection of Human Rights*, Martinus Nijhoff, Dordrecht: 1993; J. Schokkenbroek, *The Basis, Nature and Application of the Margin of Appreciation Doctrine in the Case Law of the European Court of Human Rights*, 19 Human Rights Law Journal 30 (1998), pp. 30-31; D. Shelton, *Remedies in International Human Rights Law,* Oxford University Press, Oxford: 2006, p. 124; F. De Santis di Nicola, *Principle of Subsidiarity and 'Embeddedness' of the European Convention on Human Rights in the Field of the Reasonable-Time Requirement: The Italian Case*, 18(1) Jurisprudence (2011), p. 7; *see also* leading studies on the mechanism of the Convention, e.g. D. Harris, M. O'Boyle, E. Bates, C. Buckley in: D. Harris, M. O'Boyle, C. Warbrick (eds.), *Law of the European Convention on Human Rights*, Oxford University Press, Oxford: 2009, p. 13; P. Leach, *Taking a Case to the European Court of Human Rights*, Oxford University Press, Oxford: 2005, p. 161; Sudre, *supra* note 8, p. 200.

[17] M. Tumay, *The Subsidiary Protection of European Convention on Human Rights*; available at: https://dergipark.org.tr/tr/pub/suhfd/issue/26643/281189 (accessed 30 June 2020), p. 207; it is still of this nature because Protocol 15 to the ECHR, opened for signature on 24 June 2013, amending the preamble to the ECHR by adding a reference to the principle of subsidiarity and the Strasbourg doctrine of the margin of appreciation of States Parties has not yet entered into force; *see* Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, CETS No. 213.

[18] Petzold, *supra* note 16, p. 42.

[19] ECtHR, *Kudła v. Poland* (App. No. 30210/96), 26 October 2000, para. 152; it can be added that in this context Art. 41 ECHR is indicated as a normative basis as well; *see also* Tumay, *supra* note 17, pp. 208-209.

[20] *Kudła*, para. 152; *Rutkowski and Others*, para. 173.

These three provisions of the Convention providing the legal basis for the principle of subsidiarity have also been indicated in more recent cases, although in a less extensive manner. This is demonstrated, for example, in the *Kislov v. Russia* case, in which the Court referred to them, stating that

> [b]y virtue of Article 1 of the Convention, the primary responsibility for implementing and enforcing the guaranteed rights and freedoms is laid on the national authorities. The machinery of complaint to the Court is thus subsidiary to national systems safeguarding human rights. This subsidiary character is articulated in Article 13 and Article 35 § 1 of the Convention.[21]

1.2. The two dimensions of the principle of subsidiarity

The academic literature draws attention to the dual-dimensionality of subsidiarity in the legal order of the Convention. The first dimension is referred to as procedural, or formal, and it means that before lodging a complaint to the Convention bodies (currently this concerns only the Court), each applicant must first have their complaint heard before the competent national institutions which afford within their scope a measure that can be considered an effective domestic remedy, depending on the circumstances of the case. The second dimension is material, or substantive, and it consists of three assumptions.[22]

According to the first, national courts play a fundamental role in the interpretation of national law. Hence, "it is not for this Court to take the place of the competent national courts in the interpretation of domestic law."[23] Secondly, the Convention may imply "a duty of specific conduct on the part of the competent national authority."[24] Lastly, the third assumption relates to the doctrine of the margin of appreciation. As H. Petzold noted, "this margin of appreciation stems directly from the principle of subsidiarity (...) It is a natural product of the principle of subsidiarity; it is a technique developed to allocate decision-making authority to the proper body in the Convention scheme, to delineate in concrete cases the boundary between "primary" national discretion and the subsidiary international supervision."[25] In the Court's words:

> The domestic margin of appreciation thus goes hand in hand with a European supervision (…). However, the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights (...). The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties

[21] ECtHR, *Kislov v. Russia* (App. No. 3598/10), 9 July 2019, para. 133.

[22] H. Petzold, *The Convention and the Principle of Subsidiarity*, in: R. Macdonald, F. Matscher, H. Petzold, (eds.), *The European System for the Protection of Human Rights*, Martinus Nijhoff, Dordrecht: 1993, p. 60; *see also* D. Shelton, *Subsidiarity, Democracy and Human Rights,* in: D. Gomien (ed.), *Broadening the Frontiers of Human Rights*: *Essays in Honour of Asjbørn Eide*, Oxford University Press, Oxford: 1993, pp. 43-44.

[23] ECtHR, *Kay and Others v. the UK* (App. No. 37341/06), 21 September 2010, para. 69; The Court made such findings for the first time in the case: ECtHR, *Handyside v. the UK* (App. No. 5493/72), 7 December 1976, para. 50.

[24] Petzold, *supra* note 16, p. 52.

[25] *Ibidem*, p. 59.

> it enshrines. The institutions created by it make their own contribution to this task, but they become involved only through contentious proceedings and once all domestic remedies have been exhausted.[26]

The studies, although limited due to the scope of this article, clearly show that the Court is not at all shy about referring to the principle of subsidiarity, thus prompting the observation that this principle has not been reduced to a tool limiting the Court's powers.

The Court first cites "subsidiarity" as the limit of its control over the findings and assessments made by the competent national authority[27] and as the basis of its supervisory function regarding such findings and assessments.[28] Secondly, "subsidiarity" is used as a justification for the earlier exhaustion of domestic remedies by the applicant,[29] and thirdly, it is recognized as confirming the need to ensure the effective protection at the national level of the rights and fundamental freedoms set forth in the Convention.[30]

Additionally, the Court has indicated a connection between the pilot judgment procedure and the principle of subsidiarity, stating that

> the pilot-judgment procedure allows "the speediest possible redress to be granted at domestic level to the large number of people suffering from the general problem identified in the pilot judgment, thus implementing the principle of subsidiarity which underpins the Convention system" (…). It also reduces the threat to the effective functioning of the Convention system by reducing the number of similar applications brought before the Court.[31]

2. THE PRINCIPLE OF SUBSIDIARITY AND THE RIGHT TO AN EFFECTIVE REMEDY FOR THE EXCESSIVE LENGTH OF PROCEEDINGS WITHIN THE LEGAL ORDER OF THE ECHR

The right to an effective remedy, guaranteed under Art. 13 ECHR, plays a particularly significant role in the context of the principle of subsidiarity and therefore the

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[26] *Handyside*, para. 48.

[27] ECtHR, *Mc Farlane v. Ireland* (App. No. 31333/06), 10 September 2010, paras. 88-92.

[28] The Court used to note that national authorities are better placed than international courts to assess the facts of a case. Nevertheless, when assessing and discussing the matter, they must apply standards in accordance with the principles set out in the Convention as developed in the Court's case law; it did so, for example, in the cases: *Krawczak v. Poland* (App. No. 40387/06), 8 April 2008, para. 37; *Mc Farlane*, paras. 112-113.

[29] *Mc Farlane*, para. 112; *see also* the joint dissenting opinion, submitted by judges: A. Gyulumyan, I. Ziemele, L. Bianku and A. Power, point 5.

[30] *Mc Farlane*, para. 12; *see also* dissenting opinion, which was submitted by a judge L. Guerra; and M. Balcerzak, *Concept of General Effective Remedy in the Case Law of the ECHR and the Perspective of Polish Legal Order*, in: *Disfunctions of Polish Law: How to Improve the System of Legal Remedies in Poland,* Ministerstwo Spraw Zagranicznych – Departament do Spraw Postępowań przed Międzynarodowymi Organami, Warszawa: 2016, pp. 234-238.

[31] ECtHR, *Igranov and Others v. Russia* (App. Nos. 42399/13, 24051/14, 36747/14... e.a.), 20 March 2018, para. 5; *Kurić and Others v. Slovenia* (App. No. 26828/06), 12 March 2014, para. 134.

"embedding" of the Convention in the States Parties' respective legal systems.[32] As the Court has repeatedly emphasized, "Art. 13 guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the national legal system."[33]

2.1. The principle of subsidiarity and the "reinforcing" of Article 6 § 1 ECHR

The right to an effective remedy is claimed to permeate the entire Convention system, giving it a real and effective dimension. It fulfils its guarantee and performs its protective function in the event of violations or when the State undertakes ineffective actions or none at all. In this sense, the right to an effective remedy is ancillary by default, affording the person subject to the jurisdiction of a State Party the self-enforcement at national level of the effects violations of Convention rights and freedoms. It is therefore justified to refer to availability in the context of this right, as it is used in connection with Convention rights or freedoms. It is precisely because of that fact that its accessory character should be mentioned.[34]

However, these comments cannot be directly related to the relationship between Art. 6 ECHR and Art. 13 ECHR, for until recently the Convention bodies considered that the allegations that a national legal system lacked the competence to examine an excessive length-of-proceedings claim,[35] or of the absence of any measures to shorten or terminate the excessive length of proceedings[36] should be settled on the basis of Art. 6 § 1 and not Art. 13. Two arguments were cited in support of this proposition. First, the Convention bodies assumed that the guarantees provided for in Art. 6 § 1 are stricter than those of Art. 13, and consequently that the guarantees of the latter are completely "absorbed" by the former.[37]

Accordingly, in the event of an alleged violation of Art. 6 § 1 ECHR, it was not considered necessary to establish a violation of Art. 13 since the requirements provided for in Art. 6 § 1 constitute *lex specialis* to the requirements of Art. 13 of the ECHR, which is recognized as *lex generalis* and, being less strict, they are absorbed by the requirements of Art. 6 § 1.[38]

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[32] D. Gomien, D. Harris, L. Zwaak, *Law and Practice of the European Convention on Human Rights and the European Social Charter*, Council of Europe: 1999, p. 336; L.R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 European Journal of International Law 125 (2008), pp. 128-29; *see also* other cases, among others: *Rutkowski and Others*, para 175; *G.I.E.M. S.R.L. and Others v. Italy* (App. No. 1828/06 34163/07 19029/11), 28 June 2018, paras. 81-84 and the partly concurring and partly dissenting opinion, which was submitted by a judge Pinto de Albuquerque, points 81-84.

[33] *Aksoy*, para. 95.

[34] ECtHR, *Muminov v. Russia* (App. No. 42502/06), 11 December 2008, para. 105; *A. v. the Netherlands* (App. No. 4900/06), 20 July 2010; *Othman (Abu Qatada) v. the UK* (8139/09), 17 January 2012.

[35] ECtHR, *Giuseppe Tripodi v. Italy* (App. No. 40946/98), 25 January 2000, para. 15.

[36] ECtHR, *Bouilly v. France* (App. No. 38952/97), 7 December 1999, para. 7.

[37] ECtHR, *Airey v. Ireland* (App. No. 6289/73), 9 October 1979, para. 35.

[38] ECtHR, *Kamasinski v. Austria* (App. No. 9783/82), 19 December 1989, para. 110.

The Court substantially departed from this approach to the application of Art. 13 as regards complaints about excessive delays in domestic court proceedings in the *Kudła* case.[39] According to the Court's findings in that case, the scope of the right to an effective remedy encompasses the procedural requirement of "a hearing within a reasonable time", separate from the requirements set forth in Art. 6 § 1 ECHR.[40] As a result, the Court found that the applicants alleging a violation of Art. 6 § 1 due to excessive delays before national courts in determining their "civil rights" or "criminal charges" could also invoke Art. 13 regarding a separate violation of the right to an effective remedy in the absence of a national mechanism for dealing with complaints about excessive delays in the national judicial system. In the Court's opinion, the requirements of Art. 13 should be considered as "reinforcing" those of Art. 6 § 1, rather than being absorbed by the Art. 6 § 1 obligation to prohibit inordinate delays in legal proceedings.[41]

In justifying this change, the Court largely relied on the principle of subsidiarity, and in particular on two aspects thereof. The first argument results from the Court's belief that "excessive delays in the administration of justice amount to an important danger to the rule of law."[42] The second argument relates to the factual situation in which the Court operated, and continues to operate to this day, referring more specifically to the massive number of pending applications, including in particular complaints regarding the violation of the reasonable-time requirement,[43] which the Court saw as realistically jeopardizing the effectiveness of the Convention mechanism as a whole.[44] The Court thus inferred that the lack of an effective remedy in the event of an excessive length of proceedings forces persons subject to the jurisdiction of States Parties to continually lodge complaints to the Court, while their applications could be dealt with in a more appropriate manner, primarily within the national legal system.[45]

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[39] *Kudła*, paras. 146-149.

[40] ECtHR, *D. M. v. Poland* (App. No. 13557/02), 14 October 2003, para. 47.

[41] *Kudła*, para. 152.

[42] ECtHR, *Charzyński v. Poland* (App. No. 15212/03), 1 March 2005, para. 40; ECtHR, *Sürmeli v. Germany* (App. No. 75529/01), 8 June 2006, para. 104.

[43] *Charzyński*, para. 40; ECtHR, *Michalak v. Poland* (App. No. 24549/03), 1 March 2005, para. 41.

[44] In the opinion of judge J. Casadeval, the above risk determined the interpretation of Art. 6 § 1 ECHR and Art. 13 ECHR in the *Kudła* case. *See* point 3 of the partly dissenting opinion of judge J. Casadeval to the judgment in this case; the academic literature also draws attention to the above circumstances of the settlement in the *Kudła* case. *See. e.g.* L.R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 European Journal of International Law 125 (2008), p. 146; Ph. Frumer, *Le recours effectif devant une instance nationale pour dépassement du délai raisonnable. Un revirement dans la jurisprudence de la Cour Européenne des Droits de L'homme*, 77 Journal des tribunaux. Droit européen 49 (2001), p. 53; J.-F. Flauss, *Le droit à un recours effectif au secours de la règle du délai raisonnable. Un revirement de jurisprudence historique*, 49 Revue trimestrielle des Droits de l'Homme 169 (2002), p. 179, 183; M.-A. Beernaert, *De l'épuisement des voies de recours internes en cas de dépassement du délai raisonnable*, 60 Revue trimestrielle des Droits de l'Homme 905 (2004), pp. 905-906.

[45] *Charzyński*, para. 40.

Due to the limited framework of this article we cannot analyze in detail the process and the effects of this separation of the reasonable-time requirement.[46] However, two issues seem to be of relevance to our considerations. First, prompted by the new interpretation of the relationship between Arts. 6 § 1 and 13 ECHR, the Court imposed a new obligation on the States Parties to the Convention to establish an effective remedy within the meaning of Art. 13 ECHR regarding the right to "a hearing within a reasonable time."[47] Secondly, this obligation imposed on the States Parties corresponds to the right of each person, separately ensured by the Convention, to an effective remedy as regards the right to "a hearing within a reasonable time." It should be noted that the provision in question does not deprive persons subject to the jurisdiction of the States Parties to the Convention of the right to lodge a complaint to the Court alleging a violation of Art. 6 § 1 ECHR arising from the breach of the reasonable-time requirement. This claim may be presented independently of the allegation under Art. 13 ECHR, since it concerns a different legal area.[48] In addition, in the absence of such a remedy in the national legal system, an application may be brought only on the basis of Art. 6 § 1 ECHR.[49]

This way of defining the right to an effective remedy in terms of the scope of the admissibility of a length-of-proceedings complaint makes it one of the Convention's implied rights. In addition, contrary to the literal wording of Art. 13 ECHR, the Court found that it is not an absolute right and that the context of its alleged violation may result in "inherent limitations/implied restrictions" in terms of recourse.[50] As J.G. Merrills aptly explains, a relationship is at play here where, by defining rights not explicitly guaranteed under the Convention, the Court assumes the obligation to outline their limits.[51] Therefore, the Court would argue in favour of the implied restrictions of Art. 13 being kept to a minimum.[52]

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[46] These issues are the subject of in-depth discussion. *See* the relatively recent analysis of these issues in a monograph edited by E.H. Morawska, *Polska przed Europejskim Trybunałem Praw Człowieka. Sprawy wiodące: sprawa Kudła przeciwko Polsce z 2000 r.* [Poland in front of the European Court of Human Rights. Leading cases: Kudła v. Poland of 2000], C.H. Beck, Warszawa: 2019.

[47] *D. M.*, para. 50.

[48] To give an example: ECtHR, *FIL LLC v. Armenia* (App. No. 18526/13), 31 January 2019; *Cosmos Maritime Trading and Shipping Agency v. Ukraine* (App. No. 53427/09), 27 June 2019, paras. 83-91; in Polish cases, *see Wcisło and Cabaj v. Poland* (App. Nos. 49725/11, 79950/13), 8 November 2018.

[49] *See* relatively recent case *Liblik and Others v. Estonia* (App. Nos. 173/15… *e.a.*), 28 May 2019.

[50] Expanding on this, the Court added that "In such circumstances Article 13 is not treated as being inapplicable but its requirement of an "effective remedy" is to be read as meaning "a remedy that is as effective as can be having regard to the restricted scope for recourse inherent in [the particular context]"; *see Kudła*, para. 151. The Court has already made such findings in the case of *Klass and Others v. Germany* (App. No. 5029/71), 6 September 1978, para. 69.

[51] J.G. Merrills, *The Development of International Law by the European Court of Human Rights*, Manchester University Press, Manchester: 1995, p. 88.

[52] *Kudła*, para. 152.

2.2. The principle of subsidiarity and the "close affinity" of ECHR

Separation of the guarantee to be heard within a "reasonable time" from Art. 6 § 1 ECHR has a specific and tangible impact on the practice of admissibility of complaints regarding the length of proceedings in relation to the condition of exhaustion of domestic remedies referred to in Art. 35 § 1 ECHR.

The exhaustion of domestic remedies is examined as a prerequisite at the admissibility stage, but only if the applicant has alleged a violation of ECHR without having recourse to ECHR. On the other hand, in the event of an application combining these two allegations (violations of both Art. 13 and Art. 6 § 1), in response to the Government's preliminary objection of non-exhaustion of domestic remedies in relation to the complaint under Art. 6 § 1, the Court tends to assume that the non-exhaustion of domestic remedies under Art. 6 § 1 is closely linked to the merits of the complaint regarding Art. 13, and as such should be included in the substantive settlement of the complaint's admissibility based on Art. 13.[53] The transition to the merits of such an application is usually preceded by a statement that the application concerning the length of proceedings and the lack of an effective remedy "is not manifestly ill-founded within the meaning of Article 3 § 3(a) of the Convention", and that "it is not inadmissible on any other grounds" and "must therefore be declared admissible."[54] Should the violation of Art. 13 be found in connection with Art. 6 § 1 ECHR, the Government's allegations regarding the non-exhaustion of domestic remedies (under Art. 6 § 1) would be dismissed.[55] Thus, for the condition of admissibility to be fulfilled under Art. 35 § 1, the issue of violation of Art. 13 becomes decisive.

This practice has far-reaching consequences in both procedural and substantive terms, and its basis should be traced in the case law, in particular in the principle of subsidiarity and the joint reading of Arts. 1, 13 and 35 § 1 ECHR. This determination prompted the assumption of a close affinity between Arts. 13 and 35 § 1, while the objects of Art. 35 § 1, i.e. to afford the State the possibility of preventing or making right the violations alleged against them[56] before they are presented to the Court, correspond to the assumption reflected in Art. 13 ECHR about there being an effective remedy for the alleged violation in the State Party's domestic legal system.[57]

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[53] ECtHR, *Balogh and Others v. Slovakia* (App. No. 35142/15), 31 January 2018, para. 43; *Wcisło and Cabaj*, paras. 167-168; *FIL LLC*, para. 44; *Engelhardt v. Slovakia* (App. No. 12085/16), 31 August 2018, para. 53.

[54] *FIL LLC*, para. 45. The Court puts it as follows: "The Court notes that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible." The Court did so even in the relatively recent case of *Cosmos Maritime Trading and Shipping Agency*, para. 67.

[55] *Balogh and Others*, para. 67.

[56] ECtHR, *Cardot v. France* (App. No. 11069/84), 19 March 1991, para. 36; *Civet v. France* (App. No. 29340/95), 28 September 1999, para. 44; *Akdivar and Others v. Turkey* (App. No. 21893/93), 16 September 1996, para. 65; *Haghilo v. Cyprus* (App. No. 47920/12), 26 March 2019, para. 134.

[57] *Kudła*, para 52. The Court took a similar position in several subsequent cases, including the case of *Balogh and Others*, para. 42.

It is therefore appropriate to address the question about the effects of this practice on the admissibility of length-of-proceedings complaints. First and foremost, the premise of the "manifestly ill-founded" under Art. 13 ECHR and the scope of application of art. 13 plays a key role.[58] This in turn leads to what is termed as a claim's "arguability." The existing case law suggests that Art. 13 applies only to an "'arguable complaint' under the Convention."[59]

2.3. The principle of subsidiarity and the arguability test

As a rule, the arguability test serves a limiting function. As a result of its application, the right to a remedy set forth in Art. 13 does not concern all alleged violations of the Convention, but only those which may be considered arguable within the meaning of the Convention.[60] Consequently, Art. 13 imposes on the States Parties the obligation to provide a domestic remedy to "deal with the substance of an 'arguable complaint' under the Convention",[61] implying it is a Convention complaint which, as such, may be regarded as an arguable complaint.[62]

It is difficult to say exactly what arguability is,[63] since the Court has avoided formulating a general definition of the concept, claiming that it should be determined "in the light of the particular facts and the nature of the legal issue or issues raised."[64] At the same time however, the threshold of admissibility based on arguability seems to be relatively low,[65] especially given the fact that declaring a violation of the Convention is not, at the current stage of the Court's case law, a prerequisite for its fulfilment.[66] Consequently, the admissibility of a complaint is not so much about a *prima facie* violation,

[58] ECtHR, *Powell and Rayner v. the UK* (App. No. 9310/81), 21 February 1990, para. 33.

[59] ECtHR, *Silver and Others v. the UK* (App. Nos. 5947/72 *e.a.*), 25 March 1983, para. 113(a); *Kudła*, para 157; *Čonka v. Belgium* (App. No. 51564/99), 5 February 2002; *see also* the ECHR decision on the admissibility of this application of 31 March 2001; *A. v. The Netherlands* (App. No. 4900/06), 20 July 2010, para. 155; *Adam v. Romania* (App. No. 30474/15), 25 September 2018, para. 22.

[60] ECtHR, *De Bruin v. the Netherlands* (App. No. 9765/09), 17 September 2013, paras. 61-62.

[61] ECtHR, *Bazjaks v. Latvia* (App. No. 71572/01), 19 October 2010, para. 127; *Matei and Badea v. Romania* (App. Nos. 30357/15 *e.a.*), 9 October 2018, para. 24; *Amrahov v. Armenia* (App. No. 49169/16), 26 February 2019, para. 36.

[62] ECtHR, *Abu Zubaydah v. Lithuania* (App. No. 46454/11), 31 May 2018, paras. 672-673.

[63] F. J. Hampson, *The Concept of an "Arguable Claim" under Article 13 of the European Convention on Human Rights*, 39(4) International and Comparative Law Quarterly 891 (1990).

[64] ECtHR, *Boyle and Rice v. the UK* (App. Nos. 9659/82, 9658/82), 27 April 1988, para. 55.

[65] The Court differed significantly from the Commission because in its view an "arguable complaint" was a complaint related to the Convention in a way that required substantive settlement. In this context, *see* the case of *Boyle and Rice*, para. 55; *see also* R.C.A. White, C. Ovey, F.G. Jacobs, *Jacobs, White & Ovey, The European Convention on Human Rights*, Oxford University Press, Oxford: 2010, p. 134.

[66] The Court changed its view in this regard in the case of *Klass and Others*: "Article 13 (…) read literally, seems to say that a person is entitled to a national remedy only if a «violation» has occurred. However, a person cannot establish a «violation» before a national authority unless he is first able to lodge with such an authority a complaint to that effect. Consequently, (…) Article 13 (…) must be interpreted as guaranteeing an 'effective remedy before a national authority' to everyone who claims that his rights and freedoms under the Convention have been violated" (para. 64).

but rather a *prima facie* arguability.[67] By specifying the content of a claim's arguability test in relation to the length of proceedings, the Court focuses on the duration of the proceedings for each case.[68] For example, if court proceedings have lasted more than sixteen years, then considering Art. 6 § 1 ECHR the complaint is *prima facie* arguable.[69] Accordingly, the applicant is entitled to an effective remedy regarding the length of proceedings.[70]

3. THE PRINCIPLE OF EFFECTIVENESS WITHIN THE LEGAL ORDER OF THE ECHR

In order to better understand the essence of the criterion of effectiveness in constructing a remedy for the excessive length of proceedings, it seems necessary to look at the principle of effectiveness as one of the most important principles determining international law, and take into account that the Court, recognizing the primacy of this principle in the interpretation of the Convention, has adopted its own "doctrine of effectiveness."

The literature indicates a number of elements explaining the meaning of this doctrine. H. Thirlway, for example, argues it has two basic elements. The first element assumes that in the process of interpreting a treaty (or another international document) it should be borne in mind that all its provisions are to be read as established with the intention of giving them a specific meaning (they have been set out to perform a specific role) and therefore preserving their intended meaning is necessary, meaning a court interpretation is questionable if it does not reflect that meaning.

The second element is the rule according to which a treaty as a whole and its individual provisions must be read as established for the final realization of their object. This thus echoes the Roman maxim *ut res magis valeat quam pereat*,[71] which we can find in the definition of effectiveness put forward by G. Fitzmaurice, in the light of which

> effectiveness (*ut res magis valeat quam pereat*) indicates that treaties must be interpreted in terms of their declared or ulterior objects and purposes; individual provisions should be interpreted so as to reflect the fullest effect, consistent with the ordinary meaning of

[67] *See also* M. Balcerzak, *Konstrukcja prawa do skutecznego środka odwoławczego (right to an effective remedy) w uniwersalnym i regionalnych systemach ochrony praw człowieka*, in: J. Białocerkiewicz, M. Balcerzak, A. Czeczko-Durlak (eds.), *Księga jubileuszowa Profesora Tadeusza Jasudowicza*, Toruń: 2004, p. 50.

[68] ECtHR, *A. K. v. Liechtenstein (No. 2)* (App. No. 10722/13), 18 February 2016, para. 88.

[69] *Sürmeli*, para. 102.

[70] ECtHR, *Vlad and Others v. Romania* (App. Nos. 40756/06 *e. a.*), 26 November 2013, para. 113.

[71] M. Fitzmaurice, P. Merkouris, *Cannons of Treaty Interpretation*, in: M. Fitzmaurice, O. Elias, P. Merkouris (eds.), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on the Law of Treaties*, Brill, Leiden: 2010, pp. 154-155; A. Wyrozumska, *Umowy międzynarodowe. Teoria i praktyka* [International agreements: theory and practice], PWN, Warszawa: 2006, p. 345.

> words and other parts of the text and in such a way that raison d'être and meaning can be attributed to each part of the text.[72]

3.1. The special character of the Convention

The principle of effectiveness (*effet utile*) was not explicitly stated in the 1969 Vienna Convention on the Law of Treaties (VCLT), although it is assumed that it results implicitly from Art. 31.1 VCLT, which states that a treaty should be interpreted, *inter alia*, in the light of its object and purpose.[73]

Thus, the interpretation of the provisions of a treaty in the light of its object and purpose makes it necessary to refer to their effectiveness (*effet utile*).[74] In the process of interpreting a treaty, the fundamental subordination to its object and purpose has specific effects. In this process the subjective intention of the parties to the treaty and the reflection of this intention in its text becomes of secondary importance.[75] Advocates of the teleological school of thought deem it permissible to go beyond the text of the treaty, not because of the need to determine the intention of the parties but rather to achieve the purpose for which it was established.[76] These observations are confirmed by ECtHR case law, e.g. in *Soering v. the UK*, in which the Court held that

> In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms. Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective.[77]

In this way, the principle of effectiveness (*effet utile*), understood as the practical effectiveness of the Convention, is linked to the idea of a collective guarantee of human rights and fundamental freedoms, thus confirming the Convention's object, namely human rights and fundamental human freedoms, and purpose, i.e. ensuring the practical effectiveness of the collective guarantee. The consequence of this teleological approach is emphasis on the object and purpose, as a result of which the ECtHR, like any

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[72] G. Fitzmaurice, *Treaty Interpretation and Other Treaty Points, 1951-1954*, 33 British Yearbook of International Law 2003 (1957); it is also present in the ECHR jurisprudence; *see e.g.* EComPC decision in the case *Chrysostomos, Papachrysostomou and Loizidou v. Turkey* of 1991, para. 47.

[73] *See* the comments on the work of the International Law Committee on Art. 31 of the Vienna Convention on the Law of Treaties: M.K. Yassen, *L'interprétation des traités d'après la Convention de Vienne sur le droit des Traités*, Martinus Nijhoff Publishers, Dordrecht: 1976 (*Chapitre VII: L'effet utile: le principle ut res magis valeat quam pereat*, p. 71 et seq.); as regards the reasons for this, *see* Wyrozumska, *supra* note 71, p. 347; P. Merkouris, *Article 31 (3) (c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave*, Brill, Leiden: 2015, p. 211, fn. 861.

[74] Wyrozumska, *supra* note 71, p. 347.

[75] Judge G. Fitzmaurice clearly expressed this opinion in a separate opinion in the ECtHR *National Union Belgian Police v. Belgium* judgment.

[76] M. Frankowska, *Prawo traktatów* [Law of treaties], Wydawnictwo SGH, Warszawa: 1979, p. 122.

[77] ECtHR, *Soering v. the UK* (App. No. 14038/88), 7 July 1989, para. 87.

other teleological interpreter, "will attempt to subordinate all interpretative efforts to the object and purpose for which a contract has been entered into."[78] In other words, it will seek to ensure that the object and purpose of the Convention are fulfilled to the greatest extent possible while marginalizing the need to determine whether States Parties indeed intended to make such, not any other commitment.[79]

3.2. The dynamic object and purpose of the Convention

Given the above, it is obvious that the object and purpose of the Convention play a central role in the interpretation of its provisions. Although this idea expresses what is referred to as the essence of the treaty,[80] our case law analysis shows that the ECtHR gave this directive a broader meaning and considered it, as R. Bernhardt put it, as "entering certain dynamism."[81] This is because the ECHR interpretation must be "dynamic", that is, carried out based on changes occurring in social and political foundations,[82] as a consequence of which "its [substantive and procedural] provisions cannot be interpreted solely in accordance with the intentions of its authors from more than 40 years ago." The Court found additional justification for this approach in the provisions of the preamble to the ECHR, which mention "the maintenance and further realisation of Human Rights and Fundamental Freedoms." As explained by judge F. Tulkens, "this 'maintenance' requires in particular that the rights and freedoms contained in the Convention be effective in the face of changing circumstances. Whereas 'development' allows a certain degree of innovation and creativity, as a result of which the scope of the Convention's guarantees may be expanded."[83]

Therefore, the ECtHR decided that the provisions of the Convention should be interpreted so that the guarantees of its human rights and fundamental freedoms are not "theoretical or illusory", but instead, "practical and effective" and confirmed in a given case.[84] In turn, the rules of evolutionary interpretation require that the Convention be

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[78] Frankowska, *supra* note 76, p. 122.

[79] ECtHR, *Loizidou v. Turkey* (App. No. 15318/89), 23 March 1995, para. 71; *Mamatkulov and Askarov v. Turkey* (46827/99, 46951/99), 4 February 2005, para. 121 (with regard to Art. 34); A. Mowbray, *The Creativity of the European Court of Human Rights*, 5(1) Human Rights Law Journal 57 (2005), pp. 62-63, 264; D. Rietiker, *The Principle of "Effectiveness" in the Recent Jurisprudence of the European Court of Human Rights: Its Different Dimensions and its Consistency with Public International Law – No Need for the Concept of Treaty Sui Generis*, 79(2) Nordic Journal of International Law 245 (2010), p. 264.

[80] *See* ICJ, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 28 May 1951, ICJ Rep 1951, p. 15.

[81] R. Bernhardt stated in this context that: "The object and purpose of the treaty plays a central role in treaty interpretation." *See* R. Bernhardt, *Evolutive Treaty Interpretation, Especially of the European Convention of Human Rights*, 42 German Yearbook of International Law 11 (1999), p. 16.

[82] C. Ovey, R. C. A. White, F. G. Jacobs (eds.), *The European Convention on Human Rights*, Oxford University Press, Oxford: 2014, p. 46; *see also* M.N. Shaw, *Prawo międzynarodowe* [International law], Książka i Wiedza, Warszawa: 2008, p. 586.

[83] *See* the dissenting opinion of judge F. Tulkens to the ECtHR judgment in the case of *Stummer v. Austria* (App. No. 37452/02), 7 July 2011, paras. 3-4.

[84] *Airey*, para. 24.

treated as a living instrument, the provisions of which should be interpreted in the light of present-day conditions.[85]

The practical and effective assurance of the rights and fundamental freedoms of persons under the jurisdiction of States Parties requires considering social and economic changes broadly understood, as well as scientific and technical progress, thus pointing to an approach sensitive to contemporary threats to ensuring the rights and fundamental freedoms contained in the Convention[86]. Consequently, the fact that the authors of the Convention did not address a given issue must not prevent it from being considered as one that falls within the scope of the Convention.[87]

3.3. In dubio pro rights and freedoms

Additionally, this triggers a broad interpretation of human rights and fundamental freedoms and a simultaneous narrow interpretation of their exceptions and limitations,[88] making it a restrictive interpretation not so much towards individual rights as to the limits of their permissible violations by States Parties.[89]

The Court deemed it necessary to seek an interpretation that is "most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties,"[90] for "the overarching function of the Convention is to protect the rights of individuals, and not to establish mutual obligations between States, which will be interpreted restrictively, taking into account their sovereignty."[91]

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[85] ECtHR, *Marckx v. Belgium* (App. No. 6833/74), 13 June 1979, para. 30; the case of *Tyrer v. the UK* (App. No. 5856/72), 25 April 1978, was the case in which the ECtHR for the first time formulated these rules of evolutionary interpretation (*see* para. 31). M. Balcerzak, *Zagadnienie precedensu w prawie międzynarodowym praw człowieka* [The problem of precedence in international human rights law], Toruń: 2008, pp. 177-179.

[86] Bernhardt, *supra* note 81, p. 12; Mowbray, *supra* note 79, p. 72; Rietiker, *supra* note 79, p. 261.

[87] ECtHR, *Matthews v. the UK* (App. No. 24833/94), 18 February 1999, para. 39.

[88] P. van Dijk, F. van Hoof, (eds.), *Theory and Practice of the European Convention on Human Rights*, Antwerpen: 1998, pp. 73-74; R. Bernhardt states similarly that "the object and purpose of human rights treaties may often lead to a broader interpretation of individual rights on one hand and restrictive on State activities on the other" (Bernhardt, *supra* note 83, p. 14).

[89] Rietiker, *supra* note 79, p. 259; EComHR stated that "a restrictive interpretation of the individual rights and freedoms guaranteed by the European Convention on Human Rights would be contrary to the object and purpose of this treaty"; *see* EComHR, *East African Asians v. the UK* (App. Nos. 4403/70 *et al.*), 14 December 1973, para. 192; the academic literature, however, notes that a restrictive interpretation as such is, among other methods, not accepted in international law and has no basis in the VCLT of 1969; this opinion is shared by I. Brownlie, *Principles of Public International Law*, Oxford University Press, Oxford: 1998, p. 636; Bernhardt, *supra* note 81, p. 14.

[90] ECtHR, *Wemhoff v. Germany* (App. No. 2122/64), 27 June 1968, para. 8; the academic literature points out that "such argument, which emphasizes the character of the Convention as a contract by which sovereign States agreed to limitations upon their sovereignty, has now totally given way to an approach that focuses upon the Convention's law-making character." *See* Harris, O'Boyle, Warbrick, *supra* note 16, p. 7.

[91] EComHR, *Belgian Linguistic Case* (App. No. 1474/62), Report, p. 25.

The interpretation of the Convention is therefore non-restrictive as regards certain values, namely human rights.[92]

4. THE EFFECTIVENESS OF REMEDIES FOR THE EXCESSIVE LENGTH OF PROCEEDINGS

The effectiveness of the Convention largely depends on the effectiveness of the remedies which are provided to redress violations of its provisions.[93]

In this context, attention should be drawn to the rulings of the Court in *Nicolae Virgiliu Tănase v. Romania*, where the Court, in defining the criterion of the effectiveness of a domestic remedy, stated that the "remedy must in any event be 'effective' in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the State."[94] This statement is, however, difficult to find in cases concerning the "effectiveness" of remedies in cases concerning the length of proceedings pursuant to Art. 13 ECHR,[95] as the Court determined separate criteria for such cases.

Bearing in mind our previous comments regarding subsidiarity and the margin of appreciation afforded to States, it is understandable why the Court defines these cases not by indicating the specific form of a remedy, but by indicating the objects of their application, while emphasizing the need for the authorities to comply with Art. 6 § 1 ECHR and thus exercise *special diligence* in the conduct of such proceedings.[96]

4.1. Reasonableness and diligence in the proceedings

States Parties are therefore obliged to "make every effort" to avoid lengthiness, assuming that there may be objective reasons why this may not be possible.[97] The above remarks are justified in Art. 6 § 1 ECHR, which requires proceedings to be conducted "within a reasonable time."

In accordance with the principle of subsidiarity, when assessing the reasonableness of the length of proceedings, account must be taken of the circumstances of the case

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[92] L. Crema, *Disappearance and New Sightings of Restrictive Interpretation(s),* 21(3) European Journal of International Law 681 (2010), pp. 684-686.

[93] The right to a remedy with respect an arguable claim of a violation of a fundamental right or freedom is expressly guaranteed by almost all international human rights instruments. *See e.g.*, in addition to Art. 13 of the ECHR, Art. 8 of the Universal Declaration on Human Rights and Freedoms, Art. 2.3 of the International Covenant on Civil and Political Rights, Art. 6 of the Convention on the Elimination of Racial Discrimination, and Art. 6 of the Convention on the Elimination of All Forms of Discrimination against Women.

[94] ECtHR, *Nicolae Virgiliu Tănase v. Romania* (App. No. 41720/13), 25 June 2019, para. 218.

[95] *Sürmeli*, para. 100; *FIL LLC*, para. 47.

[96] *Kudła*, para. 130; *Rutkowski and Others*, para. 184.

[97] R. Pisillo Mazzeschi, *The Due Diligence Rule and the Nature of the International Responsibility of States*, 35 German Yearbook of International Law 9 (1992), p. 48 *mutatis mutandis*.

on one hand, and the criteria set out in the Court's case law on the other. As the Court recently stated in the *Raspopović and Others v. Montenegro* case, this will depend in particular on: the complexity of the case, the applicant's conduct and that of the competent authorities, and the importance of what is at stake for the applicant (the parties) in the dispute.[98]

However, the notion of reasonableness must also reflect the necessary balance between prompt and fair proceedings. In this regard, States Parties must strike a middle ground between procedural guarantees, which necessarily entail the existence of periods that cannot be shortened, and the concern for prompt justice. Therefore, situations may arise that justify delays in proceedings, e.g. where the protection of defence interests and the proper administration of justice so require. What is needed, therefore, is for the actions (or lack thereof) undertaken by state authorities in a given situation to judiciously act and prevent as far as possible, burdensome extensions of the length of proceedings. In this way the criterion of reasonableness has been applied to the criterion of due diligence in conducting proceedings.

Due diligence plays an important role in the good faith clause. A State acts in good faith when it could not, despite having exercised due diligence, fulfil its statutory obligations. *A contrario*, if due diligence has not been exercised at all by a State, it is then considered to have acted in bad faith. Therefore, due diligence is an element of good faith. The Court has issued many guidelines as to what this should mean in practice, although this has not been translated into a catalogue of specific actions, the performance of which could determine the possibility of recognizing the undertaking of such actions as being implemented with due diligence. It is in fact impossible to develop such a catalogue, given that due diligence depends on the circumstances of the case, the type and specifics of the law, and the basic human freedoms at stake.

In assessing a State's commitment to due diligence in a given case, it should be born in mind that, at present, "the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies."[99]

There is therefore no single, constant, required level of due diligence, all the more so because there are persons and situations in which the Court expects States Parties to conduct *special diligence*. In terms of the right to be heard within a "reasonable time" it is required, for instance, in cases when parties to the proceedings are affected by

[98] ECtHR, *Scordino v. Italy* (App. No. 36813/97), 29 March 2006, para. 177; *Raspopović and Others v. Montenegro* (App. Nos. 58942/11, 14361/13, 71006/13), 26 March 2020, para. 7.

[99] ECtHR, *Henaf v. France* (App. No. 65436/01), 27 November 2003, para. 55; these findings relate not only to Art. 8 ECHR, but also to other human rights and fundamental freedoms. *Cf.* the cases of *Mangouras v. Spain* (App. No. 12050/04), 28 September 2010, para. 87; *Demir and Baykara v. Turkey* (App. No. 34503/97), 12 November 2008, para. 146; and *Siliadin v. France* (App. No. 73316/01), 26 July 2005, para. 121.

illnesses, or in labour disputes, child-care cases[100] and claims of compensation for health damage allegedly resulting from medical malpractice.[101] It is also generally required in criminal cases, in particular when the accused is detained on remand.[102]

4.2. Obligations of States to provide effective remedies for the excessive length of proceedings

Returning to the issue of the effectiveness of remedies against the excessive length of proceedings within the meaning of Art. 13 ECHR, it should be noted that in general the "doctrine of effectiveness" is analysed in the context of either "preventing the alleged violation or its continuation, or of providing adequate redress for any violation that had already occurred (...)."[103] The Court therefore sets forth two objectives for a domestic remedy, pointing out in further rulings that prevention is of paramount importance. In fact, with respect of the length of proceedings the Court tends to state that "the best solution in absolute terms is indisputably, as in many spheres, prevention."[104] The above two elements constitute the content of the State's obligations arising from Art. 13 ECHR in the context of excessive length of proceedings.[105]

In this context it is also important to note that in accordance with the principle of subsidiarity and directly related to it the concept of margin of appreciation, States have some discretion as to the means and manner of carrying out their duties.[106] As a consequence, the Court declares respect for the procedural autonomy of the State even when it sets limits on it. Most importantly, this does not need to be one single remedy, but could be an aggregate or a combination of remedies which, by creating a specific mechanism, can function either together within a set or independently.[107] Furthermore, the Court points out that not all these remedies need to be strictly judicial remedies, although it adds that the procedural guarantees inherent in judicial authority are important in assessing their effectiveness.[108] As a result, a conclusion can be drawn that, in the Court's view, judicial remedies allow the State to best fulfil this obligation.[109]

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[100] *See e.g.* ECtHR, *H. v.* UK (App. No. 9580/81), 8 July 1987, para. 83; ECtHR, *Olsson v. Sweden (no. 2)* (App. No. 13441/87), 27 November 1992, para. 103; *Hokkanen v. Finland* (App. No. 19823/92), 23 August 1994, para. 72; *Ruotolo v. Italy* (App. No. 12460/86), 27/02/1992, para. 17.

[101] ECtHR, *Marchenko v. Russia* (App. No. 29510/04), 5 October 2006, para. 40.

[102] ECtHR, *Debboub v. France* (App. No. 37786/97), 9 November 1999, para. 46.

[103] *Kudła*, para. 158; *Charzyński*, para. 33; ECtHR, *Stefan Kozlowski v. Poland* (App. No. 30072/04), 22 April 2008, para. 35; *Krawczak*, para. 35.

[104] *Sürmeli*, para. 100.

[105] ECtHR, *Stanev v. Bulgaria* (App. No. 36760/06), 17 January 2012, para. 217.

[106] *Aksoy*, para. 95; *see generally* Morawska, *supra* note 3, p. 201.

[107] ECtHR, *Tagayeva and Others v. Russia* (App. Nos. 26562/07 *et al.*), 13 April 2017, para. 621; the Court has expressed a similar views in previous cases: *Abramiuc v. Romania* (App. No. 37411/02), 24 February 2009, para. 119; *Futro v. Poland* (App. No. 51832/99), 3 June 2003; *Kołodziej v. Poland* (App. No. 47995/99), 18 October 2005; *Szablińska v. Poland* (App. No. 52462/99), 2 February 2006; *Olędzki v. Poland* (App. No. 3715/03), 4 January 2008.

[108] ECtHR, *Rotaru v. Romania* (App. No. 28341/95), 4 May 2000, para. 69.

[109] *See also* Greer, *supra* note 9, p. 8.

By affording a margin of appreciation to States regarding the way of fulfilling their obligations under Art. 13 ECHR in the context of the excessive length of proceedings, the Court also admits that the scope of this obligation is not uniform but rather depends on the nature of the allegations contained in a complaint lodged by the applicant(s).[110] The Court's case law confirms that this applies to both the form of this remedy as well as the way the State operates and the method of granting appropriate relief.[111] In either case, however, this remedy must be "effective"[112] in practice as well as in law,[113] and the criteria for this effectiveness are determined by the Court.[114]

Considering the above remarks, the question once again arises as to the actual limits of the discretion awarded to States by the Court as regards the fulfilment of their obligations under Art. 13 ECHR, with the effectiveness of domestic remedies being of particular importance.

4.3. Effectiveness in preventing the lengthiness of proceedings

In view of the foregoing, it must be noted that the effectiveness of the remedy at issue cannot be reduced to "the certainty of a favourable outcome for the applicant."[115] The need for such clarification is due to the large number of complaints in which the applicants, such as in *Jarmuż v. Poland*, took advantage of what the Court considered to be an effective domestic remedy available to them only to see the disputed case not resolved in their favour.[116] It seems that this statement expresses a general reasoning of the Court, which it invokes not only with regard to the length of proceedings. For example, the Court has determined that "neither Article 13 nor any other provision of the Convention guarantees an applicant a right to secure the prosecution and conviction of a third party or a right to *private revenge*."[117]

Therefore, the Court approaches the length-of-proceedings issue in terms of political or systemic solutions, especially in that "Article 6 § 1 imposes on the Contracting

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[110] *Aksoy*, para. 95; ECtHR, *Stanev v. Bulgaria* (App. No. 36760/06), 17 January 2012, para. 217; and in two relatively recent cases: ECtHR, *Voynov v. Russia* (App. No. 39747/10), 3 July 2018, para. 38; and *Balogh and Others*, para. 48.

[111] This "essence" depends on the specifics of the Convention right, and consequently it varies: it is different, for example, in the case of the right to life (Art. 2 ECHR) or the prohibition of ill-treatment (Art. 3 ECHR); *see* respectively: *Aksoy*, paras. 95-100; ECtHR, *Tanrikulu v. Turkey* (App. No. 23763/94), 8 July 1999, para. 117; *Tagayeva and Others*, para. 149.

[112] *G.I.E.M. S.R.L.*, para. 306; ECtHR, *Zvolský* and *Zvolská v. the Czech Republic* (App. No. 46129/99), 12 November 2002, para. 40.

[113] ECtHR, *Mentes and Others v. Turkey* (App. No. 23186/94), 28 November 1997, para. 89; *Stanev v. Bulgaria,* (App. No. 36760/06), 17 January 2012, paras. 48, 217.

[114] *Krawczak*, para. 40.

[115] *Kudła*, para. 157; ECtHR, *Gorkiewicz* v. *Poland* (App. No. 41663/04), 13 January 2009, para. 28; and in many subsequent cases, including the cases of *Charzyński*, para. 38; ECtHR, *Voynov v. Russia* (App. No. 39747/10), 3 July 2018, para. 38; *Rudzis v. Poland* (App. No. 60347/10), 26 March 2019, para. 27.

[116] ECtHR, *Jarmuż v. Poland* (App. No. 63696/12), 13 June 2019.

[117] *Tagayeva and Others*, para. 623; ECtHR, *Bacciocchi v. San Marino* (App. No. 23327/16), 4 December 2018, para. 40.

States a duty to organise their judicial systems so that their courts can meet each of its requirements, including the obligation to hear cases within a reasonable time."[118] This approach can be observed in the way the relationship between the two main objectives of a remedy, namely prevention and redress, are determined. Because of the systemic dimension, preventing the excessively long settlement of cases is of paramount importance. The systemic nature of preventive remedies means that they cannot be reduced by a State to remedies applicable in just one case, but their objective is to prevent the lengthiness of the same category of specific case proceedings also in the future. As they are intended to prevent unjustifiable delays, they are not limited to repairing the breach *posteriori*.[119] For these reasons, remedies aiming to expedite the proceedings have an advantage over remedies affording only compensation,[120] and they are considered the "best solution" since they can prevent further delays.[121]

The primary importance of preventing delays or expediting court proceedings should also be viewed through the prism of the effectiveness of the Convention mechanism itself and the justification for isolating the reasonable-time requirement under Art. 6 § 1 ECHR. In other words, if a State effectively prevents the lengthiness of its courts' proceedings, then persons entitled to lodge individual complaints will no longer have to lodge them to the Court and will instead have their applications resolved within the boundaries of a national legal system.

4.4. Effectiveness of compensation for the excessive length of proceedings

However, in a situation where given proceedings have clearly already been excessively long,[122] other remedies are necessary to appropriately repair the breach, given that remedies aimed only at expediting the proceedings may prove inadequate.[123] In that case, States may seek to jointly establish two types of remedies, one designed to both expedite the proceedings and afford compensation,[124] and the other being a purely compensatory remedy.[125] Admittedly, the latter has no preventive element, but due to the wide margin of appreciation afforded to States and the alternative nature of the remedies referred to in Art. 13 ECHR,[126] the Court has no grounds to question its effectiveness immediately.[127] On the other hand, the Court is required to verify whether the way in which the domestic law is interpreted and applied "produces consequences that

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[118] ECtHR, *Cocchiarella v. Italy* (App. No. 64886/01), 29 March 2006, para. 74.

[119] *Ibidem*.

[120] *Sürmeli*, para. 100; ECtHR, *Borzhonov v. Russia* (App. No. 18274/04), 22 January 2009, para. 34; ECtHR, *Krasuski v. Poland* (App. No. 61444/00), 14 June 2005, para. 66.

[121] *Scordino v. Italy*, para. 183.

[122] *Ibidem*, paras. 183-187; *Cocchiarella*, paras. 74-78.

[123] *Istvan and Istvanova v. Slovakia*, para. 82; *see also* the case *Engelhardt*, para. 58.

[124] *Sürmeli*, para. 100.

[125] *Scordino*, paras. 183-187; *Cocchiarella*, paras. 74-78; *FIL LLC*, para. 47.

[126] *Kudła*, paras. 158-159.

[127] *Cocchiarella*, para. 41; ECtHR, *Wasserman v. Russia (No. 2)* (App. No. 21071/05), 10 April 2008, para. 48.

are consistent with the principles of the Convention, as interpreted in the light of the Court's case law."[128] Elaborating on the foregoing, the Court has set forth five general criteria for the effectiveness, adequacy, or accessibility of these remedies. These are:

- an action for compensation must be heard within a reasonable time;
- the compensation must be paid promptly and generally no later than six months from the date on which the decision awarding compensation becomes enforceable;
- the procedural rules governing an action for compensation must conform to the principle of fairness guaranteed by Art. 6 of the Convention;
- the rules regarding legal costs must not place an excessive burden on litigants where their action is justified;
- the level of compensation must not be unreasonable in comparison with the awards made by the Court in similar cases.[129]

The above criteria should be viewed through the prism of the distinction between material damages and non-material damages, since the Court assumed the existence of a strong, albeit rebuttable, presumption of non-pecuniary damage in the event of excessively long proceedings. Therefore, a State may rebut this presumption and waive relief, or grant it in the minimum required amount, but in either case it is obliged to properly justify its decision.[130] Clearly, this has a significant impact on the above-mentioned distribution of the burden of proof (i.e. the rebuttable presumption) in proceedings before the Court.

Insofar as concerns compensation for damages caused by the excessive length of proceedings, two elements must be taken into consideration. The first is the Court's verification of civil law mechanisms in the area of actions for damages against the State on account of the excessive length of the proceedings.[131] The case law shows that the Court expects the practice of national courts to provide for "a sufficient level of certainty to become an *effective remedy* within the meaning of Art. 13 ECHR for an applicant alleging a violation of the right to a hearing within a reasonable time (…)."[132] On the other hand, this mechanism can be considered a remedy in the scope of the excessive length of court proceedings, provided that it is effective, sufficient and accessible, whereas the assessment of its sufficiency may depend on the delay of the proceedings and the level of compensation.[133] This, however, is not meant to ensure a favourable outcome to the applicant, which in this case would be receiving an expected amount of compensation.[134]

The second issue concerns the applicant's victim status as a result of the violation of the reasonable-time requirement arising from Art. 6 § 1 ECHR, which is required

[128] *Scordino*, paras. 187-191; *Wasserman*, para. 49.

[129] *Wasserman*, para. 49.

[130] *Scordino*, paras. 203-204; *Wasserman*, paras. 49-50; *Rutkowski and Others*, para. 181.

[131] In relation to Poland, the key mechanism is the mechanism based on Art. 417 of the Civil Code. Journal of Laws of 1964 No. 16 item 93; current consolidated text: Journal of Laws of 2019, item 1145.

[132] *Krasuski v. Poland*, para. 72.

[133] ECtHR, *Istvan and Istvanova v. Slovakia* (App. No. 30189/07), 12 June 2012, para. 68.

[134] *Rudzis*, para. 27.

under Art. 34 ECHR.[135] The limited framework of this article will not allow us to explore this issue in great detail, but suffice it to say that certain rules determining the amount of compensation must be provided in redress cases. First of all, let us consider the Court's declaration that the State is not obliged to award compensation of the same amount as is usually awarded in similar cases regarding just satisfaction. The State is nonetheless obliged to afford damages which the Court may consider to be "sufficient and adequate redress."[136] Consequently, the Court expects that the amount of that compensation is comparable to that of just satisfaction,[137] and that it should not be "manifestly inadequate" given the circumstances of the case and the case law.[138]

The compensation amount and victim status in the event of obtaining by the applicant of compensation at the national level inevitably leads us to the practice of Polish courts regarding the application of the 2004 Act.[139] This practice consists in the so-called fragmentation of the proceedings and comes down to limiting the examination of the lengthiness of proceedings "to the court instance at which the case was currently pending, notwithstanding the prior instances."[140] In 2005, the ECtHR recognized the practice at issue as incompatible with both the object of the 2004 Act and its case law, as courts examining length-of-proceedings complaints should consider all stages of the proceedings conducted to that end.[141] That practice was also "a principal reason for the deficient operation of a complaint under the 2004 Act in the subsequent years."[142]

The problem just discussed is eagerly debated by both academics and the public, but for the purposes of our analysis it is crucial to answer the question of the impact of the fragmentation of proceedings on the effectiveness of the remedy and on granting victim status to the applicant within the meaning of Art. 34 § 1 ECHR. The answer to this question is rather obvious. First of all, the fragmentation of proceedings allowed courts to declare certain complaints alleging excessive length of procedures as ill-founded and consequently dismiss them.[143] Consequently, the fragmentation of the proceedings allowed for only a partial admittance of the length-of-proceedings complaint, which in turn resulted in the awarding of a "sum of money", as provided for in the 2004 Act, in an amount corresponding to a small fraction of the sum that the Court would

[135] In this context, attention should be drawn to the relatively recent case of *Chiarello v. Germany* (497/17), 20 June 2019, in which the Court found that "In the Court's view, the issue whether the applicant is deprived of his status as a victim within the meaning of Article 34 of the Convention is closely linked to the question raised with respect to his complaint under Article 6 § 1 of the Convention about the length of the proceedings. It therefore joins this issue to the merits of the application" (para. 38).

[136] *Ibidem,* para. 59.

[137] *Engelhardt*, para. 50.

[138] ECtHR, *Horvathova v. Slovakia* (App. No. 74456/01), 17 May 2005, para. 32.

[139] *See supra* note 14.

[140] *Rutkowski and Others*, para. 181

[141] The Court pointed out the issue for the first time in the case of *Majewski v. Poland* (App. No. 52690/99), 11 October 2005, para. 35.

[142] *Rutkowski and Others*, para. 215.

[143] *Ibidem,* 181.

have granted taking into account the entire period of consideration of the case (that is, the duration of the trial).[144] This sum was ultimately considered by the Court to be "manifestly inadequate" given the circumstances of the case and case law standards.

Thus, neither obtainment of the amount indicated nor dismissal of the complaint as a result of the fragmentation and the failure to consider the proceedings in their entirety deprived the applicants of victim status under the Convention.[145] Regrettably, the above finding reaches well beyond one case. At present, "the principal cause behind the violation [by Poland] of Article 13 is in the Polish courts' non-compliance with the Court's case law setting out standards for sufficient and appropriate redress [for the excessive length of court proceedings]."[146] So, the handling of court practice in the area of fragmentation of the proceedings has not solved the problem of lengthiness in the Polish judiciary. On the contrary, this problem was recognized by the Court as indicative of a structural or systemic dysfunction of the Polish judiciary.[147]

As part of the procedure for executing the pilot judgment delivered in the *Rutkowski and Others* case, the 2004 Act was amended on 30 November 2016 (the 2016 amendment). It obliges Polish courts to apply the 2004 Act in accordance with the standards deriving from the Convention.[148] In addition, it imposes on Polish courts the obligation to assess the rationality of the length of the proceedings as a whole (and not fragments, as had been the earlier practice) and sets a minimum level of compensation in the event of delays.

In accordance with the 2016 amendment, the minimum amount of compensation is not less than PLN 500 for each year of the duration of the proceedings to date, irrespective of how many stages of the proceedings were affected by the overall length of the proceedings. The 2016 Amendment provides for two possibilities for increasing this

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[144] *Ibidem*.

[145] *Ibidem,* paras. 27, 48, 74; the Court stated that the applicant Rutkowski would lose his status as a victim if the domestic court awarded him PLN 13,200 for nearly 8 years of protracted criminal proceedings (paras. 14-27). In turn, the applicant Orlikowski would lose his status as a victim in a civil case if he obtained approximately PLN 1,000 for each year of the proceedings (paras. 30-48);

[146] Para. 217. The Court's assessment of the practice of Polish courts is extremely critical. The Tribunal explicitly speaks of the reluctance of Polish courts to grant appropriately higher amounts for excessive length of proceedings; the amounts awarded by Polish courts correspond to 7% to 25% of the amount usually awarded by the Court. Moreover, the reasons for this reluctance were not found in the provisions of the 2004 Act or in the inability of Polish courts to exercise a proper margin of appreciation in assessing the relevant circumstances of lengthiness.

[147] The Court stated this in the *Rutkowski and Others* case.

[148] In this context, the speech of the former ECtHR judge L. Garlicki during the 9th Warsaw Seminar was extremely important. He underlined that "The model manner of the judicial implementation of the ECHR jurisprudence of the ECHR must be based on the knowledge of the jurisprudence, the respect for the legal authority of the entire jurisprudence of the ECHR, as well as good faith in its implementation and use." *See* L. Garlicki, *Model Manner of the Judicial Implementation of the European Convention and the Jurisprudence of the Strasbourg Court*, in: *Disfunctions of Polish Law: How to Improve the System of Legal Remedies in Poland*, Ministerstwo Spraw Zagranicznych – Departament do spraw Postępowań przed Międzynarodowymi Organami, Warszawa: 2016, pp. 186-198.

amount; namely the specific importance of the case for the applicant and the applicant's failure to contribute to the length of the case. Moreover, the amount already awarded to the applicant in the same case would be credited towards that amount. The minimum amount of compensation indicated in the amendment in the event of excessive length of proceedings raises reservations as to its compliance with the Convention. Let us consider the case *Rutkowski and Others v. Poland*, where the ECtHR pointed out that the average amount of compensation for each year of protracted proceedings should be at least PLN 1,000, and even higher, approximately PLN 1,600, in the case of protracted criminal proceedings.

Thus, it is very probable that the 2016 amendment to the 2004 Act will not change the assessment of the practice of Polish courts regarding compensation in the event of excessive length of proceedings. It may still not constitute 'adequate and sufficient redress' within the meaning of the standards set out in the ECtHR case law.

CONCLUSIONS

The analysis clearly shows that "the relevant principles relating to the application of Art. 13 ECHR to complaints about a violation of the right to a hearing within a reasonable time have been set out in a number of judgments."[149] On one hand, it is true that these are well-established in the case law, but on the other hand they are not always applied by the Court in an equal manner and with equal frequency. Moreover, they are neither sufficiently justified nor consistent,[150] with their content consisting essentially of indefinite terms and evaluation criteria combined with concepts understood in an autonomous way or even not at all defined in the case law. In spite of this, these principles provide a reference model for the interpretation and application of the States Parties' national law, and failure to comply with them may lead to a violation of the Convention. This is a significant burden for the States Parties, including for Poland.

Let us note once again that the current interpretation of Art. 13 ECHR in the Strasbourg jurisprudence is the result of its profound evolution over time. As indicated, the Convention bodies initially did not attach so much significance to Art. 13 ECHR and followed the concept of absorbing the scope of the right to an effective remedy by the guarantees of Art. 6 § 1 ECHR, or under Art. 5 § 4 and § 5 ECHR.[151] This approach

[149] The Court underlined it *expressis verbis*. *Cf*, the case of *Wcisło and Cabaj*, para. 140.

[150] More on this issue, e.g. J.H. Gerards, *Judicial Deliberations in the European Court of Human Rights*, in: N. Huls, M. Adams, J. Bomhoff, (eds.), *The Legitimacy of Highest Courts' Rulings*, Brill, The Hague: 2008, pp. 1 et seq.

[151] Regarding this issue, the Court also assumed that "the more specific guarantees of Article 5 §§ 4 and 5 of the Convention, being a *lex specialis* in relation to Article 13, absorb its requirements; (…) no separate issue arises in respect of Article 13, read in conjunction with Article 5 of the Convention"; *see* the cases of: *Zhebrailova and Others v. Russia* (App. No. 40166/07), 26 March 2015, para. 84; *Tsakoyevy v. Russia* (App. No. 16397/07), 2 October 2018, para. 149; *Alikhanovy v. Russia* (App. No. 17054/06), 28 August 2018, para. 106.

adopted by the Court was generally accepted and it was not until 1979 that the first voices of criticism emerged in connection with its application in *Airey v. Ireland*, one of the leading cases in the Court's case law.[152] These voices were expressed in the divergent dissenting opinions of judges P. O'Donoghue, Thor Vilhjàlmsson, and D. Evrigenis. Further reservations were expressed a few years later by judges J. Pinheiro Farinha and J. De Meyer in *W. v. The UK*. In their dissenting opinion they stated the following:

> We are not quite sure that such examination was made superfluous by the finding of a violation, in the case of the applicant, of the entitlement to a hearing by a tribunal within the meaning of Article 6 § 1 (art. 6-1). Are the "less strict" requirements of Article 13 (art. 13) truly "absorbed" by those of Article 6 § 1 (art. 6-1) [10]? Do these provisions really "overlap"? It appears to us that the relationship between the right to be heard by a tribunal, within the meaning of Article 6 § 1 (art. 6-1), and the right to an effective remedy before a national authority, within the meaning of Article 13 (art. 13), should be considered more thoroughly.[153]

Gradually, the doctrine would become more critical of this practice of the Court.[154] However, it was not until the *Kudła* case that the Court confirmed the autonomous position of Art. 13 ECHR regarding the excessive length of proceedings, announcing that:

> The time has come to review its case law in the light of the continuing accumulation of applications before it in which the only, or principal, allegation is that of a failure to ensure a hearing within a reasonable time in breach of Article 6 § 1.[155]

One of the main causes of the "autonomy" acquired by Art. 13 of the Convention over time was the Court's overload with length-of-proceedings complaints. Explaining the reasons for this state of affairs, in *Scordino v. Italy* the Court issued following statement:

> the reason [the Court] has been led to rule on so many length-of-proceedings cases is because certain Contracting Parties have for years failed to comply with the «reasonable time» requirement under Article 6 § 1 and have not provided a domestic remedy for this type of complaint.[156]

A more specific answer to the question whether this state of affairs has changed over the past years may be sought in the Court's findings in *Rutkowski and Others v. Poland*, in which it noted that the practice of Polish courts regarding a domestic remedy in connection with the excessive length of proceedings

> is not only incompatible with Article 13 but has also led to a practical reversal of the respective roles to be played by the Court and the national courts in the Convention system. It has upset the balance of responsibilities between the respondent State and the Court (…) In that regard, the Court would once again reiterate that, in accordance

[152] *See supra* note 37.

[153] ECtHR, *W. v. the UK* (App. No. 9749/82), 8 July 1987.

[154] *See* numerous references in the book by T. Barkhuysena, *Artikel 13 EVRM effectieve nationale rechtsbescherming bij schending van mensenrechten*, Koninklijke Vermande, Lelystad: 1998.

[155] *W.*, para. 148.

[156] *Scordino*, paras. 174-175.

> with Article 1, the primary responsibility for implementing and enforcing the rights and freedoms guaranteed by the Convention is laid on the national authorities and that the machinery of complaint to the Court is only subsidiary to the national systems safeguarding human rights (…).[157]

The above findings of the Court should be read as nothing short of an appeal addressed to the States Parties to the Convention for a proper reading of the subsidiarity principle of the Convsystem and for taking action in the area of human rights protection. Only then will persons subject to their jurisdiction not be forced to seek protection of their rights at the international level. In other words, it is not the ECtHR, but the national courts that should be the leading and natural defenders of human rights.

The underlying idea of shared responsibility for the protection of Convention rights has not gone unnoticed by the States Parties to the Convention. As stated in the Copenhagen Declaration of 2018, this idea is "is vital to the proper functioning of the Convention system and, as the ultimate goal, the more effective protection of human rights in Europe." However, its implementation requires "creating and improving effective domestic remedies, whether of a specific or general nature, for alleged violations of the rights and freedoms under the Convention, especially in situations of serious systemic or structural problems."[158] Considering the above analysis, it is difficult to disagree with these statements.

[157] *Rutkowski and Others*, para. 219.

[158] The Copenhagen Declaration on the reform of the European Convention on Human Rights system. It has been agreed by the 47 Member States of the Council of Europe on 13 April 2018. For more details *see* https://bit.ly/3e2dAwE (accessed 30 June 2020).

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CONFORMITY OF THE ACT ON THE POLISH CARD WITH INTERNATIONAL LAW FROM THE PERSPECTIVE OF THE CONSTITUTIONAL COURT OF BELARUS

Abstract: *With the Act on the Polish Card Poland followed the pattern of some European states (mostly Central and Eastern European ones) of enacting specific domestic legislation conferring special treatment and benefits to persons who are recognized as its kin-minorities. The most important analysis of this phenomenon from the perspective of international law was the 2001 Venice Commission's report entitled "Report on the Protection of National Minorities by their Kin-State." The Polish legislation was adopted in 2007, so for obvious reasons it was not considered by the Venice Commission. However, a rather unexpected and unusual examination of the Polish kin-state legislation from the perspective of international law came from Belarus. The Constitutional Court of the Republic of Belarus (CCRB) conducted a comprehensive examination of the Act on the Polish Card in 2011.*

The main aim of this article is to present and comment on the reasoning of the CCRB. Beginning with the broader context, this article starts with a presentation of the origins and a short description of the Act on the Polish Card, followed by a discussion of why the Polish Card and other kin-state legislation instruments are topics of concern in international law. The main part of the article is devoted to the presentation and assessment of the 2011 CCRB decision on the Act on the Polish Card. The author's assessment confirms at least some of the concerns put forward by the CCRB, i.e., that both the Act on the Polish Card and the practice based on it contradict some norms and principles of international law, namely the principle of territorial sovereignty, the norms of consular law, and several bilateral treaties in force between these two states. Bearing in mind that despite those concerns more than a quarter-million Polish Cards (also sometimes called Pole's Cards) have been issued so far by the Polish authorities, the article ends with a discussion of why such a prolonged non-conformity with international law is possible.

Keywords: Constitutional Court of Belarus, consular law, kin-minorities, Pole's Card, Polish Card, Venice Commission

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INTRODUCTION

With its enactment of the Act on the Polish Card[1] Poland followed the pattern of some European states (mostly Central and Eastern European ones) of enacting specific domestic legislation conferring special treatment and benefits to persons who are recognized as its kin-minorities.

As regards the term "kin-minorities", it should be noted that the term "kin" is added to differentiate between more traditional relations/policies of the states where minorities live (state minority policies/policies regarding ethnic minorities) and the relations/policies of the countries of origin/the motherlands and their diasporas. In consequence, the motherland/country of origin is called a "kin-state", and its diaspora is sometimes designated as a "kin-minority'.[2] These terms were popularized by the European Commission for Democracy through Law, better known as the Venice Commission, which used them in its 2001 "Report on the Protection of National Minorities by their Kin-State." The Venice Commission had taken up this topic on the initial request of Romania, concerned at that time by newly adopted Hungarian legislation on Hungarians living abroad. The Venice Commission was asked to examine the compatibility of this legislation "with European standards and the norms and principles of contemporary public international law." But the final product deals with the topic in a broader way, i.e. it contains an overall assessment of the compatibility of the protection of minorities by their kin-State through domestic legislation with European standards and with the norms and principles of international law.[3]

The Venice Commission based its report on an examination of kin-state legislation of nine states (Austria, Bulgaria, Greece, Hungary, Italy, Romania, the Russian Federation, the Slovak Republic, and Slovenia). Since the Polish legislation was not adopted until 2007, for obvious reasons it was not considered by the Venice Commission. However, a rather unexpected and unusual examination of the Polish kin-state legislation from the perspective of international law came from Belarus. In 2011 the Constitutional Court of the Republic of Belarus (also referred to as the CCRB) conducted a comprehensive examination of the Act on the Polish Card (referred to by the CCRB as the Act of the Republic of Poland on the Pole's Card).[4]

Aside from the rather controversial practice of the Constitutional Court of one state examining a foreign act by another state, the main aim of this article is to present and comment on the reasoning of the CCRB. This examination will also enable me to make

[1] Journal of Laws 2019, item 1598 (the Act or the Act on the Polish Card).

[2] In French "État-parent" and "minorité exocentrée" respectively.

[3] Report on the Protection of National Minorities by their Kin-State adopted by the Venice Commission at its 48th Plenary Session (Venice, 19-20 October 2001), *Science and technique of democracy. No. 32*, CDL-STD(2002)032, Council of Europe 2002, p. 10, available at: http://www.venice.coe.int/webforms/documents/?pdf=CDL-STD(2002)032-bil (accessed 30 June 2020).

[4] Decision of the Constitutional Court of the Republic of Belarus (7 April 2011, No P-258/11) on the position of the Constitutional Court of the Republic of Belarus on the Act of the Republic of Poland on the Pole's Card, available at: http://www.kc.gov.by/en/document-23293 (accessed 30 June 2020).

my own assessment of the Act on the Polish Card from the perspective of international law. My assessment confirms at least some of the concerns put forward by the CCRB, i.e., that the Act on the Polish Card and the practice based on it contradict some norms and principles of international law, namely the principle of territorial sovereignty, the norms of consular law, and several bilateral treaties in force between these two states.

Beginning with the broader context, this article starts with a presentation of the origins and a short description of the Act on the Polish Card, followed by a discussion of why the Polish Card and other kin-state legislative instruments are topics of concern in international law. Its main part is devoted to the presentation and assessment of the 2011 CCRB decision on the Act on the Polish Card. Echoing at least some of the international law concerns raised by the CCRB, and bearing in mind that despite those concerns more than a quarter-million Polish Cards have been issued so far by the Polish authorities, this article ends with a discussion of why and how such a prolonged non-conformity is possible.

1. THE ACT ON THE POLISH CARD – ITS ORIGIN AND A BRIEF CHARACTERISATION

The political breakthrough of 1989, and its consequent beginnings of the construction of a new system involved a change in the attitude of the Polish state towards Poles and people of Polish origin living abroad. At the end of the 1990s work was commenced on three laws, i.e. an act on repatriation, which

> was meant to enable the return to Poland of exiles and their descendants from the places of transportation and deportation (the Asian part of the former USSR, and Armenia, Georgia and Azerbaijan); a new act on Polish citizenship, which was meant to restore Polish citizenship to those who had lost it in the post-war period; and an act on the Polish Card [which was meant – W.B.] to strengthen the bonds between the homeland and those Poles who stayed on in the Eastern Borderlands of the Second Polish Republic.[5]

The work on the regulations enabling repatriation to the territory of the Republic of Poland was completed first, and the Act on Repatriation was passed in 2000.[6] It took the longest time to complete work on the new Polish Citizenship Act of 2009[7] which, *inter alia*, provides for the option of "restoring citizenship" to individuals (or their descendants) who were forced to emigrate during the communist period.[8]

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[5] M. Sora, *Repatriacja do Polski po 1990 r. – uwarunkowania prawne, skala przyjazdów, obszar osiedlenia* [The repatriation to Poland after 1990 – legal determinants, scale of arrivals, area of settlement], 2 (34) Studia Bas 9 (2013), p. 10.

[6] Act of 9 November 2000 on Repatriation, Journal of Laws of 2018, item 609 as amended.

[7] Act of 2 April 2019 on Polish Citizenship, Journal of Laws of 2018, item 1829 as amended.

[8] *Cf.* A. Górny, D. Pudzianowska, *EUDO Citizenship Observatory. Country Report: Poland*, RSCAS/EUDO-CIT-CR 2013/26, p. 12, available at: https://bit.ly/2VIsFgO (accessed 30 June 2020).

And in 2007 work on a regulation aimed at enabling the confirmation of belonging to the Polish nation and thus strengthening the national bonds of the diaspora with the homeland/motherland was completed. It was modelled after the regulations adopted in the 1990s and early 2000s in several other Central and Eastern European countries.[9] The first draft, which was proposed by the Senate in 1998, referred in its explanatory memorandum to the Slovak legislation on the Foreign Slovak's Certificate.[10] After nearly three years of legislative work, the parliamentary committees dealing with the Senate draft put forward an almost completely reworked draft in 2001.[11] The next proposal appeared first in 2006. Finally, work on the governmental draft was submitted in 2007 – it was handled at full speed and was successfully completed.[12] With the adoption of the Act on the Polish Card in the same year, a new legal institution appeared in the Polish legal system, setting out the legal framework for Poland's relations and policy with regard to the diaspora. This legislation has a constitutional basis. The Polish Constitution of 1997, similarly to the constitutions of several other Central and Eastern European states[13] establishes the obligation of public authorities to "provide assistance to Poles living abroad to maintain their links with national cultural heritage" (Art. 6(2)).[14]

The Polish Card (*Karta Polaka* in Polish, also sometimes translated as the Pole's Card[15]) is a document certifying a holder's belonging to the Polish nation. It should be noted that such "belonging" does not, however, replace and is not the same as Polish citizenship (hence a Polish Card does not entitle its owner to vote in Polish elections). In light of the latest amendment, it may be applied for by persons who do not have Polish citizenship or a right to permanent residence in Poland. The main criterion for granting it is the ethnic origin of the applicant, i.e. proving that one has Polish roots. However, the Act allows for the possibility of obtaining the Polish Card based on cultural criterion, i.e. by proving that the person concerned cultivated Polish traditions and culture, actively promoted them, and also promoted the Polish language and Polish minority rights for at least three years prior to submitting the application. Proceedings and decisions on granting the Polish/Pole's Card are conducted and issued either by a territorially competent consul (for applications submitted outside Poland), or in excep-

[9] *See e.g.* the legislation of: Slovakia (Zákon 70/1997 o zahraničných Slovákoch); Hungary (2001. évi LXII. Törvény a szomszédos államokban élő magyarokról, Magyar Közlöny 2003/84); and Romania (Legea nr. 299/2007 privind Sprijinul Acordat Românilor din Străinătate).

[10] *See* Sejm Paper No. 1206, 3rd Term.

[11] *See* Sejm Paper No. 2641, 3rd Term.

[12] For more on the course of the parliamentary work on this and previous draft laws, *see* A. Madera, *Karta Polaka w Parlamencie RP* [The Polish Card in the Polish Parliament], 13 Rocznik Wschodni 7 (2007/2008). For a broader background, including the regional context, *see* D. Pudzianowska, *Karta Polaka – Old Wine in New Bottle,* 19 Ethnopolitics (2020, forthcoming).

[13] *See e.g.* J. Jagielski, D. Pudzianowska, *Ustawa o Karcie Polaka. Komentarz* [The Act on the Polish Card. A Commentary], Wolters Kluwer, Warszawa: 2008, pp. 12-15; Pudzianowska, *supra* note 12.

[14] Journal of Laws of 1997, No. 78, item 483 as amended.

[15] Especially when citing or referring to the discussed decision of the Constitutional Court of the Republic of Belarus as official translations of the Court's decision used the term "Pole's Card."

tional situations by a territorially competent voivode, i.e. the governor of a province (for applications submitted within the territory of Poland). A holder of the Polish Card may be entitled to various privileges which are effective primarily in the territory of Poland. These include, *inter alia*, full access to the labour market and to free education, the possibility of conducting a business activity in Poland, transportation discounts, free access to museums and cultural institutions. Additionally, the Pole's Card gives an exemption from the fee for the national visa and entitles its holder to consular assistance from the Polish consular service in cases of threats to his or her life or health.

Pursuant to Art. 2(2) in the original wording of the Act, which was in force until 13 July 2019, the Pole's Card could only be applied for by citizens of fifteen countries, listed exhaustively in this provision. They were exclusively the states created after the dissolution of the Soviet Union. The reasoning behind this restriction was linked to financial conditions, as the drafters had come to the conclusion that this form of compensation should be offered to those who had suffered the most in the course of history, many of whom are now living in severe conditions. There was a common understanding that these conditions were common to a multitude of Poles living in states created after the dissolution of the Soviet Union. The other argument put forward in this context was that many of the potential beneficiaries of the Act could not, under their home state's legislation, hold dual citizenship.[16] Such a significant subjective limitation of the Polish Card raised reasonable concerns of both a legal and non-legal nature. As regards those of a legal nature, they included the compliance of the Act with the Polish Constitution (the anti-discrimination clause, the obligation to "help Poles living abroad to preserve their links with the national cultural heritage") as well as with EU law (the principle of non-discrimination on grounds of nationality [Art. 18 TFEU], due to the fact that the benefits under the Pole's Card were potentially available to citizens of only three EU member states, i.e. the Baltic republics). As regards the concerns of a non-legal nature, they concerned mainly the unjustified exclusion from the scope of the Act of those persons of Polish origin living in other countries of the world. At the beginning of April 2019, during the course of the publication process, the Sejm received a governmental bill to amend, among others, the Act on the Pole's Card, which provided for "widening the scope *ratione personae* of the Act on the Pole's Card to cover the whole world and thus to include all persons of Polish origin and all Polish diaspora communities." The Act was amended on 6 May 2019 and the amendment entered into force on 14 July 2019. Since then, the Polish Card can be applied for by both citizens and stateless persons residing in any country in the world.

In a report summarising the first eight years of the Act being in force, it was indicated that 162,218 Cards had been issued during that period, of which over 47% were to citizens of Belarus and over 43% to citizens of Ukraine.[17] Currently, this number has

[16] *See* Jagielski, Pudzianowska, *supra* note 13, pp. 83-86.

[17] M. Kowalski, *Raport z badań na temat posiadaczy Karty Polaka,* in: *Odkryte karty historii. Podsumowanie ustawy o Karcie Polaka* [The research report on the holders of the Polish Card], Fundacja Wolność i Demokracja, Warszawa: 2015, p. 27.

increased to approx. 250,000.[18] It is worth noting in this context that Polish diaspora organisations and Polish diplomatic missions abroad estimate the number of Poles living in the post-Soviet territories at about 2.6 million. However, the opening of the Act to all countries of the world significantly increases the number of its potential beneficiaries.

2. THE POLISH CARD AS AN ISSUE OF INTERNATIONAL LAW

From the point of view of national law, the matters covered by the Act on the Polish Card as set forth in its Article 1 i.e. "the rights of such person to whom the Polish Card has been granted (…) the principles of granting, expiry and invalidation of the Polish Card and the jurisdiction and procedure of the authorities in these matters" are of interest primarily in terms of administrative law. As indicated above, the Polish Card is not synonymous with Polish citizenship, so international law considerations concerning citizenship will not be applicable to it.[19] Nevertheless, the content of the Act – both directly and indirectly (as well as potentially) – either refers to international law or opens the way to analyses from the point of view of international law (including EU law). Direct references to international law include:[20]

[18] A. Nogal, *Niepotrzebne obostrzenia w ustawie o Karcie Polaka* [Unreasonable restrictions on the Act on the Polish Card], 10 February 2018, available at: http://www.lex.pl/czytaj/-/artykul/niepotrzebne-obostrzenia-w-ustawie-o-karcie-polaka. In August 2018 the Supreme Chamber of Control published information on the results of the audit of the granting of the Polish Card in 2015-2017, which shows that in 2015 and 2016 a total of more than 45,000 decisions were issued in cases of granting the Polish Card – *see Materiały kontrolne NIK: Przyznawania Kart Polaka osobom zamieszkałym za wschodnią granicą RP. Lata 2015-2017, Najwyższa Izba Kontroli*, August 2018, available at: https://www.nik.gov.pl/plik/id,17959,v,artykul_17003.pdf (both accessed 30 June 2020). These data confirm the number of approx. 250,000 Polish Cards having been issued as of that time.

[19] Although states continue to enjoy a certain degree of freedom to regulate issues related to nationality, numerous international agreements in this area, as well as rulings by international courts and the relevant international practice, constitute certain limitations to this freedom and consequently confirm that issues related to nationality are also a matter of concern under international law – *see, inter alia,* R. Clerici, *Freedom of States to Regulate Nationality: European Versus International Court of Justice?*, in: N. Boschiero et al. (eds.), *International Courts and the Development of International Law*: *Essays in Honour of Tullio Treves*, Springer, The Hague: 2013, pp. 839-862. In other words, "under international law, matters of nationality fall within the exclusive competence of each state but because of the international legitimacy of nationality, the freedom of a state is limited to a certain extent" (W. Ramus, *Instytucje prawa o obywatelstwie polskim* [The institutions of the law on Polish citizenship], PWN, Warszawa: 1980, p. 25). The very process of internationalisation of citizenship law began in practice first in the 20th century, with the decade 1920-1930 being particularly important in this regard – *see* G. Matias, *Citizenship as a Human Right: The Fundamental Right to a Specific Citizenship,* Palgrave Macmillan, London: 2016, pp. 41 et seq.

[20] A very extensive and multifaceted reference to international law (its individual parts will be analysed later in the study while discussing specific issues) was included in the Preamble to the 2006 draft, namely: "...with regard to the accession of the Republic of Poland to the European Union and in accordance with the fundamental principles adopted by international organisations, and in particular by the Council of Europe, as regards respect for human rights and the protection of minorities, while respecting generally accepted principles of international law, as well as the commitments of the Republic of Poland adopted under

- numerous references to the activities of the consul of the Republic of Poland as the competent authority in matters relating to the Polish Card (*inter alia*, Art. 2(1)(2), Art. 4(2)) and the consular protection for card holders (Art. 6(1)(8) of the Act). The status of the consul in the host country and the basis and limits of the consular functions performed are determined by the norms of international law;
- the requirement introduced by one of the latest amendments to the Act that a person applying for the Polish Card should submit "a declaration that neither they nor their ancestors or descendants have been repatriated from the territory of the Republic of Poland or the People's Republic of Poland under the repatriation agreements concluded in 1944-1957 by either the Republic of Poland or the People's Republic of Poland with the Belarusian Soviet Socialist Republic, the Ukrainian Soviet Socialist Republic, the Lithuanian Soviet Socialist Republic and the Union of Soviet Socialist Republics, to any of the States being a party to those agreements" (Art. 2(1)(4) and Art. 19(3) of the Act). Thus the Act directly refers to several international agreements.

Indirect and/or potential links with international law, including EU law, are connected with the very fact that the potential beneficiaries of the Polish Card are not Polish citizens but citizens of other countries (or stateless persons permanently residing in those countries). With regard to Poland's neighbouring countries, provisions such as those in the Act on the Polish Card may also thus be analysed in the light of the concept of the so-called "good neighbourhood." As W. Czapliński and A. Wyrozumska point out, although "the regime of cooperation with respect to the border is not clearly defined in law … it is usually assumed that this obligation goes further than with respect to other areas of international law' and 'the norms related to the concept of 'good neighbourhood', derived from the transfer of certain constructs of private law to international law, are of particular importance."[21]

Another indirect link between the Act on the Polish Card and international law can be found in its provisions concerning the role that may be played by Polish diaspora organisations operating in the home-state of the applicants in the procedure for applying for this document. Art. 2(1)(3) of the Act indicates that an alternative to proving one's Polish nationality is to present a certificate from a "Polish or Polish diaspora organisation confirming active involvement in activities for the advancement of the Polish language and culture or Polish national minority for at least the last three years." The list of organisations authorised for this purpose is published in the *Monitor Polski* by the Minister of Foreign Affairs (Art. 13(4) of the Act). In this way, the Polish legislator also includes entities operating in the territory and on the basis of the law of a third-

international law, with due respect for the development of bilateral and multilateral good neighbourly relations, partnership and cooperation in the region of Central and Eastern Europe, in particular taking into account the bilateral treaties concluded by the Republic of Poland with neighbouring countries on maintaining good neighbourly relations and cooperation and guaranteeing minority rights..."

[21] W. Czapliński, A. Wyrozumska, *Prawo międzynarodowe publiczne. Zagadnienia systemowe* [Public international law. The systemic aspects], C.H. Beck, Warszawa: 2014, p. 232.

party country in the procedure for issuing the Polish Card, which also opens the way for analyses concerning the compliance of such a solution with the applicable international law.

That the Polish Card and the national cards introduced by other states involve a number of important issues of public international law is also confirmed by the fact that, as already mentioned, in 2001 the Venice Commission addressed this issue in detail in its assessment of the compliance of the legislative solutions and practices in question with the "Council of Europe standards and principles of international law." At the same time, in the main part of the report the assessment pattern is slightly different, i.e. it indicates that compliance with "European standards and norms and principles of international law" will be examined. As a result, the report addresses a number of issues of international law, with a particular focus on four issues:

- the principle of territorial sovereignty of states (Part D, item a of the Report);
- the principle of *pacta sunt servanda* (Part D, item b of the Report);
- the principle of friendly neighbourly relations (Part D, item c of the Report);
- the principle of respect for human rights and fundamental freedoms and the prohibition of discrimination (Part D, item d of the Report).

The outcome of the Venice Commission's work became the basis for the assessment presented by the Belarusian Constitutional Court, so a more detailed presentation of the above issues identified by the Venice Commission will take place when discussing the decision of this particular constitutional court.

References to international and EU law also appeared, with varying degrees of effect, during the legislative work on the individual drafts of the Act on the Polish Card. For example, the Sejm Office for Studies and Expert Opinions decided that the Senate draft of 1999 "does not fall within the scope of the applicable Community law and the adjustment obligation,"[22] and this despite the fact that e.g. in the original draft there was already a provision stating that the Card entitles its holder to a "nationality visa" (Art. 3(1) of the 1999 draft).

However, two years later, when giving his opinion[23] on the 2001 draft, the Secretary of the Committee for European Integration noted that "it also regulates issues related to the entry and stay in the territory of the Republic of Poland of third-party nationals (Article 1) including issues related to the issuance of visas" and thus, in consequence, it also concerns EU law, including the Schengen *acquis*. Later on, the Secretary found the provisions of the Act concerning visas to be vague and therefore requiring amendment in order to be considered as compliant with EU law. Additionally, this opinion referred to general public international law by indicating that the privileged treatment of a certain group of foreigners as a result of the proposed act raises doubts as to the compatibility of these solutions with the aforementioned provisions of international documents in the field of human rights protection (e.g. the Universal Declaration of Human Rights

[22] Opinion by the Sejm Office for Studies and Expert Opinions – Annex to Sejm Paper No. 1206, 3rd Term.

[23] Annex to Sejm Paper No. 2641, 3rd Term

of 1948[24] and the International Covenant on Economic, Social and Cultural Rights of 1966[25] were indicated).

The above arguments were also shared by the Polish Council of Ministers (Government), which in its opinion[26] additionally pointed out two other problems in the field of international law. It was noted that in light of international standards (e.g. the Framework Convention for the Protection of National Minorities of 1994[27] and non-designated "bilateral treaties signed by Poland"), "nationality is a state of consciousness of every person and the resulting identification with a given ethnic group", and consequently should not be "decreed" by a state official, in this case the Consul of Poland. In addition, Art. 55 of the 1963 Vienna Convention on Consular Relations,[28] which obliges members of the consular post to respect the internal law of the host country, was also indicated. The opinion points out that, in principle, all states have rules in their internal laws requiring equal treatment of their citizens, also regardless of their nationality. In this context, it was noted that the activities of the consuls of the Republic of Poland in the area of the Polish Card result in *de facto* unjustified differentiation between the citizens of the host country based on their declared nationality.

On the other hand, in the legislative process of the 2007 draft – which after minor amendments was finally adopted – the draft was assessed negatively from the perspective of EU law by the Office of the Committee for European Integration (UKIE), which, until its merger with the Ministry of Foreign Affairs in 2010, gave its opinion on proposed legal acts with regard to their compliance with EU law. In its opinions,[29] the UKIE focused on the fact that three EU Member States (the Baltic republics) are among the countries listed therein. In the UKIE's opinion, the fact that citizens of the other Member States cannot apply for the Polish Card, even if the other statutory conditions are met, is contrary to one of the fundamental principles of EU law, i.e. the principle of non-discrimination on grounds of nationality, reflected today in Art. 18 of the Treaty on the Functioning of the European Union (TFEU).[30]

It should be noted with regret that none of the official expert opinions presented at the various stages of work on the law which took place after the adoption of the report by the Venice Commission actually referred to the Commission's report or made any attempt to assess the planned solutions with respect to the guidelines included in the report.

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[24] UN Doc. A/RES/3/217 A.

[25] The International Covenant on Economic, Social and Cultural Rights of 16 December 1966, 993 UNTS 3 (ICESCR).

[26] Prime Minister's letter of 19 June 2001, DSPR-140-109/01.

[27] ETS, No. 157.

[28] The Vienna Convention on Consular Relations of 24 April 1963, 596 UNTS 261 (VCCR).

[29] One opinion (of 12 June 2007) was attached to the government's draft (Sejm Paper No. 1957, 5th Term), and another one (of 31 August 2007) was submitted by the UKIE to the Sejm Committee for Liaison with Poles Abroad (Sejm Paper No. 2097, 5th Term).

[30] OJ EU C 202 of 2016, p. 47

3. THE 2011 DECISION OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF BELARUS ON ITS POSITION ON THE ACT OF THE REPUBLIC OF POLAND ON THE POLISH CARD

The CCRB's competence, which provides for "stating the position (…) on conformity of the document adopted (issued) by foreign states, international organisations and (or) their bodies and affecting the interests of the Republic of Belarus to generally recognised principles and rules of international law" (Art. 147) is currently based on the 2014 Law of the Republic of Belarus on Constitutional Proceedings (Chapter 22, Articles 147-152).[31] Similar provisions existed under the former constitutional regulations in Belarus.[32]

According to the official census of 2009 there are around 295,000 persons of Polish origin in Belarus (3.1% of the population), and they constitute the second largest (after Russians) minority in Belarus. However, unofficial estimates range from 500,000 to even 1.2 million persons of Polish origin.[33] Nevertheless, whether using official or unofficial data, Belarus is one of the states with the largest number of potential beneficiaries of the Act on the Polish Card. While this context was not mentioned in the CCRB's decision, it must have played an important role in terms of why the Act on the Polish Card met with such great political and legal interest in Belarus.

The CCRB rendered its decision regarding the motion of the House of Representatives of the National Assembly of the Republic of Belarus, a motion which contained their opinion that the Act of the Republic of Poland on the Polish Card "contradicts the rules of international law and the principle of good neighbourhood." The MEPs stated that:

1) by granting benefits to the holders of the Pole's Card, Poland discriminates against other foreign nationals (including Belarusians without a Polish Card) and this alone "contradicts such basic international documents in the field of human rights such as the Universal Declaration of Human Rights of December 10, 1948, the International Convention on the Elimination of All Forms of Racial Discrimination of December 21, 1965[34] and the Convention concerning Discrimination in Respect of Employment and Occupation of June 25, 1958[35] as well as the Treaty between the Republic of Belarus and the Republic of Poland on Good Neighbourly Relations and Friendly Co-operation of June 23, 1992;"[36]

[31] National Legal Internet Portal of the Republic of Belarus, 16 January 2014, 2/2122, English translation available on the website of the CCRB http://www.kc.gov.by/en/document-5273 (accessed 30 June 2020).

[32] Subpoint 1.5 of point 1 of the Decree of the President of the Republic of Belarus of 26 June 2008, no. 14 "On Certain Measures to Improve the Activities of the Constitutional Court of the Republic of Belarus."

[33] Previous censuses had revealed a much higher number of Poles, for example around 540,000 in 1959, and around 395,000 in 1999 – *see* P. Eberhardt, *Polacy na Białorusi i Ukrainie* [Poles in Belarus and Ukraine], 1 Wspólnota Polska 3 (2003).

[34] 660 UNTS 195.

[35] 362 UNTS 31.

[36] Journal of Laws 1993, No. 118, item 527 (the Treaty on Good Neighbourly Relations).

2) the power of the Consuls of the Republic of Poland to process and grant the Polish Card on the territory the Republic of Belarus contradicts "point 'm' of article 5 of the Vienna Convention on Consular Relations of April 24, 1963,[37] and articles 26 and 29 of the Consular Convention between the Republic of Belarus and the Republic of Poland of March 2, 1992;"[38]
3) the Act as a whole provides rules other than those embodied in several bilateral treaties between both states (i.a., the Agreement between the Government of the Republic of Belarus and the Government of the Republic of Poland on Mutual Employment of Citizens of 27 September 1995[39] and the Agreement between the Government of the Republic of Belarus and the Government of the Republic of Poland on Mutual Trips of Citizens, concluded by the exchange of notes on 20 December 2007[40]), and especially contradicts article 1 of the Treaty between the Republic of Belarus and the Republic of Poland on Good Neighbourly Relations and Friendly Co-operation of 23 June 1992.

The Constitutional Court of the Republic of Belarus started its analysis (point 1) by providing a detailed list of the legal bases from which the Court derives the generally recognized principles and rules of international law used in its analysis, i.e., the 1945 UN Charter,[41] the 1970 Declaration on International Law Principles,[42] The 1975 Final Act of the Conference on Security and Co-operation in Europe,[43] the 1966 International Covenant on Civil and Political Rights,[44] the ICESCR, the 1963 Vienna Convention on Consular Relations,[45] the Treaty on Good Neighbourly Relations, and "other bilateral international treaties between the Republic of Belarus and the Republic of Poland."

The CCRB subsequently (point 2) differentiated between two situations – kin-state policy towards a country's own nationals living abroad, and kin-state policy towards foreign nationals. Regarding the first situation, the Court observed that under generally recognized principles and rules of international law, which derive from the above-mentioned acts and also, *inter alia*, from documents and treaties on minorities (e.g. the 1994 Framework Convention for the Protection of National Minorities),

[37] 500 UNTS 95.

[38] Journal of Laws 1994, No. 50, item 197 (the Consular Convention).

[39] Not promulgated. Text available on the "Internet Treaty Base" website, established by the Polish Ministry of Foreign Affairs.

[40] Polish Monitor 2008, No 83, item 733.

[41] The Charter of the United Nations, 1 UNTS, XVI (the UN Charter).

[42] The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations adopted by the resolution of the General Assembly of the United Nations of October 24, 1970 no. 2625 (XXV), UN Doc. A/C.6/SR.1180 (1970)

[43] The Final Act of the Conference on Security and Co-operation in Europe of August 1, 1975, ILM, vol. 14, 1292 (1975 Final Act).

[44] The International Covenant on Civil and Political Rights of December 16, 1966, 999 UNTS 171 (ICCPR).

[45] The Vienna Convention on Consular Relations of April 24, 1963, 596 UNTS 261 (VCCR).

"the adoption of legislation by a kin-state, entitling its nationals living abroad to any privileges is consistent with the rules of international law and represents a fairly common international practice."

Regarding the situation wherein benefits and privileges of a kin-state are offered to foreign nationals (as is the case of the Act on the Polish Card), the CCRB started by referencing the above-mentioned Report of the Venice Commission. Indirect referral to the report occurred when the Court noted that such a policy requires "respect for the principles of sovereign equality of states, implementation in good faith of international obligations, respect for friendly interstate relations, human rights and fundamental freedoms, and prohibition of discrimination"[46] (all these aspects were discussed in the report). The CCRB also directly referred to the Venice Commission's Report and focused on the part of the report in which it stated that, in principle, preferential treatment "may be granted to persons belonging to kin-minorities in the fields of education and culture, in so far as it pursues the legitimate aim of fostering cultural links and is proportionate to that aim," and only in exceptional cases (and again subject to respecting the proportionality test) in other fields.

The following part of the CCRB decision lacks clarity, is rather puzzling, and is far from persuasive. The CCRB concentrated on the fact that the Polish Card can be also granted to citizens of the Republic of Belarus who do not have Polish roots (under the cultural criterion, confirmed by a Polish or Polonian organization – e.g. Art. 2(1), point 3 *in fine*; Art. 13(4)) and also on provisions of the Act stipulating when the Card cannot be granted or should be annulled (if the applicant's behaviour is detrimental to the basic interests of Poland – Art. 19 point 6; and if the behaviour of the Card's holder "discredits Poland and Poles" – Art. 20(1), point 1, respectively. The Court concluded with the observation that these provisions of the Act "are inconsistent with the generally recognised principles of the respect for human rights and fundamental freedoms and non-discrimination." The weakness of this argument is confirmed by the fact that in the closing parts of its decision the CCRB omitted this point and reiterated other points of incompatibility of the Act with "generally recognised principles and rules of international law." The fact that in the following paragraphs the Court came back to the previously-repeated argument of the Venice Commission that preferential treatment of kin-minorities should be, in general, restricted to education and culture, confirms that this part of the decision is also not well-structured and, as such, a bit puzzling.

As regards preferential treatment based on the Act, the Court focused on the exemptions of card holders from visa fees (Art. 5) and their rights concerning employment and entrepreneurial activity in Poland (Art. 6(1), points 1 and 2), stating that none of these benefits are related to education and culture. As a supplementary argument, the CCRB added that these benefits are in contradiction with the provisions of two bila-

[46] In the Venice Commission's opinion, kin-state legislation on the protection of their kin-minorities "is conditional upon the respect of the following principles: a) the territorial sovereignty of States; b) *pacta sunt servanda*; c) friendly relations amongst States, and d) the respect of human rights and fundamental freedoms, in particular the prohibition of discrimination" – *see* part. D of its Report.

teral treaties between Belarus and Poland (i.e. the 1995 Agreement between the Government of the Republic of Belarus and the Government of the Republic of Poland on Mutual Employment of Citizens, and the Agreement between the Government of the Republic of Belarus and the 2007 Government of the Republic of Poland on Mutual Trips of Citizens), which do not recognize exemptions similar to the ones stipulated in the Act.

The following two arguments are better structured. The first concentrates on the role of "public associations registered and operating in the territory of the Republic of Belarus" in the procedure of granting the Polish Card. As mentioned above, under Art. 2(1), point 3 *in fine* the Polish Card can also be granted when a cultural condition is met, i.e. when a Polish or Polonian organization operating in the applicant's country of origin confirms his/her "engagement in activities in favour of the Polish language and culture or national minority for at least three years prior to the application for the card." Furthermore, the Polish Prime Minister published in the official bulletin (Monitor Polski) the list of recognized organizations which are authorized to issue those certificates (Art. 13). The CCRB, referring once again to the Venice Commission's report, observed that these provisions "are not consistent with such generally recognised principles of international law as the principle of sovereign equality of states and the principle of non-interference in affairs within the internal jurisdiction of any other state."

Another argument was built upon one of the points raised by the MEPs in their motion to the CCRB – that consuls of the Republic of Poland can only perform functions other than those directly listed in the VCCR and the Consular Convention "which are not prohibited by the laws and regulations of the receiving State or to which no objection is taken by the receiving State" (Art. 5(m) of the VCCR). Neither the crucial role of the consuls in the whole procedure, nor the fact that granting documents such as the Polish Card is not included in the non-exhaustive lists of consular functions of the VCCR or the Consular Convention, is disputable. After noting that, the CCRB referred to the above-mentioned provision of the VCCR and also to, *inter alia*, Art. 26(1) of the 1992 Consular Convention, confirming this rule. Thereafter the Court noted that the Republic of Belarus on several official occasions objected that the Act is applied to citizens of the Republic of Belarus and "(h)ence the issuance by the consul of the Republic of Poland in the territory of the Republic of Belarus of any documents entitling some Belarusian citizens to privileges and benefits is not properly sanctioned by the Republic of Belarus." In the opinion of the Court, it also contradicts the Treaty on Good Neighbourly Relations "that provided for bilateral co-operation."

In concluding its reasoning, the CCRB listed only three arguments supporting its assessment that "the Act of the Republic of Poland on the Pole's Card affects the interests of the Republic of Belarus, and some of its provisions do not conform to certain generally recognised principles and rules of international law." It referred to the role of certain Belarusian public associations, the functions of the Polish consuls, and the fact that at least some of the benefits of having the Pole's Card "being established unilaterally without the consent of the Republic of Belarus, do not conform to the

provisions" of the above-mentioned bilateral agreements and "violate the generally recognised principle of the fulfilment in good faith of the obligations assumed by states." The argument based on the alleged discrimination was omitted in the concluding part of the decision.

4. THE ASSESSMENT OF THE CCRB DECISION

Despite the rather wide legal basis of its decision and arguments presented in the opinion attached to the motion of the House of Representatives of the National Assembly of the Republic of Belarus, the Court in its reasoning focused only on four issues, namely:

- the discriminatory effect of the Polish Card on other foreign nationals not entitled to this document, and as such, the alleged breach of several human rights treaties;
- unilaterally, and without permission of the Republic of Belarus, the established benefits and privileges resulting from the possession of the Polish Card go beyond the field of education and culture and, as such, are neither justified nor proportional. Furthermore, they violate several bilateral agreements in force between Belarus and Poland;
- in accordance with official statements from the Republic of Belarus, the Polish consuls' functions related to the Polish Card contradict the rules of international consular law (namely the VCCR and the Consular Convention);
- the authorization of certain Belarusian associations to play a role in the procedure of granting the Polish Cards contradicts the principle of the sovereign equality of states and the principle of non-interference in affairs within the internal jurisdiction of any other state.

The first point is presented in a very puzzling and unconvincing way. It seems that the Court was not itself convinced by this argument as provided (but similarly not reasoned) by the MEPs, or at least neglected its obligation to be persuasive and to justify its findings. The Court mixed several points (i.e., a preferential treatment which goes beyond education and culture, the fact that citizens of Belarus without Polish origin are also entitled to a Polish Card under the cultural condition, and its discussion on the provisions of the Act, which require a certain behaviour – loyal to the interests of Poland – on the applicants and holders of this document). Instead, it only bluntly confirmed that the discussed provisions "are inconsistent with the generally recognised principles of the respect for human rights and fundamental freedoms and non-discrimination." The CCRB's alleged hesitation to make this argument was seemingly confirmed by the fact that this accusation was not repeated in the final part of the decision, wherein the Court summed up its findings. Bearing that in mind and considering the weakness of this argument, one can only posit the rhetorical question of why this part is included in the decision at all.

Expanding the assessment of the decision from the perspective of the clarity of the argumentation and standards of legal craft, other serious concerns could be expressed

regarding the fact that the CCRB invoked a number of legal bases, but later on only directly referenced some of them; while others were omitted (e.g. the UN Charter or the 1975 Final Act). It seems that such a practice was part of a strategy to make the reasoning look more serious and legitimate than it actually was. A vigilant peer reviewer of a draft document like this should have suggested deleting these parts to make the final version more coherent and transparent.

Turning now to the three main arguments which were summarized in the final parts of the decision, the latter two are the most convincing and for this reason are discussed first.

The findings of the Court are correct that processing the Polish Card is outside the consuls' list of directly authorized functions, and in consequence the performance of these functions can be perceived as permitted only when not in contradiction to the laws of the receiving state or when no objection is made by the receiving state. The CCRB came to this conclusion, citing Art. 5 of the VCCR and Art. 26 of the Consular Convention. Only one comment in the context of consistent references by the CCRB to both treaties is justified. Bearing in mind Art. 73 of the VCCR (the Convention 'shall not affect other international agreements in force as between States party to them'), the generally recognized rules on conflicting laws (e.g. *lex posterior derogat legi priori*), and the wording of recital 3 of the Preamble to the Consular Convention (the provisions of the VCCR 'shall be applied only to issues not directly regulated in this convention'), the Court should have limited its reasoning to the Consular Convention only. The extensive citing of the VCCR was not necessary, as the only basis of the assessment is (and was) a bilateral treaty between Belarus and Poland. The above-mentioned statement is true regardless of the fact that adequate provisions of both treaties are the same.

As to the required conditions for legally performing functions connected to the Polish Card, there is nothing in the decision of the CCRB that shows that these functions contradict internal laws of the Republic of Belarus. However, the Court quoted examples of the official statements against granting the Polish Cards to the citizens of Belarus, namely:

- "the draft memorandum on results of consultations between the Ministry of Foreign Affairs of the Republic of Belarus and the Ministry of Foreign Affairs of the Republic of Poland with regard to the Act of the Republic of Poland on the Pole's Card that was submitted to the Republic of Poland in May 2008";
- "proposals of the Ministry of Foreign Affairs of the Republic of Belarus to impose a moratorium on the application of the Act to Belarusian citizens."

I was unable to inspect these documents, and in consequence it is difficult to assess whether or not they included a direct objection to the functions of the Polish consuls concerning the Polish Card. However, regardless of the factual circumstances it is difficult to support the extremely formalistic approach that until an explicit objection is presented to the Polish authorities, the general voices of dissatisfaction with the whole Act do not meet the criteria derived from consular law. The quoted statements should be treated as an official position of the Republic of Belarus and, as such, should also

bring to an end all activities of the Polish consuls on the Polish Card in the territory of the Republic of Belarus.

One should also accept the reasoning and conclusion of the CCRB concerning the fact that the Act refers to "public associations registered and operating in the territory of the Republic of Belarus." This part of the decision echoes appropriate paragraphs of the Venice Commission report and their initial assumption that states

> can legitimately issue laws or regulations concerning foreign citizens without seeking the prior consent of the relevant States of citizenship, as long as the effects of these laws or regulations are to take place within its borders only'. However, '(w)hen the law specifically aims at deploying its effects on foreign citizens in a foreign country, its legitimacy is not so straightforward.[47]

The CCRB repeated, no more and no less, what the Venice Commission stated, but using other words, namely that the "grant by a State of administrative, quasi-official functions to non-governmental associations registered in another country constitutes an indirect form of state power: as such, it is not permissible unless specifically allowed."[48] However, what is missing in the CCRB's decision is the repetition of the supporting argument presented by the Venice Commission, namely that "[t]his grant appears to be particularly problematic when these functions are neither allowed nor regulated under the law of the home-State. Under these circumstances, in fact, in performing them the associations in question would not be subjected to any effective legal control."[49] One can assume that that is the case in most or even all of the states of origin of applicants for the Polish Card who base their application on cultural reasons and therefore require a special certificate *in situ*.

Finally, the CCRB also put forward the argument that by virtue of the Act Poland, unilaterally and without permission from Belarus, also gives privileges and benefits which are outside the fields of education and culture. This argument is reasoned in a two-fold way. Firstly, combined with only a sweeping reference to the Venice Commission's report, and secondly by regarding bilateral treaties in force between both states.

The Venice Commission touched upon the question of what kind of preferential treatment is allowed while considering two different issues – the question of the territorial sovereignty of the state, and the question of human rights and the prohibition of discrimination. Discussing the rather uncontroversial practice (at least in the case of friendly relations between the given states) of some states to take actions which have effects on the territories of different states, the Venice Commission presented examples from the field of education and culture (e.g. granting scholarships to kin-minorities to study kin-language in their home-states). The Venice Commission referred to this again while discussing the problem of human rights and the prohibition of discrimination and made a distinction "as regards the nature of the benefits granted by the legislation

[47] The Venice Commission's report, part D, point a(i).

[48] *Ibidem.*

[49] *Ibidem.*

in question, between those relating to education and culture and the others." Without issuing a comprehensive justification, the Venice Commission took the view that in the first situation "the differential treatment they engender may be justified by the legitimate aim of fostering the cultural links of the targeted population with the population of the kin-State," while as regards the second (others) "preferential treatment might be granted only in exceptional cases, and when it is shown to pursue the genuine aim of maintaining the links with the kin-States and to be proportionate to that aim."[50] No further justification was presented, nor was the legal basis therefore. Consequently, and noting that the Venice Commission's report cannot be treated as a stand-alone source of law, the simple repetition by the CCRB of an insufficiently justified opinion of the Venice Commission is not convincing.

Justification based on bilateral treaties seems more promising. Again citing the Venice Commission, one can agree with their argument based on the principle of *pacta sunt servanda*, that

> [l]egislation or regulations on the preferential treatment of kin-minorities should (…) not touch upon areas demonstrably pre-empted by existing bilateral treaties, unless of course the home-State concerned had been consulted and had approved of this step or had implicitly – but unambiguously - accepted it, by not raising objections. Similar considerations are valid in the case that a given area is not covered by specific rules of an existing treaty.[51]

Apart from the Consular Convention, the CCRB referred to three bilateral treaties.

The 1995 Agreement between the Government of the Republic of Belarus and the Government of the Republic of Poland on Mutual Employment of Citizens determines the conditions of entry and stay of workers from one contracting party for the purpose of employment in the territory of the second contracting party, and defines the basic rights of the workers. Art. 15 is of particular importance in this context. It contains the prohibition of employing workers referred to in Art. 1 (workers from both states, commencing work in another state party to this agreement and so-called "contracted workers" performing work under contracts between companies from both states) under rules other than those stipulated in this treaty. There is also nothing in the treaty on the recognition of more favourable provisions which could be adopted or retained by parties to the agreement. The 1995 Agreement sets out several conditions (*inter alia*, obtaining special authorization prior to commencing work), which contradict the simple rule that the holders of the Polish Card are fully entitled to work in the territory of Poland without any formalities whatsoever. The treaty was established for an initial period of three years, with automatic prolongation for subsequent periods of a year until either party to the treaty issued a note of its objection (Art. 18(2)). It seems that no such notifications have ever occurred, and consequently this agreement was in force when the CCRB decision was delivered, and it is still in force. It should be noted that the Internet

[50] *Ibidem*, part D, point d.

[51] *Ibidem*, part D, point b.

Treaty Base, established by the Polish Ministry of Foreign Affairs, tagged this treaty as being in force. The wording of the above-mentioned Art. 15 raises doubts not only about the benefits granted to the holders of the Polish Card, but also about several other internal provisions in the field of immigration laws (primarily the Act on foreigners[52] and the Act on employment promotion and labour market institutions[53]), which in many cases establishes rules on employment of third-country nationals (including the citizens of Belarus) which differ from the provisions of the 1995 Act.

The 2007 Agreement between the Government of the Republic of Belarus and the Government of the Republic of Poland on Mutual Trips of Citizens deals with the conditions of entry, re-entry, temporary stays, and transit and transfers of the nationals of one state in/through another state. Apart from the provisions on the visa fees (Arts. 14 and 15), there are no direct links between the content of the agreement and the benefits granted under the Act. Article 15 contains an exhaustive list of situations of visa exemptions, and the holders of national cards or similar documents are not included.

And finally one must touch upon the treaty on Good Neighbourly Relations. In Arts. 13 through 17 thereof, the obligations of each state towards minorities are stipulated. However, the wording of these provisions confirms that the contracting parties had in mind the traditional relations/policies of the states where minorities live regarding their own ethnic minorities. There is nothing in the treaty which can be interpreted as a legal basis for acts of the contracting state towards its kin-minorities with an effect in another contracting state (the home-state of the minorities). Furthermore, Art. 16(1) can be interpreted as a obligation to closely co-operate in all issues concerning minorities, as it reads: "The contracting parties shall develop constructive cooperation in protecting persons belonging to national minorities, treating them as a factor of strengthening mutual trust and good neighbourly relations between the Belarusian and Polish nations." This provision, along with Art. 1 (which contains the general obligation to closely cooperate in the spirit of friendship, mutual trust and good neighbourly relations, and with respect to the generally recognized principles of international law), can be invoked to raise a general concern regarding the whole idea of the Polish kin-state policy towards, *inter alia*, Belarusian citizens, rather than to selected issues, as the CCRB interpreted it.

CONCLUSIONS

The Constitutional Court of the Republic of Belarus in its 2011 decision on the Act on the Polish Card rightly pointed out that in several instances the Act does not "conform to certain generally recognised principles and rules of international law." There are parts of the decision which lack clarity and where the Court's reasoning is

[52] Journal of Laws 2020, item 35.

[53] Journal of Laws 2019, item 1482 as amended.

missing or is unconvincing; however, there are three main points, indicating explicit contradictions with international law, with which it is difficult not to agree; namely:

1) Polish consuls performing functions regarding the Polish Card, in light of the explicit and clear, formal objection from Belarus, contradicts Art. 26(1) of the bilateral Consular Conventions, which confirmed general rules stipulated in Art. 5(m) of the VCCR;
2) Poland's granting of administrative, quasi-official functions to non-governmental associations registered in Belarus constitutes an indirect form of state power: as such, it can be perceived as being in contradiction to the principle of the territorial sovereignty of Belarus;
3) at least some benefits and privileges for the holders of the Polish Card contradict at least two bilateral treaties in force between these two states, namely the 1995 agreement on Mutual Employment of Citizens (which in its Art. 15 explicitly forbids any parallel schemes for employment), and the 2007 agreement on Mutual Trips of Citizens (which in its Art. 15 lists situations of visa exemptions, and the holders of national cards or similar documents are not included).

This is what the "law on the books" has to say about it. However, what is the reality (or the 'law in action,' to use the term popularized by the legal realists)? As was mentioned earlier, in the detailed report summarising the first eight years of the Act being in force, it was indicated that 162,218 documents were issued during that period, of which over 47% were issued to citizens of Belarus. This trend continues, as official information of the Ministry of Foreign Affairs shows that in subsequent years the number of applications from Belarus was also very robust (in 2015 – 13,094, in 2016 – 12,710, in 2017 – 16,482), and only in isolated cases were the applications rejected.[54] In consequence, almost 50% of Polish Cards have been issued to citizens of Belarus. In light of the above findings, all these decisions and acts can be seen as having been carried out contrary to international law. And moreover, these same legal concerns also apply in relations with other states from which the applicants and now holders of the Polish Card come (for example the authorization of specific local associations to play a role in the procedure of granting Polish Cards).

So how is it possible that despite all of these legitimate concerns the Polish authorities have issued more than a quarter-million Polish Cards so far? There are several possible answers to this question. Bearing in mind that at least some of the answers need further analysis and commentary beyond the scope of this article, I will only briefly present them and elaborate a bit more on only one issue, which is specific only to Belarus. Firstly, what are the common reasons (applicable to all states in which the holders of the Polish Card are citizens) of such a prolonged breach of international law?

1) All states, including Poland, are entirely free to grant their citizenship to basically whomever they want. Having that in mind, a stronger protest against kin-state

[54] The answer to the Parliamentary interpellation no. 23612, available at: http://www.sejm.gov.pl/sejm8.nsf/InterpelacjaTresc.xsp?key=B2YEQD&view=6 (accessed 30 June 2020).

policies could result in establishing even stronger ties (i.e. of citizenship) between the kin-state and its kin-minorities. That was partially the case with Hungary, which, building upon its experiences with kin-policy, in 2010 amended its citizenship act and thus opened the way for ethnic Hungarians living abroad to apply for citizenship under a simplified procedure and without the need to move to Hungary.[55] The factual tacit acceptance of the Polish practice can be explained with reference to the Latin *argumentum a maiore ad minus* – it seems that the relevant States concur with the logic of this argument.

2) There are no real remedies available to the affected States. For instance, Poland (similarly to most of the states affected by the Act on Polish Card) is not a party to the Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes,[56] which could be a basis for the jurisdiction of the International Court of Justice (ICJ). The relevant bilateral treaties do not have compromissory clauses providing for dispute resolution by the ICJ or other international courts or tribunals.
3) It seems that other states' kin-state policies are not perceived as something posing a threat of such great importance as to justify a stronger stance. One my recall here Louis Henkin's famous assertion that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."[57] While it seems clear that the Polish practice regarding the Polish Card can be deemed non-observance of international law, perhaps the lack of stronger reactions to it by the affected states is shows that they have simply chosen to apply Henkin's assertion to the case at hand and not challenge the Poland's non-observance.

Finally, there is also one reason confirming the above supposition which is specific to Belarus only. Alexander Lukashenko, the President of the Republic of Belarus – a country commonly described as "Europe's last dictatorship"[58] – reversed course and despite his initial protest against the Act on the Polish Card upon its passage in 2007, as early as in April 2008 in his annual state of the nation address presented a different approach and admitted that he had reacted wrongly to the Act and that "if Poland wanted to help Polish Belarusians, it is free to do so.'[59] Such a statement by "Europe's last dictatorship" is treated by other state officials as a kind of source of law (or at least

[55] L. Szymanowska, *The Implementation of the Hungarian Citizenship Law*, OSW Analyses, 2 February 2011, available at: https://www.osw.waw.pl/en/publikacje/analyses/2011-02-02/implementation-hungarian-citizenship-law (accessed 30 June 2020).

[56] 596 UNTS 487.

[57] L. Henkin, *How Nations Behave: Law and Foreign Policy*, Columbia University Press, New York: 1979, p. 47.

[58] A contemporary usage of this term; s*ee, e.g.* R. Gramer, A. Mackinnon, *A Diplomatic Breakthrough for Washington in Europe's Last Dictatorship*, Foreign Policy, 10 January 2019, available at: https://bit.ly/2VIPgcZ (accessed 30 June 2020).

[59] A. Poczobut, *Łukaszenko zmienił zdanie o „Karcie Polaka"* [Lukashenko has changes his opinion of the Polish card], Gazeta Wyborcza, 30 April 2008.

practice), so it is not surprising that at least from that moment onward tacit acceptance of the Polish practice has become the rule.

Returning to the legal analysis, the question remains whether these kinds of oral statements can be perceived as an official annulment of the previous written statements opposing the Polish practice of granting the Polish Card to the citizens of Belarus? Some indication of a positive answer can be found in Art. 7(2)(a) of the Vienna Convention on the Law of Treaties ("(i)n virtue of their functions and without having to produce full powers, the following are considered as representing their State: (a) Heads of State, (…), for the purpose of performing all acts relating to the conclusion of a treaty").[60] However, the scope of these provisions is explicitly restricted to acts related to the conclusion of a treaty. In the Polish context, this question is irrelevant as Polish consuls in the territory of Belarus have performed their duties concerning the Polish Card on a constant basis since date the Act on the Polish Card entered into force.

[60] 1155 UNTS 331.

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THE IMPACT OF *ACHMEA* ON INVESTOR-STATE ARBITRATION UNDER INTRA-EU BITS: A TREATY LAW PERSPECTIVE

Abstract: *This article examines the consequences of the Court of Justice of the European Union's (CJEU) ruling in Achmea concerning Investor-State Arbitration (ISA) under intra-EU Bilateral Investment Treaties (BITs) from a treaty law perspective. It begins by briefly setting out the arguments of Advocate General Wathelet and the CJEU supporting their different positions on whether intra-EU BITs ISA clauses are compatible with EU law. The article then proceeds to analyse Achmea's implications for intra-EU BIT ISA. It concludes that, as a result of the CJEU's ruling, arbitral tribunals are deprived of their jurisdiction to entertain investors' claims brought under intra-EU BIT ISA clauses. Finally, the article argues that Achmea's applicability to cases brought under intra-EU BIT ISA clauses is limited, using the application of EU law as a relevant qualification. In order for an arbitral tribunal to be deprived of its jurisdictional competence as a result of Achmea, it must be entitled to interpret and apply EU law directly or indirectly in determining its jurisdiction.*

Keywords: Achmea, arbitral tribunal, intra-EU BITs, Investor State Arbitration, jurisdiction

INTRODUCTION

In its decision of 6 March 2018 in *Slovak Republic v. Achmea BV*[1] (*Achmea*), the Court of Justice of the European Union (CJEU or Court) held that an Investor-State Arbitration (ISA) clause in an international agreement between EU Member States, such as the one included in the Netherlands – Slovak Republic Bilateral Investment Treaty

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[1] Case C-284/16 *Slovakische Republic v. Achmea BV* [2018] ECLI:EU:C:2018:158.

(BIT), was incompatible with Arts. 267 and 344 of the Treaty on the Functioning of the European Union (TFEU).

It has been two years since the CJEU rendered its judgment in *Achmea*, yet only recently has its impact on intra-EU ISA started to unfold. In *Achmea*'s aftermath, there has been a significant debate among EU and international law scholars, as well as among practitioners and arbitral tribunals, regarding the consequences of the Court's ruling on investor-state arbitration under both intra-EU BITs, as well as on mixed agreements such as the Energy Charter Treaty (ECT). For some, *Achmea* is bound dramatically to alter the landscape of investment arbitration on the basis not only of intra-EU BITs but of mixed agreements as well. Yet, others remain more sceptical and abstain from making predictions regarding the decision's possible outreach and effects.

This article examines what the CJEU's ruling in *Achmea* entails for investor-state arbitration under intra-EU BITs from a treaty law perspective. It begins by briefly setting out the arguments of Advocate General (AG) Wathelet and the CJEU supporting their differing positions on whether intra-EU BIT ISA clauses are compatible with EU law. The article then proceeds to analyse *Achmea*'s implications for intra-EU BIT investor-state arbitration using a treaty law analysis. In this regard it concludes that as a result of the CJEU's ruling arbitral tribunals are deprived of their jurisdiction to entertain investors' claims brought under intra-EU BIT ISA clauses. Finally, the article argues that *Achmea*'s applicability to cases brought under intra-EU BIT ISA clauses is limited and uses the application of EU as a relevant qualification; for an arbitral tribunal to be deprived of its jurisdictional competence as a result of *Achmea*, it must be entitled to interpret and apply EU law directly or indirectly in determining its jurisdiction.

1. THE TWO FACES OF JANUS: EXPLORING THE ACHMEA SAGA

In March 2016, the German Federal Court of Justice (*Bundesgerichtshof)* submitted to the CJEU a request for a preliminary ruling[2] in the course of an action for the annulment of a Permanent Court of Arbitration's (PCA) final award in *Achmea v. the Slovak Republic*.[3] Achmea, an undertaking belonging to a Dutch insurance group, had initiated arbitral proceedings under UNCITRAL against Slovakia based on the Netherlands and Czech and Slovak Republic BIT (Netherlands-Slovak Republic BIT), claiming damages. In the proceedings before the tribunal, Slovakia challenged the latter's jurisdiction to hear the dispute on the grounds that the ISA clause of the applicable intra-EU BIT was incompatible with EU law. The tribunal rejected the objection to its jurisdiction, proceeded to adjudication of the dispute on the merits and awarded

[2] *See* Decision of the German Federal Court of Justice (*Bundesgerichtshof*) dated 3 March 2016, available at: https://bit.ly/3iyHegv (accessed 30 June 2020).

[3] *Achmea B.V. v. the Slovak Republic (former Eureko B.V.),* Case No 2008-13, Final Award of 7 December 2012.

damages to *Achmea*, as it found Slovakia to be in breach of its obligations under the BIT. Following the tribunal's award, Slovakia brought proceedings before the Higher Regional Court in Frankfurt am Main, the latter being the seat of arbitration, claiming that the ISA clause of the applicable intra-EU BIT was incompatible with Arts. 18(1),[4] 267[5] and 344[6] TFEU. The Commission intervened in both the proceedings before the arbitral tribunal and in the annulment proceedings before the German courts, supporting Slovakia's argument. The request for annulment was dismissed in the first instance proceeding and Slovakia lodged an appeal against that decision before the *Bundesgerichtshof*. In the light of the Commission's position throughout the proceedings and in order for the CJEU to be able to weigh in on the compatibility of intra-EU BIT ISA clauses with EU law, the *Bundesgerichtshof* decided to refer three questions to it under Art. 267 TFEU, namely, first, whether Art. 18(1) TFEU precluded the application of an intra-EU BIT provision under which an investor of a contracting Member State could bring proceedings against another EU Member State before an arbitral tribunal; secondly, if Art. 344 TFEU could be interpreted as precluding the application of such provision; and finally, whether the application of an ISA clause could be precluded under Art. 267 TFEU.[7]

In September 2017, AG Wathelet delivered an opinion on the case, concluding that all three questions needed to be answered in the negative. First, he rejected the argument that intra-EU BIT ISA clauses were incompatible with Art. 18(1) TFEU. Drawing a parallel to the CJEU's approach in *D.*,[8] the AG considered the situation of EU investors covered under an intra-EU BIT not to be comparable to that of investors in Member States that are not intra-EU BIT signatories. Consequently, there could be no prohibited discrimination against EU investors not offered a benefit that other EU

[4] Art. 18(1) TFEU provides that "[w]ithin the scope of application of the Treaties, and without prejudice to any special provision contained therein, any discrimination on grounds of nationality shall be prohibited.'

[5] According to Art. 267 TFEU, "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.

Where such a question is raised before in a case pending before a court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give the judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court [...]."

[6] Under Art. 344 TFEU, "Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein."

[7] Case C-284/16 *Slowakische Republic v. Achmea BV* [2017] ECLI:EU:C:2017:699, Opinion of AG Wathelet, para. 30.

[8] Case C-376/03 *D.* [2005] ECR I-05821.This case dealt with the legality of a wealth tax allowance granted by the Dutch authorities to Belgian residents under the Belgium-Netherlands Convention for the avoidance of Double Taxation (DTC). In that case, the CJEU had held that it was an 'inherent consequence' of bilateral DTCs that the rights and obligations stemming therefrom only applied to residents in one of the two DTC contracting states.

investors enjoyed on the basis of an intra-EU BIT,[9] including the possibility to have recourse to an ISA clause.[10] On the referring court's second question, AG Wathelet took the view that Art. 344 only covers disputes instituted directly by an EU Member State against another Member State or against the Union itself, drawing argumentation from the CJEU's relevant case law.[11] In his view, an alternative dispute settlement mechanism between Member States and investors fell outside the scope of Art. 344 TFEU. Finally, AG Wathelet considered a tribunal set up under an ISA clause, such as the one of the applicable intra-EU BIT, to be a "court or tribunal of a Member State" in the sense of Art. 267 TFEU,[12] thus being able to refer preliminary questions to the Court.[13] Based on these considerations, AG Wathelet supported the compatibility of an ISA clause such as the one included in the Netherlands – Slovak Republic BIT with Arts. 18(1), 267 and 344 TFEU and proposed that the CJEU rule accordingly.[14]

However, the CJEU decided not to follow AG Wathelet's suggestions. In establishing the light under which it would scrutinise the compatibility of the intra-EU BIT ISA clause with EU law, the Court highlighted the constitutional characteristics of the EU, including the principle of mutual trust, acknowledging the crucial part that the EU's judicial system and the preliminary reference procedure are called upon to play in ensuring the consistency, uniformity, full effect and autonomy of the EU legal order.[15] On that basis, in its judgment of 6 March 2018 the Court ruled against the possibility of an intra-EU BIT ISA mechanism to harmoniously coexist with the provisions of EU law and, in particular with Arts. 267 and 344 TFEU.

The CJEU first examined the compatibility of an intra-EU BIT ISA clause with Art. 344 TFEU. The Court has been confronted several times with the question of whether an international agreement is incompatible with the EU treaties because of a dispute resolution mechanism that threatens the autonomy of the EU legal order.[16] The incompatibility of an intra-EU BIT ISA clause with Art. 344 TFEU presupposes that the tribunal established thereunder would be in a position to rule on issues pertaining to the interpretation and application of EU law. According to the Court, Art. 8(6) of the applicable Dutch-Slovak Republic BIT allowed for this, as it enabled the tribunal to take account

[9] *Achmea* (AG Wathelet), para. 71.

[10] *Opinion 2/15 Free Trade Agreement with Singapore* [2017] ECLI:EU:C:2017:376, para. 292; *Achmea* (AG Wathelet), para. 77.

[11] Case C-459/03 *Commission v. Ireland* [2006] ECR I-4635; *Opinion 2/13 on the Accession to the ECHR* [2014] ECLI:EU:C:2014:2454, para. 208; H. Wehland, *Intra-EU Investment Agreements and Arbitration: Is European Community Law an Obstacle?*, 58 International and Comparative Law Quarterly 297 (2009), p. 318; S. Ø. Johansen, *The Reinterpretation of TFEU Article 344 in Opinion 2/13 and the Potential Consequences,* 16 German Law Journal 169 (2015), p. 171; *Opinion 1/09 on the Creation of a Unified Patent Litigation System* [2011] ECLI:EU:C:2011:123, para. 63.

[12] *Achmea* (AG Wathelet), paras. 85, 89.

[13] *Ibidem,* para. 131.

[14] *Ibidem*, para 273.

[15] *Achmea* (CJEU), paras. 32-34, 37.

[16] *Opinion 2/13 on the Accession to the ECHR*, para. 208; *Commission v. Ireland*; Wehland, *supra* note 11, p. 318; Johansen, *supra* note 11, p. 171.

of EU law, both as part of Slovakia's domestic law and as an international agreement to which the contracting parties of the applicable intra-EU BIT are both signatories.[17]

Having established that the arbitral tribunal could be called upon to interpret and apply EU law, the CJEU sought subsequently to ascertain whether the tribunal could form part of the EU judicial system and, therefore, participate in the judicial dialogue with the Court through the preliminary reference procedure of Art. 267 TFEU.[18] The CJEU's case law has already established a consistent set of criteria that need to be met for a *forum* to be characterised as a "court or tribunal" under Art. 267 TFEU. Such characterisation takes place on a case-by-case basis,[19] essentially depending on the nature of the referring judicial body.[20] Given that the expression "court or tribunal" is an autonomous concept of EU law, the final word as to whether a judicial body meets these criteria rests with the Court.[21] In contrast to AG Wathelet's reasoning, the CJEU answered this question in the negative. The Court based its response on the fact that an arbitral tribunal established under an intra-EU BIT ISA clause was not one of a "Member State", as required under Art. 267 TFEU. Unlike the courts under review in *Parfums Christian Dior*,[22] *Miles*[23] and *Ascendi Beiras*,[24] the *Achmea* tribunal was found to lie outside the EU judicial system, as it was neither part of the intra-EU BIT signatories' judicial system nor did it have any links whatsoever with their judicial systems.[25] In this regard, the Court held that 'it is precisely the exceptional nature of the tribunal's jurisdiction compared with that of the courts of those two Member States that is one of the principal reasons for the existence of Art. 8 of the BIT.'[26]

Since an arbitral tribunal established under an intra-EU BIT ISA clause could not directly refer preliminary questions to the CJEU under Art. 267 TFEU, the Court went on to ascertain whether intra-EU BIT disputes could be subjected to its review indirectly. This would be the case if an award issued by such an arbitral tribunal could

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[17] *Achmea* (CJEU), para. 42.

[18] *Ibidem*, para. 43.

[19] Case C-394/11 *Belov* [2013] ECLI:EU:C:2013:48, para. 38; Case C-196/09 *Miles and others* [2011] ECR I-05105, para. 37 and further references there.

[20] The CJEU has on a number of occasions refused to answer preliminary questions referred by arbitral tribunals; *see* Case C-125/04 *Denuit and Cordenier* [2005] ECR I-00923; Case C-126/97 *Eco Swiss China Time Ltd v. Benetton International NV* [1999] ECR I-03055; and Case C-102/81 *Nordsee v. Reederei Mond* [1982] ECR I-01095. On the other hand, it has equally upheld its jurisdiction in cases where the referring tribunal was established by law, its decisions were binding on the parties and its jurisdiction was not dependent on the parties' agreement, Case C-555/13 *Merck Canada* [2014] ECLI:EU:C:2014:92, para. 18; Case C-377/13 *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta* [2014] ECLI:EU:C:2014:1754, para. 28; Case C-109/88 *Danfoss* [1989] ECR I-03199, paras. 7-8.

[21] Case C-24/92 *Corbiau v. Administration des Contributions* [1993] ECR I-01277; P. Craig, G. De Búrca, *EU Law: Texts, Cases and Materials* (6th ed.), Oxford University Press, Oxford: 2015, p. 466.

[22] Case C-337/95 *Parfums Christian Dior v. Evora* [1997] ECR I-06013, para. 21.

[23] *Miles*, paras. 40-41.

[24] Case C-377/13 *Ascendi Beiras Litoral e Alta, Auto Estradas das Beiras Litoral e Alta* [2014] ECLI:EU:C:2014:1754, para. 28.

[25] *Achmea* (CJEU), paras. 45-49.

[26] *Ibidem*, para. 45.

subsequently be subjected to the review of the Member States' domestic courts, which could then refer questions to the Court.[27] However, in investor-state arbitration it is the applicable BIT and arbitration rules, as well as the domestic law of the tribunal's seat, that determine whether and to what extent judicial review of the arbitral award is an option. Consequently, there could be cases where an arbitral award would either completely escape judicial review by the Member States' domestic courts or such review would be limited, depending on the applicable national rules. Insofar as disputes falling within the jurisdiction of intra-EU BIT arbitral tribunals may relate to the interpretation or application of EU law while the dispute resolution mechanism provided therein could prevent them from being submitted to the CJEU, the Court found such a dispute resolution mechanism to have an adverse effect on the autonomy of EU law.[28] Based on the above, the CJEU concluded that an ISA clause included in an *inter se* agreement of the Member States was incompatible with Arts. 267 and 344 TFEU.[29]

2. THE LEGAL CONSEQUENCES OF ACHMEA ON INTRA-EU BIT INVESTOR-STATE ARBITRATION

Despite the fact that it has been two years since *Achmea* was delivered, its legal consequences on investor-state arbitration under intra-EU BITs remain to a great extent unclear, with EU and public international law scholars and practitioners, as well as national courts and tribunals, still arguing over the ruling's potential outreach.[30] To some,

[27] *Ibidem*, para. 50.

[28] *Ibidem*, para. 59.

[29] *Ibidem.*

[30] *See, inter alia*, M. Fanou, *Intra-European Union Investor-State Arbitration post-Achmea: RIP? An Assessment in the Aftermath of the Court of Justice of the European Union, Case C-284/16, Achmea, Judgment of March 6 2018, EU:C:2018:158*, 2 Maastricht Journal of European and Comparative Law 316 (2019); C. Contartese, M. Andenas, *Court of Justice: EU Autonomy and Investor-State Dispute Settlement under Inter Se Agreements between EU Member States*, 56 Common Market Law Review 157 (2019); A. Gourgourinis, *After Achmea: Maintaining the EU Law Compatibility of Intra-EU BITs Through Treaty Interpretation*, 3 European Investment Law and Arbitration Review 282 (2018); A. Bilanova, J. Kudrna, *Achmea: The End of Investment Arbitration as We Know It*, 3 European Investment Law and Arbitration Review 261 (2018); N. De Sadeleer, *The End of the Game: The Autonomy of the EU Legal Order Opposes Arbitral Tribunals under Bilateral Investment Treaties Concluded Between Two Member States*, 9 European Journal of Risk Regulation 355 (2018); C. Fouchard, M. Krestin, *The Judgment of the CJEU in Slovak Republic v. Achmea – A Loud Clap of Thunder on the Intra-EU BIT Sky!*, Kluwer Arbitration Blog 2018, available at: https://bit.ly/3gvEvCG; V. Kapoor, *Slovak Republic v. Achmea: When Politics Came Out to Play*, Kluwer Arbitration Blog 2018, available at: https://bit.ly/2YY6y88; F. Stefan, *Brace for Impact? Examining the Reach of Achmea v. Slovakia* (Kluwer Arbitration Blog 2018), available at: https://bit.ly/3e1mDOv; V. Ponomarov, *CJEU Does Not Buy Wathelet's Opinion in Achmea – What Is Left Unanswered*, Kluwer Arbitration Blog 2018, available at: https://bit.ly/2VMJS8R; P. Nikitin, *The CJEU's Achmea Judgment: Getting Through the Five Stages of Grief*, Kluwer Arbitration Blog 2018, available at: https://bit.ly/3f0IQ0H; N. Lavranos, *After Achmea: The Need for an EU Investment Protection Regulation*, Kluwer Arbitration Blog 2018, available at: https://bit.ly/3iwdPnc; N. Newing, L. Alexander and L. Meredith, *What Next for Intra-EU Investment Arbitra-*

Achmea struck a lethal blow against intra-EU BIT investor-state arbitration in general, depriving arbitral tribunals of their jurisdiction to entertain any claims under intra-EU BITs. Yet others remain largely unimpressed by the CJEU's ruling. In fact, several arbitral tribunals have so far rejected the *Achmea*-based objection to their jurisdiction on various grounds. Recently, an arbitral tribunal dismissed *Achmea* as irrelevant to its jurisdiction to entertain claims under the applicable intra-EU BIT, arguing that any legal consequences stemming from the CJEU's judgment are limited to within the EU legal order. In the opinion of that tribunal, *Achmea*'s *rationale* did not impinge on the – distinct from the EU – international legal order, from which it derived its jurisdictional competence to rule on the case.[31]

In our view, the truth lies somewhere in the middle. In this section, we analyse *Achmea*'s consequences on intra-EU BIT investor-state arbitration from a treaty law perspective, explaining how *Achmea* deprives arbitral tribunals established under intra-EU BIT ISA clauses of their jurisdiction to entertain relevant disputes. At the same time, we approach the application of EU law as the limit to *Achmea*'s relevance to investor-state arbitration under intra-EU BITs. In doing so, we explain why the *Achmea rationale* only binds an arbitral tribunal in cases where it is entitled to interpret and apply EU law in determining its jurisdiction to hear a case under an intra-EU BIT.

Before proceeding to the examination of *Achmea*'s legal consequences on intra-EU BIT investor-state arbitration, it is necessary first to frame our analysis by making two preliminary points.

The first relates to the nature of EU law from the perspective of public international law. Despite its autonomous nature and particular characteristics, EU law stems from an international agreement between the Member States, namely the EU Treaties,[32] thus forming part of international treaty law.[33] Regardless of whether they form part of the EU Treaties or constitute secondary legislation, all EU legal rules are part of a regional system of international law, and therefore, have an international legal character.[34] Against this background, alleged conflicts between the provisions of intra-EU BITs and those of EU law are to be addressed as treaty conflicts, which are governed by international law.[35]

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tion? Thoughts on the Achmea Decision, Kluwer Arbitration Blog 2018, available at: https://bit.ly/3e8gnot; D. Dragiev, *A Procedural Perspective of Achmea: What Does Achmea Imply in Practice?*, Kluwer Arbitration Blog 2018, available at: https://bit.ly/2C6cLG8; D. Dragiev, *2018 in Review: The Achmea Decision and its Reverberations in the World of Arbitration*, Kluwer Arbitration Blog 2018, available at https://bit.ly/3gxvXLT (all accessed 30 June 2020).

[31] *United Utilities (Tallinn) BV and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24, Award of the Tribunal of 21 June 2019, para. 503.

[32] *Achmea* (CJEU), paras. 33, 41.

[33] *See, ex multis*, O. Spiermann, *The Other Side of the Story: An Unpopular Essay on the Making of the European Community Legal Order,* 10 European Journal of International Law 763 (1999); B. De Witte, *The European Union as an International Legal Experiment,* in: G. de Búrca, J. H.H. Weiler (eds.), *The Worlds of European Constitutionalism,* Cambridge University Press, Cambridge: 2012, p. 19.

[34] *Electrabel S.A. v. Republic of Hungary,* ICSID Case No. ARB/07/19, Decision on Jurisdiction of 30 November 2012, para. 4.133.

[35] *Ibidem*, para. 4.120.

In fact, there is consensus among arbitral tribunals that international law encapsulates EU law, as constituting rules of international law applicable between the Member States.[36]

The second observation relates to the role of the CJEU and the effects of its rulings under international law. Through the EU Treaties, which, as pointed out above, are part of international law, the EU Member States have agreed on the establishment of a specialised *forum*, authorised to rule on questions of EU law.[37] Under Arts. 19(1) TEU and 344 TFEU, the CJEU is vested with the exclusive power authoritatively to interpret and apply the EU Treaties and the rights and obligations stemming from them. Given that in the context of intra-EU disputes both signatories of the applicable international agreement are EU Member States, they remain bound to respect the CJEU's rulings on matters pertaining to EU law.[38] To the extent that arbitral tribunals are bound by the application of EU law, as part of international law, for the adjudication of intra-EU investment disputes, they are also bound to give effect to the exclusive competence of the CJEU authoritatively to apply and interpret EU law provisions. Therefore, insofar as an intra-EU BIT dispute involves questions of EU law that have already been dealt with by the CJEU, the arbitral tribunal must adhere to the CJEU's interpretation and resolve the dispute before it accordingly. On that basis, the CJEU's interpretation of EU law in *Achmea* is binding not only on the courts and tribunals of the EU Member States, as part of the EU legal *acquis*;[39] but also on tribunals established under intra-EU BIT ISA clauses, as the ruling of a *forum* established to provide the authoritative interpretation of an international agreement between the contracting parties.[40] In a similar vein, as the CJEU's ruling only interprets existing and does not create new law, the Court's reasoning will be applicable *ex tunc*,[41] from the date on which the BIT became intra-EU, namely from the date on which the last of the parties to the BIT acceded to the EU.

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[36] *Ibidem,* paras. 4.122, 4.189, and 4.195; confirmed, *ex multis*, in ICSID Case No. ARB/14/3, *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, Award of 27 December 2016, para. 278.

[37] J. McMahon, *The Court of the European Communities: Judicial Interpretation and International Organisation*, 37 British Yearbook of International Law 320 (1961).

[38] This has recently been affirmed by the arbitral tribunal in ICSID Case No. ARB15/16 *BayWa R.E. Renewable Energy GmbH and BayWa R.E. Asset Holding GmbH v. the Kingdom of Spain*, Decision on Jurisdiction, Liability and Directions on Quantum of 2 December 2019, para. 280.

[39] Joined Cases 28 to 30/62 *Da Costa en Schaake NV, Jacob Meijer NV, Hoechst-Holland NV v. Netherlands Inland Revenue Administration* [1963] ECLI:EU:C:1963:6; Case C-453/00 *Kühne & Heitz NV v. Produktschap voor Pluimvee en Eieren* [2004] ECLI:EU:C:2004:17; Craig and De Búrca, *supra* note 21, pp. 475-476.

[40] *Vattenfall v. Germany*, ICSID Case No. ARB/12/12, Decision on the *Achmea* issue, paras. 148 and 150. For more on the role of the CJEU as the authoritative source of interpretation of EU law, *see* the UNCLOS tribunal in *Mox Plant*, ITLOS Order No. 3, 24 June 2003, paras. 27 and 28, and Award in the *Arbitration regarding the Iron Rhine (Ijzeren Rijn) Railway between the Kingdom of Belgium and the Kingdom of the Netherlands*, Decision of 24 May 2005, Chapter III, in particular at para. 103.

[41] Case C-262/12 *Vent de Colère* [2013] ECLI:EU:C:2013:851, para. 39; Joined Case C-66, 127 and 128/79 *Salumi* [1980] ECLI:EU:C:1980:101, para. 9; Case C-61/79 *Amministrazione delle Finance dello Stato v. Denkavit Italiana* [1980] ECLI:EU:C:1980:100, para. 16; Case C-73/08 *Nicolas Bressol and Others and Céline Chaverot and Others v. Gouvernement de la Communauté Française* [2010] ECLI:EU:C:2010:181, para. 90.

2.1. A treaty law perspective of *Achmea*'s impact

In *Achmea*, the CJEU ruled that an ISA clause included in an international agreement between Member States, such as the one applicable in the Netherlands-Slovak Republic BIT, was incompatible with Arts. 267 and 344 TFEU. It is true that the CJEU reached this conclusion without applying the customary rules of international law on the conflict of norms, as codified in the Vienna Convention on the Law of Treaties (VCLT), to approach the alleged conflict between EU law and the pertinent intra-EU BIT.[42] However, the fact remains that insofar as a clause in an international agreement between Member States has been found incompatible with EU law, that clause is inapplicable. This outcome is supported both by virtue of the principle of supremacy of EU law, seen as a special rule of international law regulating conflicts between EU law and other *inter se* treaties of the EU Member States; and by reference to the *lex posterior* conflict rules of the VCLT.

First, the inapplicability of intra-EU BIT ISA clauses following the CJEU's judgment in *Achmea* can be supported under the principle of the supremacy of EU law. According to the latter, as originally developed by the case law of the CJEU[43] and enshrined in Declaration 17 annexed to the Final Act of the Intergovernmental Conference that adopted the Treaty of Lisbon, the provisions of EU law cannot be overridden by those of the Member States' national law.[44] More importantly for our present purposes, the CJEU has extended the application of the EU principle of supremacy also to include resolving conflicts between EU law and other international treaties between the EU Member States.[45] According to the Court,

> [...] since the bilateral instruments at issue now concern two Member States, their provisions cannot apply in the relations between those States if they are found to be contrary to the rules of the [EU] Treaty.[46]

The application of the principle of supremacy in cases of a conflict between the provisions of EU law and those of an *inter se* treaty renders the latter inapplicable,

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[42] *See also* A. Gourgourinis, *After Achmea: Maintaining the EU Law Compatibility of Intra-EU BITs Through Treaty Interpretation*, 3 European Investment Law and Arbitration Review 282 (2018), p. 293.

[43] *See, inter alia,* Case C-6/64 *Flaminio Costa v. E.N.E.L.* [1964] ECR I-01141; Case C-11/70 *Internationale Handelsgesellschaft mbH v. Einfuhr –und Vorratsstelle für Getreide und Futtermittel* [1970] ECR I-01125.

[44] Case C-26/62 *NV Allgemene Transport – en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration* [1963] ECR I-001; Craig and De Búrca, *supra* note 21, p. 266-267.

[45] Case C-478/07 *Budejovicky Budvar* [2009] ECLI:EU:C:2009:521, para. 98; Case C-469/00 *Ravil* [2003] ECR I-05053, para. 37; Case C-235/87 *Annunziata Matteucci v. Communauté française of Belgium et al.* [1988] ECR I-05589, para. 22; Case C-3/91 *Exportur S.A. v. Lor S.A. and Confiserie du Tech S.A.* [1992] ECR I-5529, para. 8; Case C-10/61 *Commission v. Italy* [1962] ECR I-00003; C. Söderlund, *Intra-EU BIT Investment Protection and the EC Treaty*, 24 Journal of International Arbitration 455 (2017), p. 463.

[46] *Budejovicky Budvar*, para. 98.

regardless of whether the conclusion of the respective *inter se* treaty preceded or followed the signatory's accession to the EU.[47] From this perspective, and in contrast to treaties between Member States and third countries, whose conflict with EU law is regulated by Art. 351 TFEU,[48] the provisions of international agreements between Member States do not apply once found incompatible with EU law.

Given the international nature of the EU Treaties, the general principle of supremacy of EU law constitutes, from a treaty law perspective, a special conflict rule of international law. By virtue of the latter, as identified by the CJEU and subsequently codified in the Lisbon Treaty, the Member States, as masters of their treaties, have agreed that EU law enjoys precedence over conflicting national legislation as well as over treaties concluded between them, whether preceding accession or subsequently enacted. As a special conflict rule, the principle of supremacy takes precedence over the residual rules of conflict of norms in the VCLT, which consequently do not apply in dealing with such conflicts. The application of the principle of supremacy to deal with conflicts between the EU Treaties and *inter se* agreements is supported by settled case law of the CJEU.[49] This argument has also been raised by several Member States as well as by the Commission itself, as *amicus curiae*,[50] in the context of intra-EU BIT arbitral proceedings.[51] In fact, in *Achmea* both Slovakia and the Commission, relying on the case law of the CJEU, argued that potential breaches of EU law cannot

[47] Report of the Study Group of the International Law Commission, finalised by M. Koskenniemi, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (ILC 2006), p. 143; J. Klabbers, *The Validity of EU Norms Conflicting with International Obligations*, in: E. Cannizzaro, P. Palchetti, R. A Wessel (eds.), *International Law as Law of the European Union*, Brill, Leiden: 2011, p. 122; R. Schütze, *EC Law and International Agreements of the Member States – An Ambivalent Relationship,* 9 The Cambridge Yearbook of International Legal Studies 387 (2007), p. 395; P. Manzini, *The Priority of Pre-Existing Treaties of EC Member States within the Framework of International Law*, 12 European Journal of International Law 781 (2001), p. 784.

[48] N. Lavranos, *Protecting European Law from International Law*, 15 European Foreign Affairs Review 265 (2010), p. 267; P. Manzini, *The Priority of Pre-Existing Treaties of EC Member States within the Framework of International Law*, 12 European Journal of International Law 781 (2001). *See also* K. Von Papp, *Solving Conflicts with International Investment Treaty Law from an EU Perspective: Article 351 TFEU Revisited*, 42 Legal Issues of Economic Integration 325 (2015), p. 328; R. Schütze, *An Introduction to European Law* (2nd ed.), Cambridge University Press, Cambridge: 2015, pp. 147-149.

[49] *See supra* note 45.

[50] Tribunals characterise as *amicus curiae* a non-party to the dispute, a "friend" offering to "help the decision maker arrive at its decision by providing the decision maker with arguments, perspectives and expertise that the litigating parties may not provide", *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. the Argentine Republic*, ICSID Case No. ARB/03/19, Order in Response to a Petition by 5 Non-Governmental Organisations for Permission to Make an *Amicus Curiae* Submission of 19 May 2005, para. 20; L. Bastin, *The Amicus Curiae in Investor-State Arbitration*, 1 Cambridge Journal of International and Comparative Law 208 (2012), p. 217; J. Viñualez, *Amicus Intervention in Investor-State Arbitration*, 61 Dispute Resolution Journal 72 (2006), p. 76.

[51] *Achmea B.V. v. the Slovak Republic (former Eureko B.V.)*, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension of 26 October 2010, para. 180; A. Reinisch, *Articles 30 and 59 of the Vienna Convention on the Law of Treaties in Action: The Decisions on Jurisdiction in the Eastern Sugar and Eureko Investment Arbitrations*, 39 Legal Issues of Economic Integration 157 (2012), p. 161.

be justified by recourse to an international agreement between two EU Member States.[52]

The direct consequence of reading *Achmea* in the light of the principle of supremacy as a special conflict rule of international law is the inapplicability of intra-EU BIT ISA clauses such as the one at issue in *Achmea*, due to their incompatibility with Arts. 267 and 344 TFEU. This is also the view of the EU Member States expressed in their 15 and 16 January 2019 Declarations "on the Legal Consequences/Enforcement of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union."[53] In their Declarations, all Member States accepted that as a result of *Achmea*, intra-EU BIT ISA clauses are incompatible with EU law, and thus inapplicable, on the ground that EU law takes precedence over intra-EU BITs. These ISA clauses are inapplicable from the moment when their incompatibility with EU law first arose. Even though in exceptional cases the CJEU may impose temporal limitations on the application of its judgments,[54] it did not do so in *Achmea*, despite a specific request to that effect during the oral hearing. In the absence of a qualification as to *Achmea*'s effects *rationae temporis*, the inapplicability of such intra-EU BIT ISA clauses dates back to the moment when the BIT at issue became intra-EU.

Even if one did not accept the application of the principle of supremacy as a special conflict rule of international law, the inapplicability of ISA clauses following *Achmea* could also be supported through the application of the *lex posterior* conflict rule set out in Art. 30(3) VCLT, regulating the "application of successive treaties relating to the same subject-matter." Art. 30(3) VCLT provides that

> When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under Article 59 [VCLT], the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

The application of Art. 30(3) VCLT seems to presuppose that the treaties under examination relate to the same subject matter. On that ground it has been suggested that Art. 30(3) VCLT cannot apply to resolve conflicts between the EU Treaties and intra-EU BITs, as these treaties do not relate to the same subject matter.[55] However, it is widely accepted in the academic scholarship that the "same subject matter" criterion cannot be decisive for determining the applicability of Art. 30 VCLT.[56] It is the wording

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[52] *Ravil*, para. 37; *Exportur*, 45, para. 8; *Achmea v. Slovakia* (Award on Jurisdiction), para. 180.

[53] Declaration of the Representatives of the Governments of the Member States of 15 and 16 January 2019 on the Legal Consequences/Enforcement of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union, available at: https://bit.ly/2ZCIruN, https://bit.ly/3f2a5YF and https://bit.ly/2VKy6eX (all accessed 30 June 2020).

[54] *Vent de Colère*, paras. 40-43.

[55] *United Utilities (Tallinn) v. Estonia*, para. 543; *Jan Oostergetel and Theodora Lauretius v. The Slovak Republic*, UNCITRAL, Decision on Jurisdiction of 30 April 2010, para. 104; *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, SCC Case No. 088/2004, Partial Award of 27 March 2007, para. 159.

[56] *See* K. von der Decken, *Article 30*, in: O. Dörr, K. Schmalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary*, Springer: 2018, pp. 544-545 and further references therein.

of Art. 30 VCLT that introduces the notion of compatibility.[57] In addition, the fact that the "same subject-matter" criterion coincides with the concept of "conflict" in the context of Art. 30 VCLT is supported by the VCLT's *travaux préparatoires*. The ILC Draft of 1964 of what was then Art. 63 used the following wording: "[…] the obligations of States parties to treaties, the provisions of which are incompatible, shall be determined in accordance with the following paragraphs."

At that point in time, the sole criterion for the application of Art. 30 VCLT was "incompatibility", namely conflict between the provisions of two treaties. Only in the ILC Final Draft was the phrase "the provisions of which are incompatible" replaced by "relating to the same subject-matter." The accompanying commentary explains the reason for that change:

> On re-examining the article at the present session the Commission felt that, although the rules may have particular importance in cases of incompatibility, they should be stated more generally in terms of the application of successive treaties to the same subject matter. […] Consequently, while the substance of the article remains the same as in the 1964 text, its wording has been revised in the manner indicated.[58]

A provision of an international treaty may be incompatible with one of an earlier treaty even if they do not regulate the same subject matter. *Vice versa*, the fact that two successive treaties regulate the same subject matter does not in and of itself preclude their harmonious coexistence, unless a conflict in their provisions can be identified that excludes their simultaneous application.[59] On that basis, it appears that only the identification of such a conflict is necessary when dealing with the relationship between successive international treaties under Art. 30 VCLT.

Viewed against this background, the EU Treaties constitute a later treaty in the sense of Art. 30(3) VCLT, as the Member States have recently reaffirmed the EU Treaties through the Treaty of Lisbon, which entered into force in 2009. This is also the case for Croatia, which acceded to the Union in 2013. Therefore, any conflict between the provisions of the EU Treaties and those of an intra-EU BIT will be resolved in favour of the former, regardless of whether EU law and intra-EU BITs can be said to regulate the same subject matter. Since intra-EU BIT ISA clauses have been found to be in conflict with the provisions of the EU Treaties by the *forum* entrusted with the authoritative interpretation thereof, namely the CJEU, such clauses will be inapplicable from the moment when that conflict arose.

In practical terms, the inapplicability of an intra-EU BIT ISA clause strikes a blow against the competence of an arbitral tribunal to entertain claims under the respective

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[57] Art. 30(3) VCLT provides that "[...] the earlier treaty applies only to the extent that its provisions are *compatible with* those of the later treaty" (emphasis added).

[58] R. Günther Wetzel, D. Rauschning, *The Vienna Convention on the Law of the Treaties Travaux Préparatoires*, Alfred Metzner 1978, pp. 227-236.

[59] Koskenniemi, *supra* note 47, p. 18; E.W. Vierdag, *The Time of the 'Conclusion' of a Multilateral Treaty: Article 30 of the Vienna Convention on the Law of Treaties and Related Provisions*, 59 The British Yearbook of International Law 75 (1989), p. 100.

BIT from the moment when the BIT became intra-EU.[60] Intra-EU BIT arbitral tribunals constitute international tribunals, whose jurisdiction is always consent-based.[61] In the context of ISAs, the tribunal's jurisdiction derives from the applicable treaty, bilateral or multilateral, whereby the contracting states agreed *ex ante* on the jurisdiction of the arbitral tribunal to hear disputes brought against either of them by investors-nationals of the other state(s).[62] ISA clauses reflect a unilateral offer of consent to arbitration by the treaty's contracting parties. Hence, the tribunal's jurisdiction is only established once an eligible investor brings a claim against a signatory state to arbitration, thus accepting the offer to arbitrate disputes included in the treaty.[63] At that point, the investor perfects an arbitration agreement with the Member State and the latter's consent to the tribunal's jurisdiction becomes irrevocable.[64] Yet insofar as an ISA clause in an international agreement between Member States is incompatible with Arts. 267 and 344 TFEU, such a clause is inapplicable under either the principle of supremacy of EU law or the l*ex posterior* conflict rule of Art. 30(3) VCLT. This means that the Member States cannot have validly consented to arbitration via the respective ISA clause, and that therefore no valid arbitration agreement could have been concluded on that basis. Consequently, an arbitral tribunal established under an ISA clause of an *inter se* international agreement lacks jurisdiction to entertain claims brought thereunder.

The above reasoning has been upheld by national courts in the context of annulment proceedings of arbitral awards rendered by intra-EU BIT arbitral tribunals. Following

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[60] De Sadeleer, *supra* note 30, p. 366; M. Gregoire, *Intra-EU BIT Arbitrations Declared Incompatible with EU Law Judgment Rendered in C-284/16 – Slowakische Republik v. Achmea BV* (4 New Square 2018), available at: https://bit.ly/3iAeDHJ (accessed 30 June 2020), para. 30.

[61] N. Rubins, T. Papanastasiou, S. Kinsella, *International Investment, Political Risk and Dispute Resolution: A Practitioner's Guide* (2nd ed.), Oxford University Press, Oxford: 2020, paras. 7.01-7.36; M. Waibel, *Investment Arbitration: Jurisdiction and Admissibility*, in: M. Bungenberg et al. (eds.), *International Investment Law: A Handbook,* Hart: 2015, p. 1222; A. M. Steingruber, *Consent in Investment Arbitration,* Oxford University Press, Oxford: 2015, p. 225; K. Valdevelde, *Bilateral Investment Treaties*, Oxford University Press, Oxford: 2010, p. 433; H.E. Kjos, *Applicable Law in Investor-State Arbitration*, Oxford University Press, Oxford: 2013, p. 20.

[62] C. Schreuer, *Jurisdiction and Applicable Law in Investment Treaty Arbitration*, 1 McGill Journal of Dispute Resolution 1 (2015), p. 2.

[63] C. Schreuer, *Consent to Arbitration*, in: P. T. Muchlinski, F. Ortino, C. Schreuer (eds.), *The Oxford Handbook of International Investment Law,* Oxford University Press, Oxford: 2015, p. 830, 836; R. Dolzer, C. Schreuer, *Principles of International Investment Law* (2nd ed.), Oxford University Press, Oxford: 2012, p. 257; Rubins et al., *supra* note 61, paras. 7.01-7.36, 7.112; Kjos, *supra* note 61, p. 72.

[64] Douglas makes a distinction between the "derivative" model, in the context of which it is supported that investment arbitration is nothing but the mere "institutionalisation" of the diplomatic protection model. According to this view, the investor is enforcing the rights of its national state, simply stepping into the procedural shoes of the latter; and the "direct" model, under which the investor is considered to be conferred an individual right that it will seek to vindicate by means of international treaty arbitration. Based on the "direct" model, once the investor brings a claim before the arbitral tribunal, the contracting parties to the BIT may no longer withdraw their consent to arbitrate such dispute, as to do so would violate the investor's right to proceed to arbitration, *see* Z. Douglas, *The International Law of Investment Claims,* Cambridge University Press, Cambridge: 2009, pp. 10-11; *see also* J. Paulsson, *Arbitration without Privity,* 10 ICSID Review 232 (1995).

Achmea, the *Bundesgerichtshof,* which originally referred the questions to the CJEU, accepted Slovakia's appeal and set aside the arbitral tribunal's award on the ground that there had been no valid arbitration agreement between the parties to the dispute, as required under the applicable German Arbitration Law. This was similarly accepted by the Swedish Court of Appeal (Svea Court) in its recent ruling in the context of *PL Holdings S.a.r.l v. Poland*.[65] In that case, the Svea Court found the applicable intra-EU BIT ISA clause to be identical to the one at issue in *Achmea.*[66] According to the Svea Court, *Achmea* had clarified that no valid arbitration agreement could have been concluded based on an intra-EU BIT ISA clause, like the one at issue in that case.[67] However, it ended up rejecting the *Achmea*-based jurisdictional objection on the ground that it was raised too late in the arbitral process. To the Svea Court, Poland's failure timely to object to the tribunal's jurisdiction in the course of the arbitral proceedings had resulted in it having entered directly into a new, tacit arbitration agreement with the investor. The tribunal's jurisdiction was, therefore, not based on the incompatible-with-EU-law ISA clause of the Poland-Belgium/Luxembourg BIT, but on the common will of the parties to the dispute, as expressed in their tacit arbitration agreement.[68] Recently, the Swedish Supreme Court, before which the matter is currently pending, requested a preliminary ruling from the CJEU on the Svea Court's reading of *Achmea*. It now remains to be seen how the Court, having the authoritative and final say on the matter, will choose to approach this question.[69]

2.2 EU law as a qualification to the application of *Achmea*

As was examined above, the inapplicability of intra-EU BIT ISA clauses following *Achmea* deprives arbitral tribunals of their jurisdiction to entertain intra-EU BIT disputes; since the Member States' consent to arbitration was granted through an intra-EU BIT ISA clause, the inapplicability of that clause invalidates the arbitration agreement itself.

However, these considerations may not apply in all cases. One should bear in mind that in order for an arbitral tribunal to be able to consider *Achmea* in a dispute pending before it, thus being bound to reject its jurisdiction to entertain an intra-EU BIT dispute, it must be empowered to take EU law into account in the resolution of that dispute. This is so for two reasons.

First, Arts. 267 and 344 TFEU as well as the factual and legal background of *Achmea* presuppose that in order for *Achmea* to be applicable the arbitral tribunal in question

[65] SCC Case No. V 2014/163.

[66] *PL Holdings S.a.r.l. v. Poland*, SCC Case No. V 2014/163, Judgment of Svea Court of Appeal on Set-aside Application of 22 February 2019, p. 41.

[67] *Ibidem*, p. 42.

[68] *Ibidem*, pp. 43-44; *see also* K. Georgaki, *The Decision of the Svea Court of Appeal in PL Holdings v. Poland: A Mutiny against Achmea?* (Cambridge International Law Journal 2019), available at http://cilj.co.uk/2019/08/07/the-decision-of-the-svea-court-of-appeal-in-pl-holdings-v-poland-a-mutiny-against-achmea/ (accessed 30 June 2020).

[69] *See* https://www.italaw.com/sites/default/files/case-documents/italaw11099.pdf (in Swedish).

must be entitled to interpret and apply EU law to the dispute before it.[70] In order for a conflict with Arts. 267 and 344 TFEU to be established, these Articles presuppose that the case at issue relate to the interpretation and application of EU law.[71] It was on that basis that the CJEU in *Achmea* ruled against the intra-EU BIT ISA clause's compatibility with EU law to begin with. Art. 8(6) of the applicable Netherlands-Slovak Republic BIT clearly empowered the arbitral tribunal to decide the dispute applying Slovakia's domestic law as well as any other relevant agreements between the latter and the Netherlands. On that ground the CJEU held that EU law would become applicable to the resolution of any dispute arising under the respective intra-EU BIT, either as part of Slovakia's domestic law or as international law. It was precisely the fact that an arbitral tribunal falling outside the scope of Art. 267 TFEU would be empowered to interpret and apply EU law which led the CJEU to conclude that the ISA clause was incompatible with Arts. 267 and 344 TFEU.

Secondly, in adjudicating intra-EU BIT disputes and prior to proceeding on the merits, an arbitral tribunal needs to establish its jurisdiction to hear the case pending before it.[72] As already analysed, *Achmea* deprives arbitral tribunals of their jurisdiction to entertain intra-EU disputes. Since the Member States' consent to arbitration has been granted through the ISA clause of an intra-EU BIT, the inapplicability of such a clause invalidates any arbitration agreement based thereon.[73] However, in order for an arbitral tribunal to be bound by the CJEU's definitive interpretation of EU law in *Achmea,* the intra-EU BIT ISA clause must allow it to apply and interpret EU law – and therefore *Achmea* – to decide on its jurisdiction.

In this regard, it should be pointed out that in order for a tribunal to consider EU law in ruling on its competence, the latter must be part of the law the tribunal examines to decide on its jurisdiction. However, this will normally be the case, as EU law will be relevant directly, as part of international law (itself deriving from international treaties, namely from the EU treaties), and in cases where the BIT at issue explicitly provides for the application of EU law as such, through an express *renvoi*; or, in any case, indirectly, through the interpretation of the law applicable to determine the tribunal's jurisdiction

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[70] *See also PL Holdings S.a.r.l. v. Poland* (Svea Court of Appeal), p. 44.

[71] M. Klamert, *Article 344 TFEU*, in: M Kellerbauer, M. Klamert, J. Tomkin (eds.), *The EU Treaties and the Charter of Fundamental Rights: A Commentary*, Oxford University Press, Oxford: 2019, p. 2045; B. Schima, *Article 267 TFEU*, in: M Kellerbauer, M. Klamert, J. Tomkin (eds.), *The EU Treaties and the Charter of Fundamental Rights: A Commentary*, Oxford University Press, Oxford: 2019, pp. 1824-1827; S. Gáspár-Szilágyi, *It Is not Just about Investor-State Arbitration: A Look at Case C-284/16, Achmea BV*, 3 European Papers 357 (2018), p. 363.

[72] Given that the authority of arbitral tribunals to decide their own jurisdiction is expressed in the *Kompetenz Kompetenz* doctrine, the latter is a necessary precondition for the proper exercise of the arbitral function; *see* Waibel, *supra* note 61, pp. 1231-1232; *see also* Art. 41 of the ICSID Convention.

[73] *European American Investment Bank AG (EURAM) v. the Slovak Republic*, PCA Case No 2010-17, Award on Jurisdiction of 22 October 2012, para. 50; Y. Shany, *Jurisdiction and Admissibility*, in: C.P.R. Romano, K. Alter, Y. Shany (eds.), *The Oxford Handbook of International Adjudication,* Oxford University Press, Oxford: 2015, p. 779.

under Art. 31(3)(c) VCLT, as part of the relevant rules of international law applicable in the relations between the treaty's contracting parties.[74]

Cases whereby an international treaty provides that a tribunal can directly consider EU law as such and not as part of international law are the least troublesome in that respect, yet also the most rare. A relevant example can be found in Art. 11(2) of the Austria-Croatia BIT, according to which "the Contracting Parties are not bound by the present agreement insofar as it is incompatible with the legal *acquis* of the European Union (EU) in force at any given time."[75] This treaty has already been relied upon in several cases currently pending before ICSID tribunals against the Republic of Croatia on account of the Government's conversion of consumer loans denominated or indexed to the Swiss Franc which, pursuant to the Croatian Supreme Court – on the basis of settled case law of the CJEU – were contrary to EU law on consumer protection.[76] Based on the wording of Art. 11(2), a tribunal constituted under the respective intra-EU BIT will be bound to reject its jurisdiction to rule on cases brought thereunder after *Achmea,* since the scope of the Member States' consent, as expressed in the BIT, is limited to what is "compatible" with the EU *acquis*. The EU *acquis* includes the case law of the CJEU.

Even in the absence of an express *renvoi*, intra-EU BIT arbitral tribunals can still directly consider EU law – and therefore, *Achmea* – in determining their competence, as part of international law; or indirectly, as international rules relevant in the interpretation of the applicable BIT under Art. 31(3)(c) VCLT. In investor-State arbitration, the tribunal's jurisdiction is founded on the applicable BIT and arbitration rules, as well as on the parties' consent to arbitration. Given the nature of the above as instruments of international law, the latter will always be relevant to a tribunal in ruling on its jurisdiction.[77] Consequently, so will EU law rules, as part of international law.

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[74] An alternative option would be for EU law to be applied indirectly, as an inherent part of a Member State's national legal order, whenever the seat of arbitration is in a Member State. In applying EU law through the lens of a Member State's domestic law, the tribunal will be bound by the rule set out in Art. 27 VCLT. Hence, even though the tribunal will be empowered to take EU law into account, in such a scenario conflicts between EU law and the provisions of the intra-EU BIT will be resolved in favour of the BIT, the latter constituting international rather than the internal obligations of the Member State at issue, A.A. Ghouri, *Resolving Incompatibilities of Bilateral Investment Treaties of the EU Member States with the EC Treaty: Individual and Collective Options*, 16 European Law Journal 806 (2010), p. 812.

[75] Agreement between the Republic of Austria and the Republic of Croatia for the Promotion and Protection of Investments, signed on 19 February 1997 and entered into force on 1 November 1999, available at https://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/236 (accessed 30 June 2020).

[76] *UniCredit Bank and Zagrebačka Banka v. Republic of Croatia*, ICSID Case No. ARB/16/31 (pending); *Raiffeisen Bank International AG and Raiffeisenbank Austria d.d. v. Republic of Croatia*, ICSID Case No. ARB/17/34 (pending); *Addiko Bank AG and Addiko Bank d.d. v. Republic of Croatia*, ICSID Case No. ARB/17/37 (pending).

[77] *See also* in this regard *Georges Pinson (France) v. United Mexican States*, Award of 19 October 1928 UNRIAA V, p. 422, where it was held that "toute convention internationale doit être réputée s'en référer tacitement au droit international commun, pour toutes les questions qu'elle ne résout pas elle-même en termes exprès et d'une façon différente."

Since the *Achmea* judgment, arbitral practice has used the application of EU law as a limit to considering the consequences that the CJEU's judgment entails on their competence to rule on intra-EU disputes. However, the arguments employed to dismiss the pertinence of EU law, and therefore *Achmea*, on the cases before them have not always been convincing. In the attempt to establish a carve out from *Achmea*, arbitral tribunals have been rejecting the relevance of EU law in determining their jurisdiction at any cost. This was the case for example in *United Utilities v. Estonia,* a case brought under the Netherlands – Estonia BIT, where an ICSID tribunal found EU law not to be relevant in deciding its jurisdiction and dismissed the *Achmea*-based objection. Its reasoning was, *inter alia*, that

> [w]hile EU law forms part of both Dutch and Estonian law and is relevant to public international law, the jurisdiction of the Tribunal arises from and is founded on the BIT and the ICSID Convention, as well as on the Parties' consent as required by these instruments. As a result, the question of jurisdiction is properly to be approached by analysing those agreements and the relevant facts from a public international law perspective.[78]

However, this reasoning has flaws. Even if the tribunal could not have applied EU law directly to rule on its jurisdiction, it should still have considered it indirectly as "relevant rules of international law applicable in the relations between the parties" under Art. 31(3)(c) VCLT in its interpretation of the parties' instruments of consent. Since the tribunal would be in a position to interpret EU law in that context to identify the meaning of the applicable ISA clause, the *Achmea* rationale would apply to the case at hand. Instead, the *United Utilities* tribunal dismissed the *Achmea*-based objection, disregarding the nature of the EU treaties as instruments of international law applicable between the parties to the BIT at issue within the meaning of Art. 31(3)(c) VCLT.[79]

CONCLUSIONS

In *Achmea*, the CJEU ruled that ISA clauses, like the one included in the Dutch-Slovak Republic BIT, are incompatible with Arts. 267 and 344 TFEU. As a direct consequence of this incompatibility, such ISA clauses are inapplicable. The inapplicability of intra-EU BIT ISA clauses following *Achmea* deprives arbitral tribunals of their jurisdic-

[78] *Ibidem*, para. 532.

[79] Although this paper does not deal with *Achmea*'s applicability to the ECT, it is relevant to mention that arbitral tribunals established under Art. 26 ECT have also used the non-pertinence of EU law as one of the grounds for rejecting *Achmea*'s relevance to their jurisdiction to entertain ECT disputes, *see e.g. Vattenfall v. Germany*; K. Georgaki, *The Decision on the Achmea Issue in Vattenfall v. Germany or: How to Escape the Application of the CJEU's Decision in Achmea in Three Steps*, Oxford Business Law Blog 2018, available at: https://www.law.ox.ac.uk/business-law-blog/blog/2018/11/decision-achmea-issue-vattenfall-v-germany-or-how-escape-application; K. Schwedt, H. Ingwersen, *Intra-EU ECT Claims Post-Achmea: Vattenfall Decision Paves the Way*, Kluwer Arbitration Blog 2018, available at: http://arbitrationblog.kluwerarbitration.com/2018/12/13/intra-eu-ect-claims-post-achmea-vattenfall-decision-paves-the-way/ (both accessed 30 June 2020).

tion to entertain intra-EU BIT disputes; since the Member States' consent to arbitration was granted through the intra-EU BIT ISA clause, the inapplicability of that clause invalidates the arbitration agreement itself. In the absence of a specific qualification as to the consequences of *Achmea rationae temporis*, the inapplicability of intra-EU BIT ISA clauses dates back to the time when the BIT at issue became intra-EU.

Yet, in order for an arbitral tribunal to be able to consider *Achmea* in an intra-EU BIT dispute pending before it, thus being bound to reject its jurisdiction in the case, it must be empowered to take EU law into account in the determination of its jurisdiction. This will normally be the case, if the applicable intra-EU BIT expressly provides for the application of EU law as such (through an express *renvoi*); EU law may become applicable directly as part of international law; in any event, under Art. 31(3)(c) VCLT, as an intra-EU BIT arbitral tribunal is always empowered to interpret the law applicable to its jurisdiction in the light of EU law, given that EU law constitutes "relevant rules of international law" applicable in the relations between the BIT's contracting parties. However, so far arbitral tribunals in the post-*Achmea* era have used the application of EU law as a carve out of the *Achmea*-based objection to their jurisdiction in cases brought under intra-EU BITs.

The fact that arbitral tribunals have used the pertinence of EU law as a way around *Achmea*'s predicament does not mean that the decision's impact on intra-EU BIT investor-state arbitration is insignificant. So far, national courts faced with annulment proceedings of intra-EU BIT arbitral awards have upheld *Achmea*'s consequences vis-à-vis the competence of arbitral tribunals to entertain intra-EU BIT disputes. In addition, *Achmea* has set in motion the long-anticipated process of reshaping the landscape with regard to intra-EU investment protection. As a result of *Achmea,* the EU Member States have declared their intention to terminate all intra-EU BITs to which they are signatories, by means of a plurilateral treaty or bilaterally.[80] In doing so, they have decided to take political action to resolve a controversy between investors and respondent Member States as well as between the Member States and the Commission; a controversy that has lasted for over a decade. In the light of the ECOFIN Council conclusions of 11 July 2017 and the imminent termination of intra-EU BITs, the Member States have now declared their intention to intensify discussions with the Commission to ensure effective intra-EU investment protection, this time within the EU legal framework. These discussions will include both the assessment of existing processes and mechanisms of dispute resolution as well as of the need to create new ones or to improve the existing ones under EU law.[81] Against this background, any gap in intra-EU investment protection resulting from the termination of intra-EU BITs will henceforth be covered on the EU level in a comprehensive manner.

[80] Declaration of the Representatives of the Governments of the Member States, *supra* note 53, p. 4; *See also* K. Georgaki, *The EU's Competence over Cross-Border Investment in the Post-Lisbon Era*, 1 European Politeia 125 (2018), p. 153.

[81] Declaration of the Representatives of the Governments of the Member States, *supra* note 53, p. 3.

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IMPLEMENTING *ACHMEA*: THE QUEST FOR FUNDAMENTAL CHANGE IN INTERNATIONAL INVESTMENT LAW

Abstract: *The judgment of the Court of Justice in the Achmea case evoked significant repercussions regarding the application and operation of the bilateral investment treaties (BITs) concluded between EU Member States. As a result of this decision, EU Member States have decided to terminate almost 190 intra-EU BITs. Nevertheless, full implementation of the Achmea judgment remains a complex issue, entangled in political and legal controversies concerning intra-EU BITs which have been present for more than a decade. On a more general level, the implementation process is simultaneously entwined in two other significant debates: the specifics of the rights of investors, and the relationship between EU law and international law.*

Keywords: Achmea, bilateral investment treaty, BIT, conflict of treaties, European Union, ISDS, VCLT

INTRODUCTION

The judgment of the Court of Justice of the European Union (CJEU) in the *Achmea* case[1] evoked significant repercussions regarding the application and operation of the bilateral investment treaties concluded between European Union Member States (intra-EU BITs). As a result of this decision, EU Member States decided to terminate its almost 190 BITs, *i.e.* about 8% of the existing and binding worldwide BITs.[2] Simultaneously,

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[1] Case C-284/16 *Slowakische Republik v. Achmea BV* [2018] EU:C:2018:158.

[2] According to UNCTAD, 2336 BITs have entered into force (*see* https://investmentpolicy.unctad.org/international-investment-agreements, accessed 30 June 2020).

a decision by the Luxembourg court can have a significant influence on arbitral and post-arbitral proceedings carried out on the basis of these treaties.[3]

On a global level, the CJEU judgment contributed to the adherence of a process of resignation from arbitration in favour of domestic courts by the EU Member States *inter se*. This process, advocated in the beginning by the countries of the global south (Brazil, Venezuela, Ecuador, South Africa), is now slowly finding some support also in the practice of developed states.[4] Thus, the *Achmea* decision, seen through the concepts of EU law (the principle of mutual trust),[5] resembles arguments (albeit limited in their geographical scope) advocated earlier by the supporters of the Calvo doctrine and New International Economic Order favouring domestic jurisdiction.[6]

On a micro level, the process of implementation of the *Achmea* decision has much more of a heterogeneous character and should be evaluated taking into account the position of EU institutions, governments, domestic courts, and investment tribunals.

The purpose of this article is to present the process of implementation of the *Achmea* decision with respect to intra-EU BITs and investor-state dispute settlement (ISDS) proceedings under those agreements. Thus, it will not in principle relate to the EU and its Member States investment agreements with third states, nor to the intra-EU application of the Energy Charter Treaty (ECT). This article also leaves aside the issue of the influence of the *Achmea* judgment upon general EU constitutional law, such as the principle of mutual trust, the procedure for preliminary references, and the scope of exclusive jurisdiction of the CJEU.

The first part of this paper recaps the relationship between EU law and intra-EU BITs from the perspective of investment tribunals' decisions, as well as the governmental discussions and actions in this respect preceding the *Achmea* judgment. The second part briefly recalls the position taken by the CJEU and the debate following it. The main part of the article discusses the position of the European Commission (EC) and EU Member States, as presented in declarations from January 2019. Furthermore, it relates also to the practice of domestic courts and investment tribunals faced with the *Achmea* question. Finally, it evaluates the plurilateral treaty on the termination of intra-EU

[3] For more on the scale of this process, *see* UNCTAD, *Fact Sheet on Intra-European Union Investor –State Arbitration Cases*, December 2018, iss. 3.

[4] *See e.g.* the elimination of ISDS in Australia-New Zealand relations under Progressive and Comprehensive Trans-Pacific Partnership (PCTPP), or in Canada-US relations under USMCA, *see* L. Kulaga, *ISDS During a Period of Transformation. Favoring Domestic Courts and Selective Judicialization in USMCA*, 17(3) Transnational Dispute Management 1 (2020), pp. 12-13.

[5] "When we say to all the member states (all of them) (...) that they have to live up to the common standard, then they must also be entitled to the same trust and not be forced into a bilateral public international law agreement with the western member state, saying whatever you do, you know, I don't trust you, you sing off disempowering your national courts or you don't get a money of our investments. That is Achmea." (President of the European Court of Justice Koen Lenaerts at II LAwTTIP Joint Conference: EU Law, Trade Agreements, and Dispute Resolution Mechanisms: Contemporary Challenges (March 2019), available at https://www.transnational-dispute-management.com/audiovisual-library.asp, accessed 30 June 2020).

[6] *See generally* A.V. Freeman, *Recent Aspect of Calvo Doctrine and the Challenge to International Law*, 40 American Journal of International Law 190 (1946).

BITs, signed on the 5 May 2020, from the perspective of treaty law, investment law, and to some extent EU law.

1. INTRA EU-BITS AND EU LAW – BEFORE *ACHMEA*

The interaction between intra-EU BITs and EU law has been the subject of consideration in several arbitration proceedings.[7] In them, the EU Member States (almost exclusively from Eastern Europe) acting as respondents held that intra-EU BITs were terminated in accordance with Art. 59 of the Vienna Convention on the Law of Treaties (VCLT).[8] Simultaneously the EC, intervening in some of these proceedings, empha-

[7] *Eastern Sugar BV (Netherlands) v. The Czech Republic*, SCC Case No. 088/2004, Partial Award, 27 March 2007; *Rupert Joseph Binder v. Czech Republic*, Award on Jurisdiction, 6 June 2007; *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic*, Decision on Jurisdiction, 30 April 2010; *Eureko B.V. v. Slovak Republic*, PCA Case No. 2008–13, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010; *Achmea B.V. (formerly known as "Eureko B.V."). v. Slovak Republic*, PCA Case No. 2008–13, Final Award, 7 December 2012; *European American Investment Bank AG (EURAM) v. Slovak Republic*, Award on Jurisdiction, 22 October 2012; *Electrabel SA v. Hungary*, ICSID Case No ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012; *I.P. Busta & J.P. Busta v. The Czech Republic*, Case V 2015/014, Final Award, 10 March 2017; *Anglia Auto Accessories Limited v. The Czech Republic*, Case V 2014/181, Final Award, 10 March 2017.

This issue was also profoundly analysed by the doctrine. *See generally* H. Wehland, *Intra-EU Investment Agreements and Arbitration: Is EC Law an Obstacle?*, 2 International and Comparative Law Quarterly 297 (2009); T. Eilmansberger, *Bilateral Investment Treaties and Eu Law*, 46 Common Market Law Review 383 (2009); M. Burgstaller, *The Future of Bilateral Investment Treaties of EU Member States*, in: M. Bungenberg, J. Griebel, S. Hindelang (eds.), *International Investment Law and EU Law*, Springer-Verlag, Berlin, Heidelberg: 2011, pp. 76-77; A. Reinisch, *The Decisions on Jurisdiction in the Eastern Sugar and Eureko Investment Arbitrations*, 2 Legal Issues of Economic Integration 157 (2012); A. Dimopoulos, *The Compatibility of Future EU Investment Agreements with EU Law*, 39 Legal Issues Of Economic Integration 447 (2012); E. Bohm, M.-C. Motaabbed, *The European Union and the Unloved BITs of Its Member States*, Austrian Yearbook on International Arbitration 371 (2014); U. Kriebaum, *The Fate of Intra-EU BITs from an Investment Law and Public International Law Perspective*, 1 ELTE Law Journal 27 (2015); J.P. Gaffney, Z. Akcay, *European Bilateral Approaches*, in: M. Bungenberg et al. (eds.), *International Investment Law: A Handbook*, Beck-Hart-Nomos, 2015, pp. 193-196; M. Bungenberg, S. Hobe, *The Relationship of International Investment Law and European Union Law* (ibidem), pp. 1622-1626; J. Kokott, C. Sobotta, *Investment Arbitration and EU Law*, 18 Cambridge Yearbook of European Legal Studies 1 (2016); C. Binder, *A Treaty Law Perspective on Intra-EU BITs*, 17 Journal of World Investment & Trade 964 (2016); J. Fecak, *International Investment Agreements and EU Law*, Wolters Kluwer, Alphen aan den Rijn: 2016; P. Koutrakos, *The Relevance of EU Law for Arbitral Tribunals: (Not) Managing the Lingering Tension*, 17 Journal World Investment & Trade 873 (2016); E. Bjorge, *EU Law Constraints on Intra-EU Investment Arbitration?*, 16 The Law and Practice of International Courts and Tribunals 71 (2017); N. Basener, *Investment Protection in the European Union*, Nomos Verlag, Baden Baden: 2017, pp. 235-240; B. Yin, L.P. Goldsmith, *Intra-EU BITs: Competence and Consequences*, in: N. Kaplan, M. Moser (eds.), *Jurisdiction, Admissibility and Choice of Law in International Arbitration: Liber Amicorum Michael Pryles*, Wolters Kluwer, Alphen aan den Rijn: 2018, pp. 217-242.

[8] *Binder*, para. 19; *Eastern Sugar*, paras. 100-103; *Euram*, para. 83; *Eureko*, para. 63; This position was also applied by the EC in *Ioan Micula, Viorel Micula and Others v. Romania*, ICSID Case No. ARB/05/20, Decision on Annulment, 26 February 2016, para. 331. *See generally* J. Klabbers, *Treaty Conflict and the European Union*, Cambridge University Press, Cambridge: 2009, p. 22; Basener, *supra* note 7, p. 245.

sized the primacy of EU law over those treaties and as a consequence the inapplicability of certain of their provisions in accordance with Art. 30(3) VCLT.[9] The EC further underlined the inconsistency of intra-EU BITs with the principle of non-discrimination (Art. 18 of the Treaty on the Functioning of the European Union, TFEU) as well as the possible incursion of investment arbitral tribunals into the exclusive competences of the CJEU envisaged by Arts. 267 and 344 TFEU. These arguments were in general contested by the arbitral tribunals, which in particular took the position that Art. 344 TFEU is applicable only to inter-state proceedings.[10] They also stated that the conflict of norms provision of VCLT[11] cannot be applied, as it requires treaties to be on the same subject matter, which is not the case in the relationship between the TFEU and intra EU-BITs.[12]

With respect to the latter argument, it should be considered as a rather formalistic approach, or "legal gymnastics"[13] undertaken by the investment tribunals. This position, if comprehensively applied, could prevent any practical application of Art. 30 VCLT. In this context one could only agree with the International Law Commission, which stated that the "criterion of 'same subject-matter' seems already fulfilled if two different rules or sets of rules are invoked in regard to the same matter, or if, in other words, as a result of interpretation, the relevant treaties seem to point to different directions in their application by a party."[14]

It should be noted that to some extent similar arguments as in the proceedings based on intra-EU BITs were made by the EU Member States (acting as Respondent) and the EC in intra-EU Energy Charter Treaty disputes. The decisions of arbitral tribunals with

[9] Amicus Brief in *Eureko* (paras. 30 and 38), *Euram* (para. 61), and *Electrabel* (paras. 4.100-4.110); Letter to Czech Department of Finance in *Eastern Sugar* (paras. 24–26).

[10] *Achmea*, para. 276; *Euram*, paras. 254 and 263.

[11] "Article 30 Application of successive treaties relating to the same subject matter. 1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of States Parties to successive treaties relating to the same subject matter shall be determined in accordance with the following paragraphs. (…) 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty."

[12] *Eastern Sugar*, paras. 142 and 160-180; similarly *Eureko*, paras. 177 and 234; *Oostergetel*, paras. 74-104; *Binder*, paras. 40-42. Using a different justification, the same result was reached in *Euram*, paras. 169-183; *Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar GmbH & Co. KG v. Czech Republic*, PCA Case No. 2014-03, Final Award 11 October 2017, para. 253. For approval of such an approach, *see* C. Binder, *A Treaty Law Perspective on Intra-EU BITs*, 17(6) Journal of World Investment & Trade 964 (2016), p. 975; For persuasive criticism concerning this conclusion, *see* Arts. 30 and 59 VCLT: A. Reinisch, *The Decisions on Jurisdiction in the Eastern Sugar and Eureko Investment Arbitrations*, 2 Legal Issues of Economic Integration 157 (2012), pp. 167-168; *see also* Basener, *supra* note 7, pp. 235-240 and 295. For the same subject matter argument, *see also* Wehland, *supra* note 7, pp. 304-305.

[13] A.A. Ghouri, *Interaction and Conflict of Treaties in Investment Arbitration*, Wolters Kluwer, Alphen aan Rijn: 2015, p. 166.

[14] *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi*, A/CN.4/L.682, 13 April 2006, para. 23, *see also* paras. 117 and 254.

respect to those jurisdictional objections were, however, similar to those acting under intra-EU BITs.[15] In the most extensive discussion of these issues, the *Electrabel* tribunal stated that there is no inconsistency between the ECT and EU law.[16]

Parallel to this scepticism on the part of the arbitral tribunals with regard to the replacement of intra-EU BITs by EU law, discussions in this regard were initiated within the auspices of EU institutions. At least since 2006 the EC has presented the position that the existence of these treaties is not consistent with the common market, which is the core idea of European integration.[17] Nevertheless, due to the scepticism of many Member States toward termination of these agreements, no specific action has been agreed upon.[18] Instead, certain individual actions were taken. Between 2009 and 2011 the Czech Republic terminated intra-EU BITs with Italy, Denmark, Slovenia, Malta, Estonia and Ireland.[19] Simultaneously, since 2008 Italy initiated the practice of termination of its existing BITs.[20]

In 2011, Poland adopted the position that intra-EU BIT agreements should be terminated, and that the best solution to achieve this would be a concordant action taken by all EU Member States. Alternatively, Poland was ready to terminate those agreements either through denunciation, or on the basis of an agreement by the parties.[21] This position began to be implemented in the summer of 2017, when Poland denounced a treaty with Portugal.[22] In late 2017, Poland concluded agreements on the Amendment and Termination of its BITs with Denmark[23] and Latvia.[24] Both of the treaties, concluded through an exchange of notes, are rather brief and provide that intra-EU BITs are terminated, including their sunset clauses.[25]

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[15] *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3 Award, 27 December 2016, paras. 286 and 309.

[16] *Electrabel*, paras. 5.32, 4.146, 4.166 and 4.175.

[17] *See* the letter written by the European Commission Directorate General Internal Market and Services of January 13, 2006 (2006 Commission Letter) and a note by DG Market of November 2006 quoted in *Eastern Sugar B.V (Netherlands) v. Czech Republic*, Partial Award, 27 March 2007, paras. 119-128.

[18] "Most Member States do not share the Commission's concern about arbitration risks and discriminatory treatment of investors. A clear majority of Member States prefers to maintain the existing agreements, in particular with view to the provisions on expropriation, compensation, protection of investments and investor-to-state dispute settlement" (2007 EFC Report to the Commission and the Council on the Movement of Capital and the Freedom of Payments, January 2008, para. 15). *See also* T. Eilmansberger, *Bilateral Investment Treaties and EU Law*, 46 Common Market Law Review 383 (2009), pp. 399-400.

[19] T. Fecak, *Czech Experience with Bilateral Investment Treaties: Somewhat Bitter Taste of Investment Protection*, 2 Czech Yearbook of Public and Private International Law 233 (2011), p. 255.

[20] M. Krajewski, R.T. Hoffmann, *Research Handbook on Foreign Direct Investment*, Edward Elgar, Cheltenham: 2019, p. 203.

[21] Druk sejmowy [Sejm paper], no. 1775, 18 July 2017.

[22] Journal of Laws of 2018, item 17.

[23] Journal of Laws of 2019, item 191.

[24] Journal of Laws of 2019, item 65.

[25] Both treaties state: "The Parties to the Agreement agreed that in respect of investments made prior to the date when the Agreement mentioned in paragraph 1 terminates, none of its provisions remain in force."

Simultaneously, since at least 2012 meetings of experts representing EU Member States have been held under the auspice of the Commission, aimed at finding a common approach to the method and time frame of terminating intra-EU BITs.[26] The lack of concrete action in this respect for several years seemed to be a consequence of the conditionality advocated by some states and businesses and industry associations. In their opinion intra-EU BITs can only be terminated when a substitute equivalent procedure for enforcing investment rights would be created.[27] An illustration of this approach was the October 2015 proposal by five EU Member States to conclude an agreement among all EU Member States which would not only terminate existing intra-EU BITs, but also envisage comparable substantive and procedural protection for European investors.[28] With respect to the latter, the abovementioned states proposed the creation of a European investment court.[29]

In June 2015 the EC Commission started infringement procedures against Austria, the Netherlands, Romania, Slovakia and Sweden for the non-compatibility of its intra-EU bits with EU law and requested their termination.[30]

2. THE *ACHMEA* DECISION

2.1. Preludium

By its decision of 3 March 2016, the Federal Court of Germany (the Bundesgerichtshof, BGH) issued a reference for a preliminary ruling by the CJEU in the *Achmea* case. The BGH asked about the compatibility of a provision of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federative Republic concluded in 1991 with Arts. 18, 267 and 344 TFEU. The issue arouse as a result of Slovakia effort's to set aside a 2012 arbitral decision, issued on the basis of this Agreement, in the case of *Achmea v. Slovakia*. Slovakia brought an action to set aside that arbitral award before the Higher Regional Court in Frankfurt am Main, as the tribunal had its seat in Frankfurt. As that court dismissed the action, it appealed on a point of law to the BGH.

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[26] *See* the information available at Ask the EU, https://www.asktheeu.org/en/request/termination_of_intra_eu_bits#incoming-10643 (accessed 30 June 2020).

[27] *See e.g.* the minutes from a meeting of the representative of the European Commission (DG Financial Stability) with the Director of Businesseurope held on 15 September 2015, available at https://www.asktheeu.org/en/request/termination_of_intra_eu_bits#incoming-10643 (accessed 30 June 2020).

[28] Intra-EU Investment Treaties, Non-paper from Austria, Finland, France, Germany and the Netherlands, available at https://www.rijksoverheid.nl/ (accessed 30 June 2020).

[29] *Similarly see* T.T. Andersen, S. Hindelang, *The Day After: Alternatives to Intra-EU BITs*, 17 Journal of World Investment & Trade 984 (2016), pp.1010-1011.

[30] *Commission asks Member States to terminate their intra-EU bilateral investment treaties*, 18 June 2015, http://europa.eu/rapid/press-release_ IP-15-5198_en.htm (accessed 30 June 2020).

In its reference the BGH advocated[31] for the compatibility of intra-EU BITs with EU law. In particular, it indicated, similarly to investment arbitral tribunals which discussed the issue, that Art. 344 TFEU does not apply to investor-state dispute settlement procedures as it only concerns inter-state proceedings. Similarly, Advocate General Wathelet advocated for the compatibility of the intra-EU BITs in question with EU law.[32] He agreed with the BGH decision that disputes between individuals and Member States are not covered by Art. 344.[33] Furthermore, he presented the opinion that the arbitral tribunal constituted under the BIT is a court or tribunal within the meaning of Art. 267 TFEU. He drew this conclusion by equating those tribunals with the status of a rather unique Benelux Court, which is allowed to make preliminary references to the CJEU.[34] Finally, he stressed that "the awards made by the arbitral tribunals cannot avoid review by the national courts."[35] He did so however without explaining how this conclusion could be applied to arbitration held under the ICSID convention.[36]

2.2. Decision of the Court

In its judgment of 6 March 2018, the Grand Chamber of the Court of Justice stated that Arts. 267 and 344 TFEU must be interpreted as "precluding" an arbitration provision in an international agreement concluded between Member States.

Before making such a conclusion the CJEU recalled the fundamental applicable principles of EU law, in particular the principle of autonomy guaranteed by the preliminary reference procedure established by virtue of Arts. 267 and 344 TFEU. In this context the CJEU analysed the possible interaction of investment tribunals with EU law, noting that they "may be called on to interpret or indeed to apply EU law, particularly the provisions concerning the fundamental freedoms, including freedom of establishment and free movement of capital" (para. 42). It found this problematic when taking into account the fact that those tribunals cannot be considered as a "court or tribunal of a member state" in accordance with Art. 267 TFEU (para. 48). This flows from the fact that they have exceptional character and that they are not integrated with the EU system of domestic courts. In particular, they cannot be equated with the Benelux Court of Justice, as it constitutes an integral element of the internal administration of justice. It distinguished between commercial and investment arbitration (paras. 54-55). Taking this into account, the CJEU indicated that adjudicative bodies created on the

[31] B. Hess, *The Fate of Investment Dispute Resolution after the Achmea Decision of the European Court of Justice*, MPILux Research Paper 3 (2018) , p. 6.

[32] Opinion of A.G. Wathelet, EU:C:2017:699.

[33] *Ibidem*, para. 144.

[34] *Ibidem*, paras. 86 and 90-131; *see* the more elaborated arguments in this respect by K. von Papp, *Clash of "Autonomous Legal Orders": Can EU Member State Courts Bridge the Jurisdictional Divide between Investment Tribunals and the ECJ? – A Plea for Direct Referral from Investment Tribunals to the ECJ*, 50 Common Market Law Review 1039 (2013), pp. 1067-1076 and 1079-1081.

[35] Opinion of A.G. Wathelet, para. 239.

[36] Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965. All EU member states except Poland are the parties to the Convention.

basis of intra-EU BITs are not in conformity with EU law, as they threaten the uniform application of EU law.

In summary, the CJEU concluded with a completely different position than those presented by both the Federal Court of Justice as well as the advocate general. In fact, the lack of any reference to the opinion of the latter in the judgment "is telling."[37]

The concise character of the CJEU judgment left several questions unanswered.[38] The Luxembourg court, in its Opinion 1/17 has already clarified some of them, and with respect to the others the chance will appear as a result of the recent (later discussed) preliminary reference of the Swedish Supreme Court. Still, the lack of reference in the judgment to the Energy Charter Treaty has created substantial controversies with respect to the legality of the intra-EU application of these treaties. Furthermore, the CJEU did not reserve that its interpretation will not be retroactive, thus creating confusion as to how its decision ought to be applied to the investor-state disputes initiated (and often also concluded) before *Achmea*.

3. THE IMPLEMENTATION OF *ACHMEA*

Soon after *Achmea*, discussion was initiated as to its consequences for international investment law. These discussions centred on three topics:

1. whether *Achmea* also applies to BITs of EU member states with third states or investment treaties that the EU and its member states concluded with Canada, Singapore, and Vietnam;

2. whether *Achmea* also applies to the Energy Charter Treaty;

3. whether *Achmea* is only a decision which has bearing only on a single specific treaty or perhaps a set of intra-EU BITs with similar applicable law clauses such as Slovakia-Netherlands BITs or only on ISDS resolved under UNCITRAL rules.

3.1. CETA clarification

As already indicated, the (second) question – on the possibility of a logic application of *Achmea* to intra-EU ECT disputes – is not covered by this article. As regards the first question the CJEU has itself made a pronouncement in this respect (a year later)

[37] Hess, *supra* note 31, p. 8; *Contra* P. Koutrakos, *The Autonomy of EU Law and International Investment Arbitration*, 18 Nordic Journal of International Law 41 (2019): "The approach adopted by Advocate General Wathelet understands EU law and intra-EU BITs as two distinct legal spheres the interactions of which need not threaten the functioning of either. In developing this approach, his line of reasoning is characterized by a strong realist streak that anchors the Opinion in the practice of arbitral tribunals set up under intra-EU BITs, as well as the avoidance of grand teleological arguments. Instead, his analysis is firmly based on a literal interpretation of primary law (he refers, for instance, to the wording of Article 344 TFEU and the ensuing irrelevance of this provision to the dispute). This is a different construction of autonomy: it is about the harmonious co-existence between EU and international investment law."

[38] C. Contartese, M. Andenas, *EU Autonomy and Investor-State Dispute Settlement under inter se Agreements between EU Member States: Achmea*, 56 Common Market Law Review 157 (2019), p. 159.

in Opinion 1/17 of the resolution of investment disputes between investors and states under the Comprehensive Economic and Trade Agreement between Canada, of the one part, and the European Union and its Member States, on the other (CETA). The Court stated that the ISDS in CETA differs from the ISDS in intra-EU BITs, as it relates to agreements with third states and as a consequence does not involve considerations concerning the principle of mutual trust.[39]

3.2. Delimiting scope of *Achmea*

Soon after the *Achmea* judgment, some opinions were presented (mainly by arbitration practitioners) regarding the limited scope of the *Achmea* decision. It was argued that the judgment of the CJEU is not binding for international arbitration tribunals and it does not apply to ICSID arbitration.[40] According to those views the *Achmea* decision was applicable only to the treaty between the Netherlands and Slovakia.[41] The view was also expressed, that the Achmea judgment may only have a direct impact on those intra-EU BITs that contain a similar rule on the applicability of domestic laws. For all other agreements, there would be no reason to automatically assume an adverse effect on the autonomy of EU law. Rather, it was argued that the applicability of EU law needs to be examined on a case-by-case basis.[42] Such a narrow reading of a decision of the Luxemburg Court seemed to be an illustration, at least to some extent, of dissatisfaction with its ruling and the fact that it could significantly affect the further development of investment arbitration (and its legal assistance) in Europe.

Still, several commentators indicated a more general consequence of the *Achmea* decision, both on the need for termination of all of the intra-EU BITs as well as with respect to the ongoing arbitral proceedings.[43] Unsurprisingly, this was also the position taken by the EC. In its Communication "Protection of intra-EU investment", the European Commission presented an unequivocal interpretation of the consequences of *Achmea* by stating that "all investor-State arbitration clauses in intra-EU BITS are inapplicable and that any arbitration tribunal established on the basis of such clauses

[39] Opinion 1/17, 30 April 2019, ECLI:EU:C:2019:341, paras. 126-127. Earlier this position was also presented by A.G. Y. Bota, Opinion 1/17, 29 January 2019, paras. 106-114.

[40] P. Sturma, *Reform of Investment Dispute Settlement and Developments in EU Investment Law: Is There Any Future for Investment Treaty Arbitration in Europe? Some Comments in the Light of Achmea Decision*, 13 September 2018, available at: https://ssrn.com/abstract=3364013 (accessed 30 June 2020), p. 6.

[41] P. Pinsolle, I. Michou, *Arbitration: The Achmea v. Slovakia Judgment of the CJEU, Is It Really the End of Intra-EU Investment Treaties?*, 7 March 2018, available at: https://bit.ly/2WgZ1iO (accessed 30 June 2020), paras. 4-6, 16.

[42] F. Stefan, *Brace for Impact? Examining the Reach of Achmea v. Slovakia*, Kluwer Arbitration Blog, 24 June 2018, available at: http://arbitrationblog.kluwerarbitration.com/ (accessed 30 June 2020).

[43] A. Dimopoulos, *Achmea: The Principle of Autonomy and Its Implications for Intra and Extra-EU BITs,* EJIL: Talk!, 27 March 2018 https://bit.ly/303M4tX; S. Gáspár-Szilágy, *The CJEU Strikes Again in Achmea. Is this the End of Investor-State Arbitration under Intra-EU BITs?*, IELP Blog, 7 March 2018, available at: https://bit.ly/2Cztly4; Hess, *supra* note 31, p. 9; L. Ankersmit, *Achmea: The Beginning of the End for ISDS in and with Europe?*, Investment Treaty News, 24 April 2018, https://bit.ly/38Q4LoS (all accessed 30 June 2020).

lacks jurisdiction due to the absence of a valid arbitration agreement."[44] Thus the Commission took the approach, without taking into account any reasoning on the grounds of international law, that certain provisions of BITs (i.e. the arbitration clause) are not operational, despite the fact that they are contained in treaties which are still in force; which however member states were obliged to terminate.[45] Furthermore, as a result of a conclusion on the absence of a valid arbitration agreement, the Commission took the view that "national courts are under obligation to annul any arbitral award rendered on that basis and to refuse to enforce it." Thus, in the view of the Commission *Achmea* had consequences on all arbitration clauses in all intra-EU BITs.[46]

3.3. Declarations of EU Member States

The EC's position was repeated to a large extent in the 15 January 2019 Declaration of 22 Representatives of the Governments of the Member States on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union.[47] Nonetheless, the EU Member States have not managed to achieve consensus on all issues. As a result, instead of a single clear message from the EU Member States (parties to intra-EU BITs) translating the *Achmea* decision into the realm of public international law, we have witnessed a discord (if not a cacophony) of three simultaneous declarations.

While the second declaration, adopted on 16 January 2019 by Finland, Luxembourg, Malta, Slovenia and Sweden, to a large extent had similar provisions to that of the majority, there was however a considerable difference on the ECT. The third declaration was an individual statement by Hungary, which, identical to the declaration of the 22 EU Member States as regards intra-EU BITs, advocated also for a lack of inconsistency with respect to ECT–EU law relations.[48]

Apart from the issue of the ECT, all three declarations are common to a certain extent. In particular, in the operative part of the declarations the Member States indicate that they will inform arbitral tribunals about the consequences of the *Achmea* judgment in pending intra-EU investment proceedings.[49] In addition, they express the will to terminate all intra-EU BITs "by means of a plurilateral treaty or, where that is mutually

[44] Communication from the Commission to the European Parliament and the Council, *Protection of intra-EU investment*, Brussels, 19 July 2018, COM(2018) 547 final, p. 3.

[45] *Similarly see* B. Soloch, *CJEU Judgment in Case C-284/16 Achmea: Single Decision and Its Multi-Faceted Fallout*, 18 The Law and Practice of International Courts and Tribunals 3 (2019), pp. 31-32.

[46] As regards nuances of this issue, *see* H. Wehland, *The Enforcement of Intra-EU BIT Awards: Micula v. Romania and beyond*, 17 Journal of World Investment & Trade 942 (2016), p. 963.

[47] Available at: https://ec.europa.eu/info/publications/190117-bilateral-investment-treaties_en (accessed 30 June 2020).

[48] According to the Investment Arbitration Reporter, the positions of Hungary and Sweden could have been linked to arbitral proceedings initiated by their State-owned companies under the ECT, *see* D. Charlotin, L.E. Peterson, *Analysis: Four Additional Takeaways from Achmea-related Declarations by EU Member States*, IA Reporter, 17 January 2019, available at: https://bit.ly/2ZqqOPK (accessed 30 June 2020).

[49] Paras. 1-2 of all three declarations.

recognized as more expedient, bilaterally."[50] According to the declaration, termination of the treaty should enter into force no later than 6 December 2019.[51]

Besides the ECT, significant differences between the declaration of the 22 Member States and the declaration and of the five appear in the preamble. Both documents stipulate that as a result of the *Achmea* judgment the investor state arbitration clauses contained in intra-EU BITs are contrary to EU law and inapplicable. Nevertheless, the declaration of the 22[52] concludes from this statement that those arbitration clauses do not produce any legal effect and that investment tribunals established on the basis of those treaties do not have jurisdiction "due to a lack of a valid offer to arbitrate by the Member State party to the underlying bilateral investment treaty." These declarations however are non-existent in the declaration of the five. Furthermore, the declaration of the five does not refer to the provisions of the Vienna Convention on the Law of the Treaties and customary international law regarding *lex posterior*. Thus, besides the ECT, the issue of converting the consequences of the *Achmea* judgment into arbitral proceedings pending on the basis of an intra-EU BIT still in force was a pivotal controversy. The group of five seemed to hold the position that the CJEU's judgment only concerns EU law, and has no direct applicability on existing international legal rights and obligations of the Member States.[53] The problem with the position of the five EU Member States is clearly visible in the second sentence of para. 2 of their declarations. While the declaration of the 22 indicates that: "[s]imilarly, defending Member States will request the courts, including any third country, which are to decide in proceedings relating to an intra-EU investment arbitration under bilateral investment treaty, to set these awards aside or not to enforce them due to a lack of valid consent." The declaration of the five lacks the phrase "due to a lack of valid consent." As a result, it is not clear why, according to those states, domestic courts – in particular in third countries – should set aside the investment awards.

With respect to the text of the declaration of the 22, several issues are striking. Firstly, it is surprising that the declaration makes almost no reference to international customary law conflict of norms provisions in order to underscore and justify the primacy of the TFEU and its *Achmea* interpretation over BITs. This issue was touched upon only in the footnote one.[54] As a result, the declaration remains, to some extent, internally inconsistent. On the one hand it specifies particular international legal effects of the *Achmea* judgment, i.e. the lack of jurisdiction of the arbitral tribunals. On the other

[50] Para. 5 of the declaration of 22 and 5 Member States, and para. 4 of the Hungary declaration.

[51] Para. 8 of the declaration of 22 Member States declaration and 5 Member States, and para. 7 of the Hungary declaration

[52] In this respect the Hungarian declaration contains the same language as the declaration of 22.

[53] Thus this approach resembled looking at EU law rather as a constitutional (in a dualist perspective) than an international legal order.

[54] "With regard to agreements concluded between Member States, *see* judgments in 235/87 *Matteucci*, EU:C:1988:460, para. 21, and C-478/07 *Budějovický Budvar*, EU:C:2009:521, paras. 98 and 99; and Declaration 17 to the Treaty of Lisbon on the primacy of Union law. The same result follows also under general public international law, in particular from the relevant provisions of the VCLT and customary international law (*lex posterior*).

hand, however it provides a very limited explanation for these effects. The lack of a detailed and convincing "translation" of *Achmea* to the letter of international law could have – and in fact has actually had – negative consequences for ensuring the effectiveness of the CJEU judgment. What also blurred the potential aim of this declaration from the perspective of international law was the insertion of several paragraphs relating to investment protection in the EU in general. This seems to have been a concession to the authors of the 2015 declaration (Netherlands, Germany, Austria, Finland and France), which thereby held the view that the sole termination of treaties without ensuring substantial protection was insufficient.[55] The general result of this mélange was a document (actually three documents) which contained a mixture of different kinds of provisions, and thus in effect failed to put before an arbitral tribunal an unequivocal message on the position of the signatories of the relevant treaties (the TFEU and intra-EU BITs) as to how they should both be interpreted. An excellent example of this approach is paragraph 6 of the declaration of the 22, in which Member States deem to strengthen the binding force of the TFEU (sic!) by emphasizing the need to respect its Art. 19.

Notwithstanding the above, in general the declarations seem to have a twofold character. Firstly, they inform about a conflict of norms and the way they should be resolved.[56] Secondly, they are interpretative declarations, which should be taken into account in the process of their interpretation on the basis of Ar. 31(3)(a) of the VCLT.

Simultaneously to the process of drafting the EU declaration, Poland – which joined the group of 22 – has formulated individual declarations invoked when denouncing several intra-EU BITs. In a Statement of the Government dated 18 December 2018, relating to its BIT with Cyprus, it stated that:

> The Republic of Poland declares that in accordance with Article 30 paragraph 3 of the Vienna Convention on the Law of Treaties concluded on 23rd May 1969 and customary international law the arbitration clause contained in Article 9 of the Agreement between the Republic of Poland and the Republic of Cyprus for the promotion and reciprocal protection of investments which is an earlier treaty, is not applicable from 1 May 2004, i.e. the day of the accession of the Republic of Poland to the European Union, as it is not compatible with the Treaty on the Functioning of the European Union which is the later treaty. The lack of compatibility of the arbitration clauses contained in agreements on the encouragement and reciprocal protection of investments between European Union Member States with the Treaty on the Functioning of the European Union was confirmed by the judgment of the Court of Justice of 6 March 2018 in Case C-284/16 Achmea. In light of the above, the arbitral tribunals constituted under the Agreement between the Republic of Poland and the Republic of Cyprus for the promotion and reciprocal protection of investments lack jurisdiction to hear cases due to the absence of a valid arbitration consent.[57]

[55] These arguments are also still raised in the academia. *See* S. Hindelang, *The Limited Immediate Effects of CJEU's Achmea Judgment*, Verfassungsblog, 9 March 2018, available at: https://verfassungsblog.de/the-limited-immediate-effects-of-cjeus-achmea-judgement/ (accessed 30 June 2020).

[56] *Similarly see* the Statement of Dissent of Professor Marcelo G. Kohen, para. 56.

[57] *See* Journal of Laws of 2019, item 204, fn 2; for similar arguments *see* Dimopoulos, *supra* note 7, p. 91; Basener, *supra* note 7, p. 295; A. Bilanová, J. Kudrna, *Achmea: The End of Investment Arbitration as We Know It?*, 3(1) European Investment Law and Arbitration Review 261 (2018), p. 265.

The Polish declaration, while sharing the core message of the declaration of the 22, refers in a more direct way to public international law and explains the basic parameters of applying a conflict-of-norms provision. Still, both documents are based on a conviction that the intra-EU BITs and TFEU share the same subject matter.

3.4. *Achmea* in domestic courts

As is clear from the declarations presented, ensuring the effectiveness of the *Achmea* judgment requires uniform case law at the level of both arbitral tribunals and national courts. With respect to the latter it should be noted that on 31 October 2018 the BGH rendered a decision, finding that as the arbitration clause in bilateral investment treaties between Slovakia and Netherlands was incompatible with EU law, an arbitral award issued under this agreement must be set aside.[58] The BGH based its decision on Section 1059(2)(a) of the Code of Civil Procedure, which allows it to set aside an award rendered under an invalid arbitration agreement. It also analysed, in the context of referring to its previous jurisprudence, whether a violation of a principle of good faith had occurred, which can result in barring a party from invoking a ground for setting aside an award.[59] However, it did not find such a violation.

Different outcomes have emerged from the Swedish court in the case of the PL Holdings judgment, concerning a challenge by Poland regarding two arbitral awards (on jurisdiction and liability, and on compensation from the mid-2017s), issued on the basis of the Polish-Belgium and Luxemburg BIT.[60] Although the court of appeal recognized that the arbitral clause concerned was similar to that in the *Achmea* case,[61] it also noted that Poland – unlike Slovakia in *Achmea* – did not raise an intra-EU objection at the early stage of an arbitration proceeding.[62] Furthermore, the court reasoned that even the invalidity of the arbitration clause does not automatically imply that the awards are manifestly incompatible with Swedish public order.[63] In rejecting the Polish argument that the autonomy of EU law is an element of the Swedish public policy, the court stated that the content of the arbitral awards did not violate fundamental principles of EU law. Furthermore, the court noted that Poland could always enter into an arbitration agreement with foreign investors, thus the possible importance of the invalidity of an

[58] Aufhebung eines Schiedsspruchs: Aufhebungsgrund des Fehlens einer Schiedsvereinbarung; Unanwendbarkeit von Schiedsklauseln in einem bilateralen Investitionsschutzabkommen zwischen Mitgliedsstaaten der EU, BGH 1. Zivilsenat, 31 October 2018, I ZB 2/15, ECLI:DE:BGH:2018:311018BIZB2.15.0.

[59] *Ibidem*, paras. 42-44.

[60] Judgment of Svea Court of Appeal, 22 February 2019, available at: https://jusmundi.com/en/ (accessed 30 June 2020).

[61] *Ibidem*, para. 176.

[62] *Ibidem*, paras. 177, 232-234.

[63] "Even if the arbitral awards would be based on an arbitration clause which was manifestly incompatible with ordre public, it does not follow that the contents of the arbitral awards are incompatible with *ordre public*. The arbitral awards shall therefore not be declared invalid as being manifestly incompatible with Swedish *ordre public*" (*ibidem*, para. 201).

agreement under the BIT had limited value.[64] As to the significance of the invalidity of the arbitral clause for the setting aside the award, the Swedish court limited its influence only to the situation where such an objection was raised by the state at the proper moment in an arbitration proceeding. As a result, the Swedish court narrowed the conclusion of the *Achmea* reasoning (and EU law), conditioning its application on the assessment of a state's behaviour in arbitration proceedings.

On 12 December 2019, the Swedish Supreme Court announced that it would make a preliminary reference to the CJEU as to whether Poland could consent to intra-EU arbitration by failing to lodge a jurisdictional objection in the early stage of an arbitration proceeding.[65] As a result, the *Achmea* judgment will be commented on by the Luxembourg Court once again, after Opinion 1/17, which gives the CJEU the possibility to delimit its scope and consequences more precisely.

3.5 *Achmea* in arbitration awards

It is not only domestic courts who have been engaged in considering intra-EU objections to jurisdiction based on the *Achmea* decision. This decision has also been considered by several arbitral tribunals. In *Marfin Investment Group v. Cyprus* the tribunal stated that Arts. 30 and 59 VCLT, invoked by the respondent, did not apply as there was no same subject matter. The Tribunal reached this conclusion through reference to previous arbitral awards, in particular *EURAM v. Slovakia*.[66]

UP and CD Holding Internationale v. Hungary is another case in which the tribunal dealt with the intra-EU objection based on the CJEU decision. The tribunal underlined that, in contrast to *Achmea*, which arose under UNCITRAL proceedings, it functions as an ICSID tribunal, which as a consequence has specific features.[67] As a result, it questioned the position whereby *Achmea* could lead to depriving it of jurisdiction. Still, it did not draw attention to the fact that from the perspective of the existence of an

[64] *Ibidem*, para. 183. *See also* "Since the TFEU thus does not preclude arbitration agreements between a Member State and an investor in a particular case, a Member State is, based on party autonomy, free – even though the Member State is not bound by a standing offer as such as that in article 8 of the Achmea case or article 9 in this case –to enter into an arbitration agreement with an investor regarding the same dispute at a later stage, e.g. when the investor has initiated arbitral proceedings. An arbitration agreement and arbitral proceedings between, on the one hand, an investor from a Member State and, on the other hand, a Member State, is therefore as such not in violation of the TFEU" (para. 184).

[65] According to IIA reporter that question will be: "Do Articles 267 and 344 of the Treaty of the Functioning of the European Union, as interpreted in Achmea, mean that an arbitration agreement is invalid if it has been entered into between a member state and an investor – when an investment treaty contains an arbitration clause which is invalid because it has been entered into between two member states – if the member state, after the investor has requested arbitration, passively abstains from objecting to the jurisdiction as a result of the state's free will?, J. Dahlquis, *Swedish Supreme Court to send Achmea-related question to European Court of Justice*, IAR Reporter, 14 December 2019.

[66] *Marfin Investment Group v. The Republic of Cyprus*, ICSID Case No. ARB/13/27, Award, 26 July 2018, paras. 584-591.

[67] *UP and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award, 9 October 2018, paras. 254-258.

arbitration agreement, the distinction between UNCITRAL arbitration rules and the ICSID convention is of secondary importance.

In *United Utilities v. Estonia* the tribunal did not agree with the respondent, the EC, and the *Achmea* decision that there existed a conflict between the TFEU and an arbitration clause in the BIT. The Tribunal adopted "as its own the reasoning developed by the tribunal in *Electrabel v. Hungary*" despite the fact that this decision preceded the *Achmea* judgment.[68] With respect to the conflict of norms argument, the tribunal felt "comforted in its conclusions by decisions of other investment arbitral tribunals, which arrived with the same findings."[69]

In *Magyar Farming Company v. Hungary*[70] the respondent claimed that by virtue of its accession to the European Union its consent to arbitration (entailed in the UK-Hungary BIT) was rendered inapplicable.[71] The Tribunal however did not agree with this stipulation and stated that there can be no retroactive revocation of consent, as it would influence the direct rights of investors (considered as third parties).[72] In addition, the tribunal stated that the treaty is still in force and that Art. 30 VCLT is not applicable as there is no same subject matter.[73] As a consequence, since the "Tribunal is not aware of the existence of provisions in the VCLT or of norms of customary international law that would govern the resolution of possible conflicts between successive treaties that do not share the same subject matter", the intra-EU BIT concerned was, according to its opinion, perfectly valid.[74] Finally the tribunal, differently than the CJEU, was not able to find a conflict between Arts. 267 and 344 TFEU and an arbitration clause. This interpretation was made without any reference to the CJEU jurisprudence regarding those provisions.[75] Finally, as regards a declaration of the EU Member States from January 2019 the tribunal, on the basis of the title only, took the view that its "wording suggests that the Member States seek to explain the legal consequences of the Achmea Decision, rather than to give an interpretation of the meaning of intra-EU investment treaties."[76]

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[68] *United Utilities (Tallinn) B.V. and Aktsiaselts Tallinna Vesi v. Republic of Estonia*, ICSID Case No. ARB/14/24, Award, 21 June 2019, para. 545.

[69] *Ibidem*, para. 547, *see also* paras. 549-559.

[70] *Magyar Farming Company, Kintyre KFT and Inicia ZRT v. Hungary*, ICSID Case No. ARB/17/27, 13 November 2019.

[71] *Ibidem*, paras. 170-174.

[72] *Ibidem*, paras. 222-223.

[73] In this respect the approach was taken that Art. 30 VCLT could be applied with respect to the relationship between the BIT concerned and the treaty, which would cover all provisions of the BIT in a similar fashion, *see* the logic presented in *Magyar Farming*, para. 232, citing with approval *Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar (zwei) GmbH & Co. KG v. Czech Republic*, PCA Case No. 2014-03, Final Award, 11 October 2017, RL-10, para. 253.

[74] *Magyar Farming*, para. 237.

[75] *Ibidem*, paras. 239–247.

[76] *Ibidem*, para. 216, "as the title of the 2019 Declarations demonstrates, such ineffectiveness or extinguishment is presented as a consequence of the Achmea Decision" – assessing legal consequences on the bases of the sole reading of the title seems to be difficult to reconcile with basic premises of interpretation of an international agreement.

In the most recent case – *Theodoros Adamakopoulos and others v. Cyprus* – the tribunal adhered to the position that there is not the same subject matter, as "BITs provide specifically for an alternative to determination by national courts.[77] Furthermore, the tribunal stated that there is a different test of conflict of norms under EU law and treaty law.[78] However, in contrast to the previous cases, the decision of the tribunal on jurisdiction was not unanimous. In a dissenting opinion Marcelo G. Kohen underlined that there exists a conflict of norms "provisions allowing nationals of one State to bring a claim against another State under a BIT prevent the EU Treaties from operating in the manner these treaties were envisaged."[79]

In summary, it should be noted that the *Achmea* judgment has not influenced the decisions of arbitral tribunals.[80] Awards published after March 2018 with respect to intra-EU objections to jurisdiction have not differed from the awards preceding *Achmea*. In particular, the intra EU-BITs tribunals have continued to uphold the argument that the subject matter is not the same.[81] Moreover, what is striking is that the arbitral tribunals have not considered themselves to be bound by the CJEU's decision over the conflict between the BITs and the EU Treaties.[82] Expectations that investment tribunals would, on the basis of judicial comity, decline their jurisdiction,[83] following the example of a tribunal in the *MOX Plant* dispute[84] have not been fulfilled. Legal, and perhaps non-legal considerations, following the line of awards which have reached analogous

[77] *Theodoros Adamakopoulos and others v. Cyprus*, Decision on Jurisdiction and Admissibility, 7 February 2020, ICSID Case No. ARB/15/49, paras. 168 and 171.

[78] *Ibidem*, para. 172 ("Where a tribunal refers to national law, then to the extent that national law is based on EU law this might be an indirect reference to EU law. But the fact that a tribunal might refer to national law to determine whether a claimant is a national of that state could hardly be seen as an action that would prevent the fulfilment of the EU Treaties or undermine their object and purpose. This limited potential for investment tribunals to look at EU law may have been sufficient for the purposes of EU law to say that arbitration under a BIT was precluded, and the CJEU so decided in Achmea. But Article 59 and 30 set a different standard. They require that the treaties be treaties with the same subject matter and such a standard is not met in this case").

[79] Statement of Dissent of Professor Marcelo G. Kohen, para. 39.

[80] *See also* Award of 28 January 2019 in *Sodexo Pass International SAS v. Hungary*, ICSID Case No. ARB/14/20 (unpublished); S. Perry, *Hungary hit with another intra-EU BIT award*, Global Arbitration Reporter, 5 February 2019; Award of 26 February 2019 in *Juvel Ltd and Bithell Holdings Ltd v. Poland*, ICC Case No. 19459/MHM, https://bit.ly/3jk62JC (accessed 30 June 2020).

[81] *RWE Innogy GmbH and RWE Innogy Aersa S.A.U. v. Kingdom of Spain*, ICSID Case No. ARB/14/34, Decision on Jurisdiction, Liability, and Certain Issues of Quantum, 30 December 2019, para. 342; *Baywa R.E. Renewable Energy Gmbh and Baywa R.E. Asset Holding Gmbh v. Kingdom of Spain*, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum, 2 December 2019, para. 273.

[82] *Magyar Farming*, paras. 207 and 209.

[83] *UP and DC v. Hungary*, ICSID Case No ARB/13/35, Award, 9 October 2018, paras. 276-279; *Eureko*, paras. 195 and 203, *see also* S. Gáspár-Szilágyi, *It Is Not Just About Investor-State Arbitration. A Look at Case C-284/16, Achmea BV*, 3(1) European Papers 357 (2018), pp. 371-372

[84] *The MOX Plant Case (Ireland v. United Kingdom)*, PCA Case 2002-01, Order, 24 June 2003. Undoubtedly, the position taken by an arbitral tribunal in that case was extraordinary and unique.

conclusions, seem to create an unsurmountable and invisible obstacle, which until now no arbiters have been willing to modify.

3.6. Termination of intra-EU BITs through a plurilateral treaty

On 5 May 2020 an Agreement for the termination of bilateral investment treaties between the member states of the European Union was signed.[85] However, Member States have still not managed to reach a full consensus. A "small minority" of Member States were not able to agree with the negotiated text.[86] The Agreement, owing to its complexity, deals not with intra-EU BITs in force but also with those already unilaterally terminated but which, through application of a sunset clause, are still in effect. This in particular relates to the 15 BITs denounced by Poland in 2018[87] (11 of which have already entered

[85] *See* https://ec.europa.eu/info/files/200505-bilateral-investment-treaties-agreement_en. (accessed 30 June 2020).

[86] EC announcement of 24 October 2019, available at: https://bit.ly/399cIFT (accessed 30 June 2020).

[87] Dokument wypowiedzenia Umowy między Rzecząpospolitą Polską a Republiką Cypru w sprawie popierania i wzajemnej ochrony inwestycji [Act of denunciation of the BIT between Poland and Cyprus], Journal of Laws of 2019, item 203; Dokument wypowiedzenia Umowy między Rzecząpospolitą Polską i Królestwem Holandii o popieraniu i wzajemnej ochronie inwestycji [Act of denunciation of the BIT between Poland and Netherlands], Journal of Laws of 2019, item 205; Dokument wypowiedzenia Umowy między Polską Rzecząpospolitą Ludową a Republiką Austrii w sprawie popierania i ochrony inwestycji [Act of denunciation of the BIT between Poland and Austria], Journal of Laws of 2019, item 762; Dokument wypowiedzenia Umowy między Rządem Polskiej Rzeczypospolitej Ludowej a Rządem Królestwa Szwecji w sprawie popierania i wzajemnej ochrony inwestycji [Act of denunciation of the BIT between Poland and Sweden], Journal of Laws of 2019, item 764; Dokument wypowiedzenia Umowy między Polską Rzecząpospolitą Ludową a Republiką Federalną Niemiec w sprawie popierania i wzajemnej ochrony inwestycji [Act of denunciation of the BIT between Poland and Germany], Journal of Laws of 2019, item 774; Dokument wypowiedzenia Umowy między Rządem Polskiej Rzeczypospolitej Ludowej a Rządem Zjednoczonego Królestwa Wielkiej Brytanii i Irlandii Północnej w sprawie popierania i wzajemnej ochrony inwestycji [Act of denunciation of the BIT between Poland and the UK], Journal of Laws of 2019, item 780; Dokument wypowiedzenia Umowy między Rządem Polskiej Rzeczypospolitej Ludowej a Rządem Republiki Francuskiej w sprawie popierania i wzajemnej ochrony inwestycji [Act of denunciation of the BIT between Poland and France], Journal of Laws of 2019 item 791; Dokument wypowiedzenia Umowy między Rządem Rzeczypospolitej Polskiej a Rządem Republiki Finlandii o popieraniu i ochronie inwestycji [Act of denunciation of the BIT between Poland and Finland], Journal of Laws of 2019, item 937; Dokument wypowiedzenia Umowy między Rzecząpospolitą Polską a Republiką Grecji w sprawie popierania i wzajemnej ochrony inwestycji [Act of denunciation of the BIT between Poland and Greece], Journal of Laws of 2019, item 939; Dokument wypowiedzenia Umowy między Rzecząpospolitą Polską a Republiką Litewską w sprawie wzajemnego popierania i ochrony inwestycji [Act of denunciation of the BIT between Poland and Lithuania], Journal of Laws of 2019, item 941; Dokument wypowiedzenia Umowy między Rzecząpospolitą Polską a Republiką Węgierską w sprawie wzajemnego popierania i ochrony inwestycji [Act of denunciation of the BIT between Poland and Hungary], Journal of Laws of 2019, item 950; Dokument wypowiedzenia Umowy między Rzecząpospolitą Polską a Królestwem Hiszpanii w sprawie wzajemnego popierania i ochrony inwestycji [Act of denunciation of the BIT between Poland and Spain], Journal of Laws of 2019, item 960; Dokument wypowiedzenia Umowy między Rzecząpospolitą Polską a Republiką Chorwacji w sprawie wzajemnego popierania i ochrony inwestycji [Act of denunciation of the BIT between Poland and Croatia], Journal of Laws of 2019, item 1163; Dokument wypowiedzenia Umowy między Rządem Rzeczypospolitej Polskiej a Rządem Republiki Bułgarii w sprawie wzajemnego popierania i ochrony inwestycji [Act of denunciation of the BIT between Poland and Bulgaria], Journal of Laws of 2019, item 1485.

into force)[88] and one in 2019.[89] Furthermore, the Agreement does not cover those BITs that were terminated bilaterally. As mentioned previously, before the *Achmea* decision Poland concluded two such agreements, with Denmark and Latvia. After the judgment of the CJEU similar agreements were concluded by Poland with Estonia (19 March 2018),[90] the Czech Republic (11 April 2018),[91] and Romania (18 June 2018).[92]

The text of the plurilateral treaty was known well before 5 May 2020, as the draft version was leaked.[93] The Agreement envisages the termination of the sunset clauses of the previously denounced and terminated intra-EU BITs listed in a separate annex.[94] According to Nikos Lavranos, the termination of the sunset clause without amendment of the previous BIT, and deleting the sunset clause, is in contravention with the VCLT.[95] Such an approach is difficult to reconcile with the basic premises of a treaty of law. States may, in a treaty, grant rights to individuals and simultaneously may take away those rights when terminating the treaty.[96] The main idea of a sunset clause is

[88] With Austria, Cyprus, Croatia, Finland, Germany, Netherlands, France, Greece, Spain, Sweden, and the UK.

[89] Dokument wypowiedzenia Umowy między Rzecząpospolitą Polską a Republiką Słowenii o wzajemnym popieraniu i ochronie inwestycji [Act of denunciation of the BIT between Poland and Slovenia], Journal of Laws of 2019, item 948.

[90] Porozumienie z dnia 19 marca 2018 r. między Rzecząpospolitą Polską a Republiką Estońską o zmianie i zakończeniu obowiązywania Umowy między Rzecząpospolitą Polską a Republiką Estońską o wzajemnym popieraniu i ochronie inwestycji [Agreement of 19 March 2018 between the Republic of Poland and the Republic of Estonia on the Amendment and Termination of the Agreement between the Republic of Poland and the Republic of Estonia on the Reciprocal Promotion and Protection of Investments], Journal of Laws of 2019, item 264.

[91] Porozumienie z dnia 11 kwietnia 2018 r. między Rzecząpospolitą Polską a Republiką Czeską o zmianie i zakończeniu obowiązywania Umowy między Rzecząpospolitą Polską a Republiką Czeską o popieraniu i wzajemnej ochronie inwestycji [Agreement of 11 April 2018 between the Republic of Poland and the Czech Republic on the Amendment and Termination of the Agreement between the Republic of Poland and the Czech Republic on the Reciprocal Promotion and Protection of Investments], Journal of Laws of 2019, item 1502.

[92] Porozumienie z dnia 18 czerwca 2018 r. między Rządem Rzeczypospolitej Polskiej a Rządem Rumunii o zakończeniu obowiązywania Umowy między Rządem Rzeczypospolitej Polskiej a Rządem Rumunii w sprawie popierania i wzajemnej ochrony inwestycji [Agreement of 18 June 2018 between the Government of Republic of Poland and the Government of Romania on Termination of the Agreement between the Government of the Republic of Poland and the Government of Romania on the Reciprocal Promotion and Protection of Investments], Journal of Laws of 2019, item 793.

[93] *See* http://arbitrationblog.kluwerarbitration.com/wp-content/uploads/sites/48/2019/12/a-draft-agreement-has-been-leaked.pdf (accessed 30 June 2020).

[94] Preambular recital VIII states the following: "Noting that certain intra-EU bilateral investment treaties, including their sunset clauses, have already been terminated bilaterally, and that other intra-EU bilateral investment treaties have been terminated unilaterally and the period of application of their sunset clauses has expired."

[95] N. Lavranos, *The EU Plurilateral Draft Termination Agreement for All Intra-EU BITs: An End of the Post-Achmea Saga and the Beginning of a New One*, Kluwer Arbitration Blog, 1 December 2019, available at: https://bit.ly/3jegiTX (accessed 30 June 2020).

[96] "Under general treaty law and the law on State responsibility, States can amend or terminate treaties which provide rights for individuals. Individuals enjoy any benefit bestowed by treaty with the continued

that it applies only with respect to unilateral termination of a treaty. In the situation of bilateral termination, the presumption should be however that it also covers the sunset clause unless expressly stating otherwise.[97]

Furthermore, the draft treaty seems to repeat some provisions of the declaration of the 22, by stating in the draft Art. 4(1) that:

> The Contracting Parties hereby confirm that Arbitration Clauses are contrary to the EU Treaties and thus inapplicable. As a result of this incompatibility between Arbitration Clauses and the EU Treaties, as of the date on which the last of the parties to a Bilateral Investment Treaty became a Member State of the European Union, the Arbitration Clause in such a Bilateral Investment Treaty cannot serve as legal basis for Arbitration Proceedings.[98]

This provision has a declaratory character and should be read in conjunction with the preamble, which states that this Agreement pronounces a common understanding "between the Parties to the EU Treaties and intra-EU bilateral investment treaties that, as a result, such a clause cannot serve as legal basis for Arbitration Proceedings" (recital 6). This seems to suggest that the drafters of the treaty consider it as a subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions in accordance with Art. 31(3)(a) VCLT. The International Law Commission, in its recently adopted conclusions in this respect, stated that: "[a]n agreement under article 31, paragraph 3 (a) and (b), requires a common understanding regarding the interpretation of a treaty which the parties are aware of and accept."[99] It is also worth noting that this provision covers all investor-State arbitration proceed-

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agreement of the States parties; […]"; Aide Memoire of the Office of the UN Secretary General, Denunciation of the ICCPR by the Democratic People's Republic of Korea, 23 September 1997, para. 13, available at: https://treaties.un.org/doc/Publication/CN/1997/CN.467.1997-Frn.pdf (accessed 30 June 2020). The fact that human rights treaties serve a community interest cannot impede the States parties from terminating the treaty by consent. Community interests as defined by treaties remain dependent on their creators as the masters of the treaty […].'); "The fact that the treaty can be amended or altered by the parties, even to the extent of taking away the investor's rights, does not alter the nature of the investor's rights that exist while the treaty is in force", D. McRae, *Countermeasures and Investment Arbitration*, in M. Kinnear et al. (eds.), *Building International Investment Law: The First 50 Years of ICSID*, Wolters Kluwer, Alphen aan Rijn: 2015, p. 497; T. Voon, A. Mitchell, J. Munro, *Parting Ways: The Impact of Mutual Termination of Investment Treaties on Investor Rights*, 29(2) ICSID Review 451 (2014), p. 467.

[97] C. Titi, *Most-Favoured-Nation Treatment, Survival Clauses and Reform of International Investment Law,* 33(5) Journal of International Arbitration 425 (2016); T. Voon, A.D. Mitchell, *Denunciation, Termination and Survival: The Interplay of Treaty Law and International Investment Law*, 31(2) ICSID Review 413 (2016).

[98] With respect to the potentially unlimited temporal scope of this provision, it is worth noting the limitations contained in Art. 6, which states that "this Agreement shall not affect Concluded Arbitration Proceedings. Those proceedings shall not be reopened."

[99] Conclusion 10 para. 1, first sentence of Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties 2018, adopted by the International Law Commission at its 17th session in 2018, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/73/10, para. 51).

ings based on intra-EU bilateral investment treaties, including those under the ICSID Convention in accordance with preambular recital VII. States which are parties to arbitration proceedings shall inform the arbitral tribunal in accordance with Art. 7, by using precisely the provisions of Art. 4(1) (repeated in Annex C to the agreement). In practice, this provision can apply to 31 pending (as of December 2019) intra-EU BIT arbitrations.[100]

Still, the applicability of these provisions to pending arbitration proceedings can evoke some concerns, particularly after the recent CJEU opinion on CETA, where the tribunal stated that "in the light of the requirement of independence of the CETA Tribunal and Appellate Tribunal, that interpretations determined by the CETA Joint Committee have no effect on the handling of disputes that have been resolved or brought prior to those interpretations. If it were otherwise, the CETA Joint Committee could have an influence on the handling of specific disputes and therefore participate in the ISDS mechanism."[101] This approach is a novelty. The issue of the interpretation of the treaty adopted during the arbitration proceeding had already appeared in the NAFTA case of *Pope & Talbot v. Government of Canada*. Nevertheless, in that case the arbitral tribunal evaluated only whether the decision of the NAFTA Commission was an illegal amendment rather than an interpretation of a treaty.[102] It did not analyze whether the note of the NAFTA Commission violated its independence as a judicial organ.[103] From the perspective of the rights of individuals, the ECHR considered that a radical and unpredictable change in the interpretation of domestic law and its retroactive application by domestic courts could lead to violations of fundamental rights protected by a convention.[104] Along the same line, Anathea Roberts pointed out that "permitting unreasonable, retroactive interpretations would strike a clear blow to the credibility of

[100] S. Gáspár-Szilágyi, M. Usynin, *The Uneasy Relationship between Intra-Eu Investment Tribunals and the Court of Justice's Achmea Judgment*, CEVIA Working Paper Series, Issue 4/2019, pp. 31-36.

[101] Opinion 1/17, para. 236; The Tribunal continued: "Although that safeguard of no retroactive effect and no direct effect on pending cases is not expressly provided for in Article 8.31.3 of the CETA, it must again be observed that the consent of the Union to any decision specified in Article 8.31.3 of the CETA will have to comply with EU primary law and, in particular, with the right to an effective remedy enshrined in Article 47 of the Charter. Accordingly, Article 8.31.3 of the CETA cannot be interpreted, having regard to Article 47, as permitting the Union to consent to decisions on interpretation of the CETA Joint Committee that would produce effects on the handling of disputes that have been dealt with or are pending" (para. 237).

[102] *Pope & Talbot v. Government of Canada*, Award in Respect of Damages, 31 May 2002, para. 47.

[103] Note however that from the letter directed by the tribunal to the parties it seems that it considered to some extent the appropriateness of retroactive interpretation: "[w]ithout pre-empting at this time the implications properly to be drawn it appears to the Tribunal that if the Commission viewed its Interpretation to have retroactive effect on this case, its actions could be viewed as seeking to overturn a treaty interpretation already made by a NAFTA Chapter 11 Tribunal, Canada acting both as disputing party and as a member of a reviewing body", para 13; This line seemed to be also applied by the ICSID Annulment Committee in *Edenred S.A. V. Hungary*, ICSID Case No. ARB/13/21 (unpublished), *see* T. Jones, *ICSID panel declines to revisit intra-EU award*, Global Arbitration Reporter, 13 February 2019.

[104] ECtHR, *Cantoni v. France* (App. No. 17862/91), 11 November 1996.

investment treaty commitments and reduce the role of investment tribunals to mere agency, precisely in the circumstance in which tribunals have the strongest claim to trustee like status in resolving specific investor-state disputes."[105] Thus, the crux of the matter would be the assessment whether the interpretation, which has retroactive effect, presented by the member states in the Agreement is a radical and unpredictable change of situation for the foreign investors protected by the intra-EU BITs. The main problems in this respect flow from the lack of a uniform point of reference to evaluate this issue. As mentioned, even before the *Achmea* decision the EC and certain (mainly Eastern European) EU Member States presented clear arguments concerning the lack of coherence of intra-EU BITs with EU law and its consequences for the possibility of raising investment claims. Simultaneously, certain other member states (as the *Achmea* proceedings suggest) were of the opposite view.[106]

An argument that can help to resolve this conundrum can be made that the subsequent agreement inserted into Art. 4 of the Agreement is of a specific character. It does not aim to contribute to the meaning of particular provisions of the BIT, but rather to explain the consequences, under Art. 30(3) VCLT, of identified conflict of norms that stem from the coexistence between intra EU-BITs and the TFEU. Thus, it is not the retroactive effect that would be anticipated by the authors of the treaty, but rather confirmation that a conflict which has an objective character has a direct consequence in the inapplicability of arbitration clauses, and as a result leads to the lack of possibility of entering into an arbitration agreement between the state and an investor.[107]

This line of thinking until now was not only not shared by the investment tribunals, but also not noticed by them in the argumentation of the EC and certain EU Members States. In general, arbitral awards do not seem to distinguish between the issue of applicability of certain provisions and the validity of a treaty as a whole.[108]

Furthermore, the Agreement also refers to pending arbitration proceedings by providing transitional measures for those investors who have not challenged measures which are subject to disputes before national courts. The envisaged scenario in these situations is twofold. The first solution, applicable if the investment proceeding is suspended pursuant to a request by the investor, is a structural dialogue between the State and an investor (Art. 9). This is a hybrid of mediation and conciliation procedures under

[105] A. Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States,* 104 American Journal of International Law 179 (2010), pp. 213-214.

[106] Federal Republic of Germany, the French Republic, the Kingdom of the Netherlands, the Republic of Austria and the Republic of Finland, *see* Opinion of A.G. Wathelet, EU:C:2017:699, paras. 34-36.

[107] S. Centeno Huerta, N. Kuplewatzky, *On Achmea, the Autonomy of Union Law, Mutual Trust and What Lies Ahead*, 4(1) European Papers 61 (2019), pp. 70 and 77. However, "[w]hen the parties have given their consent, no party may withdraw its consent unilaterally by direct or indirect means" (C. Schreuer, *Denunciation of the ICSID Convention and Consent to Arbitration*, in: M. Waibel et al. (eds.), *The Backlash against Investment Arbitration: Perceptions and Reality*, Wolters Kluwer 2010, p. 363.

[108] *Magyar Farming*, para. 221, *United Utilities v. Estonia*, para. 559.

international law, in which impartial facilitator is designated by common agreement of the investor and the party. On one hand they organize the settlement negotiations, and on the other they make a final proposal for an amicable settlement. This proposal is not mandatory. Nevertheless, a lack of acceptance of the facilitator's proposal should be justified. The second solution, applicable if the investor withdraws from an arbitration proceeding and waives all claims pursuant to BIT, is access to judicial remedies under national law (Art. 10).

These two remedies seem to express the conviction of the drafters of the need to ensure effective legal protection to foreign investors in a situation where the arbitral proceeding was initiated before *Achmea* and cannot lead to an effective result. However, whether these remedies will be of practical value, from the perspective of the investors, is not clear, as they neither provide a binding solution (structural dialogue) nor do they envisage something extraordinarily new (domestic courts).

Although, it is uncommon in a treaty aimed at termination, the Agreement also provides a dispute settlement clause. According to Art. 14, if a dispute between the Parties cannot be settled amicably it can be submitted to the CJEU, as this provision constitutes a special agreement between the Parties within the meaning of Art. 273 TFEU. This provision affords the Member States a means of resolving those of their disputes which fall within the jurisdiction of the EU judicature.[109] According to CJEU case law, in the application of this provision it is irrelevant whether the consent of the Member States was given before or after the dispute arose.[110] Art. 273 TFEU requires also that the "dispute" brought before the Court "relates to the subject matter of the Treaties." The CJEU stated in this context that the "phrase 'related to' must be understood as a link rather than a requirement that the subject matter be the same."[111] Thus although there is a clear link between the Agreement and the subject matters of the TFEU, doubts can be expressed bas to which particular provisions this dispute settlement clause could be applied.[112]

As regards the final provisions, it is striking that the Agreement will enter into force after just a second ratification, a solution unusual with respect to multilateral treaties. Still, such an approach can be justified. A requirement for any further ratifications could create an artificial situation, whereby the ratification of the Agreement by two Member States which are parties to an intra-EU BIT would not in fact terminate the BIT. In such a scenario they would have to wait for a sufficient number of others to

[109] Case C-648/15 *Republic of Austria v. Federal Republic of Germany* [2017], ECLI:EU:C:2017:664, para. 29; C-370/12 *Thomas Pringle v. Government of Ireland and Others* [2012], EU:C:2012:756, para. 172.

[110] *Pringle*, para. 172.

[111] Case C-648/15 *Republic of Austria v. Federal Republic of Germany* [2017], ECLI:EU:C:2017:664, para. 23.

[112] Draft preambular para. 13 explicitly states that "disputes between the Parties concerning the interpretation or application of this Agreement pursuant to Article 273 TFEU shall not concern the legality of the measure that is the subject of investor-State arbitration proceedings based on a bilateral investment treaty covered by this Agreement."

adhere to the Agreement for it to have legal effect in their bilateral relations. Thus, providing such a low number of ratifications for the entry into force of the Agreement makes it possible to avert solutions which would grant unjustified, under international law, rights to third states of a particular BIT.

Another uncommon solution, in particular with respect to treaties of termination, is providing the possibility of provisional application. The unusual nature of this solution flows from the fact that such provisional application can be relatively easily terminated. Thus, in the case of the treaty on the termination of other agreements questions arise as to what would be the consequence if a party provisionally applying a treaty notified its intention and does not become a party to it.[113] Still, there is such a possibility – which would also contravene EU law – although it seems to be rather unlikely.

CONCLUSIONS

Full implementation of the consequences of the *Achmea* judgment is a very complex task, entangled in political and legal controversies concerning intra-EU BITs which have been present in the relations of EU member states for more than a decade. Declarations of EU Member States as of January 2019 showed that as yet not all controversies are resolved. On a more general level the picture is even less clear, as the implementation process is simultaneously entwined in two other significant debates: the specifics of the rights of investors under international investment law, and the relationship between EU law and international law. Against this complex background, the awards of investment arbitral tribunal, which are rarely homogenous with respect to other issues, demonstrate a surprisingly uniform position on intra-EU objections to their jurisdiction. Thus, the standard of the judicial comity established by the arbitral tribunal in the *MOX Plant* case is currently being abolished by investment arbitral tribunals, which in fact are ignoring the CJEU decision through a surprisingly formalistic approach (for example as to the application of Art. 30 VCLT) – one which is not common in the interpretative practice of these bodies. Such an approach has found support by those who invoke newly refreshed arguments on the need for investment

[113] "Unless the treaty otherwise provides or it is otherwise agreed, the provisional application of a treaty or a part of a treaty with respect to a State or international organization is terminated if that State or international organization notifies the other States or international organizations between which the treaty or a part of a treaty is being applied provisionally of its intention not to become a party to the treaty." *See* Guideline 9 para. 2, draft Guide to Provisional Application of Treaties, adopted by the Commission on first reading; *see also* the commentary "The Commission decided not to introduce a safeguard in relation to unilateral termination of provisional application by, for example, applying mutatis mutandis the rule found in paragraph 2 of article 56 of the 1969 and 1986 Vienna Conventions, which establishes a notice period for denunciation of or withdrawal from a treaty containing no provision regarding termination, denunciation or withdrawal. The Commission declined to do so out of concern for the flexibility inherent in article 25 and in view of insufficient practice in that regard." (ILC Report, A/73/10, p. 219).

arbitration in view of the problems of domestic courts.[114] However, these arguments ignore the systemic problems of the ISDS, as to which general agreement between states exists.[115] That is why the EU pursues a Multilateral Investment Court initiative, which is based on a presumption that investment disputes (outside the EU) should be solved by an international organ, whose structure, members and procedures resemble those of national courts.[116]

[114] "Potential allies outside the EU legal system for promoting respect for the rule of law in the EU Member States include not only international organizations, such as the Council of Europe, the OECD and the United Nations, but also less obvious (and more controversial) candidates, such as ad hoc arbitral tribunals constituted under international investment protection treaties to decide the claims of investors against Member States of the EU" (W. Sadowski, *Protection of the rule of law in the European Union through investment treaty arbitration: is judicial monopolism the right response to illiberal tendencies in Europe?*, 55 Common Market Law Review 1025 (2018), p. 1027).

[115] Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October–2 November 2018), UNCITRAL, A/CN.9/964, 6 November 2018, paras. 40, 53, 63 and 83.

[116] Submission from the European Union and its Member States, 24 January 2019, A/CN.9/WG.III/WP.159/Add.1, UNCITRAL Working Group III (Investor-State Dispute Settlement Reform), paras. 1-2, 6-15; Ł. Kułaga, *A Brave, New, International Investment Court in Context: Towards a Paradigm Shift of the ISDS*, 38 Polish Yearbook of International Law 115 (2018), pp. 136-140.

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JURISDICTION OF THE COURT OF THE EURASIAN ECONOMIC UNION AND ITS ROLE IN THE DEVELOPMENT OF THE EURASIAN LEGAL ORDER: ONE STEP BACK AND TWO STEPS FORWARD

Abstract: *The Court of the Eurasian Economic Union was created in 2015 as a judicial organ with jurisdiction over a range of subject matters within the Eurasian Economic Union. It replaced the Court of the Eurasian Economic Community, which operated within the Eurasian Economic Community and its Customs Union (2012-2014). Though the Union become the next step in the integration process of the post-Soviet area, the newly created Court has not been given de jure a successor status. The Court of the Union was set up anew as one of the four institutional bodies in the structure of the Union. It was empowered to settle disputes between the Member States, as well as to consider different types of actions brought by private actors (economic entities only). The interpretative function of the Court was enshrined as "competence on clarification." Moreover, the Commission, the main executive and regulative organ, was not given locus standi in actions against the Member States to enhance their compliance with the obligations of EAEU law. Preliminary jurisdiction was also cut down as compared to the Court of the Community or other regional integration courts. However, some new functions were given to the Court, and its five years long practice shows a clear tendency to substitute missing powers with those given but in a broader context, as well as its aspirations to play a consolidating role for the legal order of the Union.*

Keywords: advisory opinion, dispute resolution, EAEU law, Eurasian Economic Union, Eurasian integration, jurisdiction, judgment, protection of rights

INTRODUCTION

The launch of the Court of the Eurasian Economic Union (the EAEU Court or simply the Court) was awaited with interest by both practitioners and the academic

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community. Its establishment in 2015 was a result of a general reform of the Eurasian integration process that involved the creation of new institutional structures. The Treaty on the Eurasian Economic Union (the EAEU Treaty or the Treaty on the Union) was signed in Astana on 29 May 2014 and took effect as of 1 January 2015 for three founding Member States (i.e. Belarus, Kazakhstan, and the Russian Federation). Armenia and Kyrgyzstan joined the Union in February and September 2015, respectively. The EAEU replaced the previously existing Customs Union and the Eurasian Economic Community.

The difference between judicial organs operating within those two structures is not only formal. There are also significant differences in terms of jurisdiction between the Court of the Eurasian Economic Community (the EurAsEC Court), which functioned in 2012-2014, and the new EAEU Court.

The Statute of the EAEU Court, being an integral part of the Treaty on the EAEU (Annex 2), uncontroversially prohibits the Court from establishing new legal rules, changing the existing norms,[1] as well as from extending the powers of other EAEU bodies.[2] At the same time, the Eurasian Economic Commission has been excluded from the entities possessing *locus standi* before the Court as regards actions for failure to fulfil obligations. The most regrettable change, however, concerns elimination of the preliminary ruling procedure. This development has made the academia particularly sceptical about the real powers and the role of the EAEU Court in the integration process.[3] Indeed, while according to Art. 2 of the Statute of the EAEU Court the "objective of the Court's activities shall be to ensure, in accordance with the provisions of this Statute, uniform application by the Member States and bodies of the Union of the Treaty, international treaties within the Union, international treaties of the Union with a third party and decisions of the bodies of the Union", the actual functions of the Court seem to be quite limited.

To be fair, one also must admit that some fields of the Court's jurisdiction are, in contrast, widely formulated. *Locus standi* of economic entities is only limited by the criteria of "direct effect on the rights and legitimate interests" which can be caused by the actions taken or decisions challenged. This means that there is no obligation for them to prove an "individual" interest, and that the contested action or decision may be of general application. In this context, it should be noted that in the EU judicial system, private (so-called non-privileged) applicants can also seek judicial review of acts of the EU institutions. However, Art. 263(4) of the Treaty on the Functioning of the

[1] Art. 102 of the Statute: "No decision of the Court may alter and/or override the effective rules of the Union law and the legislation of the Member States, nor may it create new ones", available at: http://courteurasian.org/doc-17063 (accessed 30 June 2020).

[2] Art. 42 of the Statute: "The jurisdiction of the Court shall not include extension of the competence of Bodies of the Union in excess of that expressly provided for by the Treaty and/or international treaties within the Union."

[3] Z. Kembayev, *The Court of the Eurasian Economic Union: An Adequate Body for Facilitating Eurasian Integration?*, 41 Review of Central and East European Law 342 (2016).

European Union (TFEU) only provides that any natural or legal person may institute proceedings against an act which is either addressed to them or of direct and individual concern. Another example of a quite wide approach to judicial access concerns the *ratione temporis* of actions. There are no preclusive time-limits for initiating actions against decisions or acts/failures to act on the part of the Commission.

When discussing the role and progress of the Court in the EAEU legal system it is useful to start with the jurisdictional issues. While the Union, its history and its evolution are quite widely explored in the doctrine,[4] the analysis of its judicial system, including the case law of the Court, still remains underdeveloped, despite its obvious influence on the integration processes. Although, the early jurisprudence is well analysed in the existing scholarship,[5] the practice of the Court shows some diversity and changes in its approaches, which requires looking at the more recent case law as well.

The objective of this article is twofold. First, the article aims at exploring the jurisdiction of the Court by analysing its jurisprudence and comparing it to its predecessor. Second, the article discusses how the judicial organ of the EAEU influences the development of the regional legal order. To this end, the basic rules and dynamics of applications to the Court are reviewed (the first section). Then in the second section the different aspects of the jurisdiction of the Court are analysed. The last section offers some general observations on the tendencies in the evolution of the Eurasian integration project as seen through the prism of the Court's activities.

1. GENERAL RULES AND THE DYNAMICS OF APPLICATIONS TO THE COURT

The Court is a permanent judicial body of the EAEU (Art. 19(1) of the Treaty on the Union), that acts within the powers granted by the Treaty on the Union and treaties within the Union (Art. 8(2) of the Treaty). Its status, jurisdiction, order of formation and functioning are set forth in the Statute of the Court (Annex 2 to the Treaty).

The Court consists of two judges from each Member State. The term of office of a judge is nine years. The judges are appointed by the Supreme Eurasian Economic Council on proposals from the Member States of persons of high moral character, highly qualified in the field of international and domestic law, and as a rule, meeting the requirements applicable to judges of the highest judicial authorities of the Member States. Judges may be dismissed by the Supreme Eurasian Economic Council, but only in some specific situations. These particularly include inability to exercise the powers of a judge for health reasons or other valid reasons; participation in activities incompatible

[4] G. Mostafa, M. Mahmood, *Eurasian Economic Union: Evolution, Challenges and Possible Future Directions*, 9(2) Journal of Eurasian Studies 163 (2018); S. Verdijeva, *The Eurasian Economic Union: Problems and Prospects*, 4 Journal of World Investment and Trade 722 (2018).

[5] K. Entin, B. Pirker, *The Early Case Law of the Eurasian Economic Union Court: On the Road to Luxembourg?* 25(3) Maastricht Journal of European and Comparative Law 266 (2018).

with the office of a judge; termination of membership in the Union of the State that nominated the judge; loss by the judge of the citizenship of the Member State that nominated him or her; entry into force of a judgment of conviction against the judge or a court decision on the application of compulsory measures of a medical nature to the judge.[6] The initiative to terminate the term of office of a judge belongs to the Member State that nominated the judge, the Court itself, or to the judge concerned.

All activities of the Court are managed by the President of the Court. The President of the Court has a deputy – the Vice-President. Both of them are elected from among the judges of the Court and by the judges of the Court, subject to approval by the Supreme Eurasian Economic Council, for a term of three years.

The jurisdiction of the Court is set forth in Arts. 39 and 46 of the Statute and includes dispute resolution and the so-called "clarification procedure." The main difference between these two procedures lies in the legal effect of the Court's decision. A dispute resolution procedure leads to a binding judgment, while a clarification procedure involves interpretation of Union's law provisions and takes the form of an advisory opinion, which is non-binding in nature. There are some differences in terms of administration of justice as well (e.g. a clarification procedure has no oral proceedings, and the principle of equal arms is not applicable there). An advisory opinion is always delivered by the Grand Chamber which consists of all 10 judges, while in the case of dispute resolution the formation of the Court depends on whether the case is a public or private litigation. The Grand Chamber hears the case on the application of a Member State, and the Chamber, consisting of five judges, deals with the cases brought by economic entities.

Both procedures (dispute settlement and clarification) are similarly in demand by applicants. The statistics at the end of 2019 is provided below. Moreover, by March 2020 four new cases have been initiated before the Court: two new applications, one application for clarification, and one complaint.

Table 1. Applications brought to the Court in 2015-2019

	2015	2016	2017	2018	2019	Total
Total in the relevant period	6	13	9	8	11	47
Applications (dispute settlement)	6	4	4	3	5	22
Applications (requests) for clarification	-	4	5	5	4	18
Applications for appeal (complaints)	-	5	-	-	2	7

The quality and legal grounding of applications brought before the Court are getting better each year, which is reflected in the number of applications found to be admissible. This positive dynamic is visible for all types of applications.

[6] Statute of the Court of the Eurasian Economic Union, Chapter II "Composition of the Court." An English unofficial translation can be found at: http://courteurasian.org/en/page-24501 (accessed 30 June 2020).

Table 2. Applications found admissible (2015-2019)

	2015	2016	2017	2018	2019	Total
Admissible	2	11	7	7	10	37
Applications (dispute settlement)	2	5	1	2	4	14
Applications (requests) for clarification	-	2	6	5	4	17
Applications for appeal (complaints)	-	4	-	-	2	6

Art. 39 of the Statute governs different types of disputes in accordance to *ratione personae* and type of action. Art. 39(1) concerns actions brought by Member States (public applicants), while Art. 39(2) concerns those brought by "economic entities" (private applicants). Note that there are types of actions which may be brought by both private and public applicants, and those which may only be brought by Member States.

2. SCOPE OF JURISDICTION OF THE COURT IN THE STATUTE AND ITS CASE LAW

2.1. Actions by private and public applicants

There are two types of actions available for both private and public entities: (i) challenges against actions of the Commission or its failure to act; and (ii) actions concerning the compliance of a decision of the Commission or its particular provisions with the Treaty or international treaties within the Union.

2.1.1. Applications challenging actions of the Commission or its failure to act

In theory the former type of action should form a separate ground for jurisdiction, but the Statute of the EAEU Court – unlike the European Union (EU) system – does not make any distinction between the challenge of an action and of a failure to act (inaction).

The first case considered by the Court on the merits (the *Tarasik* case, 2015) concerned this issue, and the Court had to draw the line between action and inaction, based on a broad approach to the latter. In this context, the Court noted that:

> In general 'improper failure to act' means a non-performance or improper performance by a supranational body (official) of the duties assigned to it by the Union law, in particular leaving a request from an economic entity without consideration in whole or in part, a response to the applicant not on the merits of his request, if the consideration of this request falls within the competence of a supranational body (official).[7]

[7] *Tarasik v. Commission*, Judgment of 28 December 2015, case no. CE-1-2/2-15-KC and Judgment of the Appeals Chamber of 3 March 2016, case no. CE-1-2/2-15-AP, sec. VII, para. 2, available at: http://courteurasian.org/doc-14443, http://courteurasian.org/doc-14893 respectively. A summary in English can be found at: http://courteurasian.org/page-25001 (all accessed 30 June 2020).

The Court widened the concept even further (again differently than the Court of Justice of the EU) by noting that a negative answer from the Commission can be also a failure to act:

> As part of a claim regarding a failure to act, a negative response of the Commission can be contested, if the performance of the action requested by the applicant constitutes its direct duty, which cannot be delegated to other persons (the so-called 'special duty'). The duty to perform the action requested by the applicant should follow from the general principles and rules of international law, decisions of the bodies of the integration association.[8]

The efficiency of an action for failure to act in the EAEU may be illustrated by the *Oil Marine Group* case (2018).[9] The applicant was a Russian company which had to pay customs duties with regard to the vessels it imported, despite a Commission decision granting an exemption with regard to those goods. The company complained to the Commission, asking it to conduct a monitoring of the application of its decision by the Russian customs authorities. Following a refusal from the Commission to do so, it brought an action before the EAEU Court. The EAEU Court considered that the company had legitimate interests in assuring that the Member States properly apply the provision of Union law and, consequently, the Commission monitor and control thereon.[10] On one hand, the exercise of such a monitoring does not usually depend on individual requests, while on the other hand the Eurasian Economic Commission has a duty to conduct monitoring when there is objective evidence that the state bodies of the Member State do not apply the rules of the Union law or where the practice in its application throughout the Member States is contradictory.[11] In this instance, the EAEU Court considered that while the Commission performed an analysis of the Russian legislation and found it to be consistent with Union law, the Commission failed to analyse the relevant law enforcement practice, thus failing to conduct a proper/full monitoring and to perform its duties under the Treaty. Consequently, when national administrative authorities violate their obligations under EAEU law, economic entities may not only bring an action before the national courts, but also file a complaint to the Eurasian Economic Commission and, eventually, challenge its inaction before the EAEU Court.

This broad approach to inaction has allowed the Court to rule more actively on the mode of action of the Commission, paying a great deal attention to due procedure in the Commission as regards communications with private persons, monitoring of compliance of states' actions with the EAEU law, taking decisions, etc.

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[8] Paras. 2(11) and (13) of section VII of the Judgment of the Chamber of the Court; paras. 8.3(8) and 8.5(18) of section IV of the Judgment of the Appeals Chamber of the Court.

[9] *Oil Marin Group LLC v. Commission*, Judgment of 18 October 2018, case no. CE-1-2/4-18-KC, available at: http://courteurasian.org/doc-21993. A summary in English can be found at: http://courteurasian.org/page-26461 (both accessed 30 June 2020).

[10] *Ibidem*, part VI, para. 8.

[11] *Ibidem*, part IV, para. 23.

2.1.2. Actions concerning the compliance of a decision of the Commission or its particular provisions with the Treaty and international treaties within the Union

Actions concerning the compliance of Commission's decisions with the Treaty and international treaties within the Union may be submitted by both public and private entities. However, access of the Member States to this category of cases is wider. Firstly, the Member States may plead for an assessment of the compliance of Commission's decisions not only with the Treaty on the EAEU and treaties within the Union, but also with decisions of other organs (i.e. the High Economic Council and the Intergovernmental Council). Secondly private actors, which are "economic entities" in the EAEU terminology, have strict *locus standi* rules.

The term "economic entity" refers to any legal entity which is "directly concerned." This category of applicants can be residents of any country; not only Member States but third states as well. For example, in *Arcelor Mittal* (2016), the applicant was from outside of the EAEU (i.e. a Ukrainian company which aimed at the review of antidumping measures imposed by the Commission).[12] On the other hand, the notion "economic entity" refers only to legal entities and individual entrepreneurs. Individuals in their personal capacity have no access to the Court notwithstanding that their interests be directly concerned.

The concept of "direct concern" has no definition in the Treaty. The case law of the Court is helpful in this context. As has been indicated by the Court in the *Sevlad* case (2016), "the decision of the Commission or its particular provisions may be recognised as directly affecting the rights and legitimate interests of an economic entity in the area of business and other economic activities, *inter alia* in cases where the corresponding decision is applied to the specific economic entity in connection with its business activities."[13] The same approach was taken in the *General Freight* case (2016) by another Chamber, which stressed that a decision of the Commission is of direct concern for an economic entity if it has legal consequences for it.[14] This very broad approach was aimed at allowing a wider circle of economic entities to have *locus standi*: according to the EAEU Court an economic entity has the right to challenge not only a decision which has been applied, but one which could be applied hypothetically.

This situation was different from what happened in the *Kapri*[15] case, where the EAEU Court found that the Commission's decision did not *directly concern* the appli-

[12] *ArcelorMittal Krivoy Rog JSC v. Commission*, Judgment of 27 April 2017, case no. CE-1-2/4-16-KC, available at: http://courteurasian.org/doc-19913, with no summary in English (accessed 30 June 2020).

[13] *Sevlad LLC v. Commission,* Judgment of 7 April 2016, case no. CE-1-2/1-16-KC and no. CE-1-2/1-16-AP, available at: http://courteurasian.org/doc-15463. A summary in English can be found at: http://courteurasian.org/en/page-25061 (both accessed 30 June 2020), para. 6.2.

[14] *General Freight CJSC v. Commission*, Judgment of 4 April 2016, case no. CE-1-2/2-16, available at: http://courteurasian.org/doc-15423, para. 3. A summary in English can be found at: http://courteurasian.org/en/page-25041 (both accessed 30 June 2020).

[15] Order of 1 April 2016, case no. CE-3/2-15-KC (*"Kompanija avtopritsepov" CJSC* or *Kapri* case), available at: http://courteurasian.org/doc-14373. A summary in English can be found at http://courteurasian.org/page-24991 (both accessed 30 June 2020).

cant. The economic entity, the company Kapri, sought to challenge the action of the Commission which imposed less strict requirements on its competitors operating in a similar business field. In this case the applicant could not prove direct concern, since the goods it imported were not subject to the Commission's Decision. The Decision of the Commission was aimed at the goods which had been imported by the competitor of the applicant. The EAEU Court found the application inadmissible and pointed out that: "the applicant has failed to substantiate how the contested Commission's decision *directly* affects the applicant's rights and legitimate interests in the area of business and other economic activities."[16] This case is a classic example of an applicant's lack of direct involvement in the activities regulated by a contested decision, and therefore of the inadmissibility of such an application.

Overall, the concept of direct concern was quite widely conceptualized in the early years of the functioning of the Court, allowing it to accept a lot of applications from economic entities whose interests were interfered with, in way or another, by a decision of the Commission. However, the practice of the Court in 2020 has changed and it appears that it has decided to narrow the concept of "direct concern." In the *Electronnaya tamozhnia* case (2020), the Chamber ruled that the Court lacked competence because, *inter alia*, the relevant decision of the Commission was of no "direct concern" to the applicant.[17] The latter was a customs agent bearing a subsidiary liability along with the declarant ("SUEK-KUZBASS" JSC), though it was not a payer of the customs duty. The challenged decision of the Commission classified the goods that "SUEK-KUZBASS" JSC imported to the Union. The goods were imported within another classification position which corresponded, according to the applicant, with the Harmonized System of Codification of Goods. As a result, the customs agent, "Elektronnaya tamozhnia" (the applicant) was fined. Therefore the latter believed that its interests were of direct concern, which gave grounds for its application to the Court. However, the Chamber decided otherwise and found the applicant as ineligible because of a lack of direct concern. Consequently, its application was found to be inadmissible. In this context it is necessary to note that previously the Court considered applications from the customs agents as from eligible applicants (the *"Unitrade" CJSC*[18] and *"ONP" LLC*[19] cases). Only time will tell whether the Court is using a new concept of *stare decisis*, or whether it was a one-time fluctuation in its position.

To be precise, Art. 39(2) of the Statute refers not only to rights and legal interests of direct concern, but also stipulates that economic entities may challenge those decisions (actions/failure to act) which entail a violation of the Treaty or an international treaty

[16] *Ibidem*, para. 6.

[17] Order of 10 March 2020, available at: http://courteurasian.org/doc-27483, with no summary in English (accessed 30 June 2020).

[18] *Unitrade JSC v. Commission*, Order of 25 March 2015, case no. CE-1-2/1-15-KC, available at: http://courteurasian.org/page-24121, with no English version available (accessed 30 June 2020).

[19] *ONP LLC v. Commission*, Judgment of 15 November 2012, case no. 1-7/2-2012, available at: http://courteurasian.org/page-20801, with no English version available (accessed 30 June 2020).

within the Union. However, this issue is not considered at the stage of admissibility of a case. As the Court held in the *Sevlad* case, the alleged violation of the rights and legal interests of the plaintiff is assessed while considering the merits ("the verification of a violation of the rights and legitimate interests of the plaintiff in the area of business or other economic activities, granted by the Treaty and (or) international treaties within the Union, should be preceded by an assessment of the legality of the challenged decision of the Commission").[20] Thus the Court determines the legality of the Commission's decision first, since "the violation of the rights and legitimate interests of the applicant in the area of business and other economic activities can be caused only by the execution (application) of a decision of the Commission which is not in line with the Union law."[21]

2.2. Applications by Member States only

2.2.1. Actions for failure to fulfil obligations

This form of action has been significantly transformed, as within the Eurasian Economic Community it used to be within the Commission's domain. Now such actions may be submitted by the Member States only. This change has considerably altered the balance of powers within the integration structure, decreasing the competence of the Commission as a supranational institution in monitoring and controlling implementation of the Union law.

The Member States inform the Court via diplomatic channels which organs can represent the Member State in its communications with the Court. All Member States have adopted special legal acts in this regard. Generally, the respective Ministries of Justice are indicated as the relevant organ. However, the Republic of Kazakhstan decided on a very wide list of organs representing the state in relations with the Court, and this group currently includes the Ministries of Justice, of Foreign Affairs, of Economic Development and Investments, the General Prosecutor Office, as well as a non-state Chamber of Entrepreneurs Atameken.

During last five years there was only one case, initiated by the Russian Federation against the Republic of Belarus (i.e. the *Kaliningrad transit* case (2017)). The Russian Federation complained that the Republic of Belarus did not recognize the decisions taken by customs authorities of the Claimant on the release of goods in accordance with the customs procedures of reimport and customs transit, reviewed the validity of such decisions and adopted decisions establishing the foreign origin of goods.[22] Five separate opinions were issued by the judges of the Grand Chamber (consisting of 10 judges).

Obviously, a state-to-state dispute is not the best compliance mechanism in an integration community, therefore it is not surprising to see so far there has been only one

[20] *Sevlad v. Commission*, para. 7.2.1(1).

[21] *Ibidem*.

[22] *Russian Federation v. the Republic of Belarus*, Judgment of 21 February 2017, case No CE-1-1/1-16/, available at: http://courteurasian1.org/doc-17943. A summary in English can be found at: http://courteurasian.org/page-25431 (both accessed 30 June 2020).

action. The relevant judgment also remains quite vague. The Grand Chamber of the Court delivered on 21 February 2017 its final judgment establishing that the Republic of Belarus had "*not fully complied* with the provisions of Articles 1, 3, 4, 25 of the Treaty on the Eurasian Economic Union of May 29, 2014 on the free movement of goods, the functioning of the Customs Union without exceptions and limitations upon completion of the transitional periods, commitment to the creation of a common market for goods, services, capital and labour resources within the Union, the application of a common customs regulation, Article 125 of the Customs Code of the Customs Union, Articles 11 and 17 of the Agreement of May 21, 2010."[23] The Court's Statute prescribes only two forms of a decision – establishing compliance or non-compliance. The formula of "non-full compliance" is unclear and not strictly prescribed by Union law; however it was politically sensitive and constituted a compromise of the mutual interests involved.

2.2.2. Actions on the compliance of a treaty within the Union or its particular provisions with the EAEU Treaty

This type of jurisdiction is novel, as it was unknown under the EurAsEC. So far this option has not been used. According to Art. 2 of the EAEU Treaty "treaties within the Union" are "international agreements concluded between member-states on the issues related to the functioning and evolving of the Union." Taking into account the procedure for drafting and signing treaties within the Union based on consensus and the internal standard procedures within the states on approving international agreements, it is hardly possible that any treaty within the Union can be elaborated, signed, and enter into force with any inconsistency to the EAEU Treaty. The situation is hypothetically possible if an agreement is concluded to which not all the Member States are the parties, and those states consider this agreement to be incompatible with the Treaty of the Union. However, if such a situation were to occur then according to the hierarchy of the Eurasian sources of law prescribed in Art. 6 of the Treaty of the Union, the Treaty prevails, and the Member States should amend the treaty within the Union based on the principle set forth in Art. 3(2) ("Member-states create favourable conditions for fulfilment of the functions of the Union by the Union and refrain from those measures which menace the objectives of the Union"). This principle is very similar to the principle of the loyal cooperation within the EU, although not so named.

2.3. Advisory procedure (clarification)

Unlike the EurAsEC Court, the Court of Justice of the EU, or the Andean Court of Justice and some other regional integration courts, the EAEU Court has no jurisdiction to give preliminary rulings based on references made by national courts concerning the application of the Treaty, treaties within the Union, or Commission decisions. In truth this function within the EurAsEC was not much in demand.

Nonetheless, the absence of a preliminary ruling procedure has caused many observers to doubt whether the Court can become a significant legal actor. During the

[23] *Ibidem*, para. 1 of the operative part of the judgment (emphasis added).

five years of its operation, the EAEU Court has managed to dispel some of the doubts concerning its role by showing that it has other tools at its disposal. Thus advisory opinions of the Court have become a kind of substitute for this missing function.

2.3.1. Clarification upon requests on general matters

The clarification function of the Court, as is set forth in its Statute, largely resembles the interpretation competence of international courts. Art. 46 of the Statute of the EAEU Court provides for the possibility for the Commission and the Member States to request the Court to issue a clarification of the provisions of the Treaty, treaties within the Union, and decisions of the Union bodies.

The main objective of the clarification process is the uniform application of the Union's law by the Member States, its legal persons and individuals, organs of the Union, as well as its staff. In the absence of a preliminary ruling procedure this clarification function performs the general role of consolidating the practices of national courts and other institutions applying the Union's law. Therefore, not surprisingly the Court tries to interpret such a request *in abstracto,* aiming its clarification at a non-limited range of analogous situations. In its advisory opinions, delivered upon the requests by Member State bodies and/or the Eurasian Economic Commission, the Court has managed not only to clarify several key provisions of EAEU law regarding the functioning of the customs union, the free movement of goods and workers, or even transport policy, but also to establish the main characteristics of the EAEU legal order: primacy, direct effect and direct applicability. In case No СЕ-2-2/518/БК (clarification of the freedom of movement of sportsmen), the Court identified the criteria of the norms of direct effect and applicability (i.e. if a norm grants rights and is sufficiently clear and precise, it does not require implementation in national legislation). Similarly, the Court took a clear stance on the issue of primacy by stating that in case of a conflict between the law of the Union and the regulatory acts of national legislation, the provisions of the Union's law shall prevail (para. 7(10) of the part III "Court's Findings" in the Advisory Opinion).[24]

The above developments resemble the approach taken by the European Court of Justice (ECJ) in *van Gend en Loos*. However, the position of the EAEU Court is formulated very concisely, without any in-depth explanation (again in contrast to the ECJ). The probable reason behind this is the fact that there seems to be no disagreement among the Member States and in the doctrine on the primacy and direct application of the Union's law. Most states have already confirmed the existence of both principles in their national practice and legal acts.[25]

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[24] *Eurasian Economic Commission (Sportsmen case)*, Advisory Opinion of 7 December 2018, case CE-2-2/5-18-BK, available at: http://courteurasian.org/doc-22543. A summary in English can be found at: http://courteurasian.org/page-26501 (both accessed 30 June 2020).

[25] *See* Judgment of the Court of the Republic of Belarus of 28 December 2017, the Order of the Constitutional Court of the Russian Federation of 13 February 2018, the Order of the Plenum of the Supreme Court of the Russian Federation of 12 May 2016, and the Decree of the Constitutional Council of the Republic of Kazakhstan of 5 November 2009 (No. 6).

The Commission and the Member States have often made recourse to this instrument as an alternative to an action for failure to fulfil obligations,[26] or as a possible test of the conformity of a Member State's actual or draft legislation with EAEU law.[27] Thus, in the case *On the application of the Ministry of Justice of the Republic of Belarus*, the Court was asked about issues relating to certain competition rules. Art. 74(3) allows Member States to determine in their legislation further prohibitions, as well as additional requirements and restrictions with regard to the prohibitions set out in Arts. 75 and 76 of the Treaty. In its application the Ministry of Justice of the Republic of Belarus asked whether a Member State was allowed to establish different criteria of admissibility of vertical agreements in its national legislation. This request was derivative to the process of amendment of national legislation, and the Ministry of Justice asked for a kind of preliminary ruling of the Court on the possibilities to change the national law as regards these competition rules. In its advisory opinion of 4 April 2017, the Grand Chamber of the Court indicated that Art. 4 and Arts. 74-76 of the Treaty and the provisions of Section II of the Protocol on General Principles and Rules of Competition (Annex 19 to the Treaty), when read jointly, do not allow the Member States to modify the prescribed admissibility criteria of vertical agreements. The national legislator (the Belarusian parliament) later followed the position of the Court.

However, the clarification function of the Court does not deprive the Member States of the right to joint interpretation of the Treaty or treaties within the Union (Art. 47 of the Treaty on the Union).

As was indicated above, the Member States designate their competent authorities which may refer to, apply to, and communicate with the Court. No Member State has indicated in a relevant national act any national courts at any level or specialization. However, taking into consideration the growing role of advisory opinions of the Court it is currently discussed in the doctrine and between practitioners whether it would be advisable for the Member States to empower their Supreme Courts with the right to request advisory opinions from the Court.

2.3.2. Clarification on Eurasian civil service matters

Both EAEU civil servants and the Commission also have the possibility to ask the Court for a clarification of EAEU law connected to labour relations, and this competence has allowed the Court to interpret several provisions of the EAEU Treaty and the Regulation on Social Guarantees, Privileges and Immunities within the Eurasian Economic Union (Annex No. 32 to the Treaty on the Union). Altogether the Court

[26] *See e.g. Ministry of Transport and Roads of the Kyrgyz Republic (Railroad tariffs case)*, Advisory Opinion of 20 November 2017, case CE-2-1/2-17-BK, available at: http://courteurasian.org/doc-18093, http://courteurasian.org/doc-18093, http://courteurasian.org/doc-18093. A summary in English can be found at http://courteurasian.org/page-25441 (all accessed 30 June 2020).

[27] *See e.g. Ministry of Justice of Belarus (Vertical Agreements case)*, Advisory Opinion of 4 April 2017, case CE-2-1/1-17-BK, available at: http://courteurasian.org/doc-18803. A summary in English can be found at http://courteurasian.org/page-25081 (both accessed 30 June 2020).

has considered three cases within this jurisdictional power. This remedy cannot be considered as an alternative to direct judicial protection of the rights and interests of the Eurasian civil service. This sphere thus lacks access to justice within the EAEU because these advisory opinions are of a non-obligatory character.

The other important issue which has not been resolved within the Union is the fragmented internal regulation of the status, rights and duties, and privileges and immunities of the Union's staff. Annex No. 32 refers to the national law of the Member State where the relevant organ resides (for the Commission this is Moscow, Russian Federation, and for the Court it is Minsk, the Republic of Belarus). As the Court pointed out in all three cases considered in this sphere, the only way to effectively address all the issues connected with the Union's staff is to develop internal Union regulations on social security, pension and other issues in order to preserve the independent character of the Eurasian civil service. As the Court stated in the case *Employees of the Eurasian Economic Commission*, "the internal law of an international organisation shall establish norms that cover the maximum range of relations connected to civil service (including issues of appraisal). Nonetheless national law regulates relations concerning solely the material sphere (e.g., pensions)."[28]

In the *Adilov case,* the Court went further and stated: "[t]aking into account the established international practice, as well as accumulated experience of regulation of employment relations in integration governing bodies, a comprehensive solution could be found to the problems of legal regulation of employment relations in the bodies of the Union via the development and adoption, within the framework of the process of improvement of the Union law, of a legal act regulating different aspects of employment and social security of international civil servants in the bodies of the Union in a more comprehensive way, subject to the need to guarantee their independence, as well as proper social and legal protection."[29]

The issues covered in these advisory opinions are diverse: appraisal, assessment, audio and video recording, contracts, reform of organizational structure, equal representation of Member States, termination of employment contracts, etc. While the three cases referred to herein constitute only 8% of all cases decided by the Court, nonetheless these advisory opinions are very important insofar as they form the only possible mechanism for any judicial protection for the Union's staff. Due to the immunities of the Union as an international organization, national institutions are without competence to rule on these issues. The Court, being aware of the problem of a lack of direct protection of the rights of civil servants in the Union, has decided to adopt a special approach to these types of cases, i.e. while issuing clarifications in other cases as a rule *in abstracto*,

[28] *Employees of the Eurasian Economic Commission case,* Advisory opinion of 3 June 2016, case no. CE-2-3/1-16-CE available at: http://courteurasian.org/doc-15913, a summary in English can be found at: http://courteurasian.org/page-25031 (both accessed 30 June 2020).

[29] *Adilov case,* Advisory Opinion of 11 December 2017, case no. CE-2-3/1-17-BK, available at: http://courteurasian.org/doc-19843, para. 15(2), a summary in English can be found at: http://courteurasian.org/page-25481 (both accessed 30 June 2020).

in labour related acts the interpretation is *in concreto*, with due attention given to the details of each particular situation and their legal consequences. Thus in the *Adilov* case the Court declared that it was the responsibility of the Commission to institute a proper competition process for the replacement of vacant positions, and technically expressed the position that an official could not be dismissed from the position of deputy head of the department for the reason of further concluding a contract with a person of the same nationality as the head of the given department. However, this type of the Court's jurisdiction is not an effective alternative to full judicial protection inasmuch as it relies upon the authoritative power of the Court and not on effective legal remedies and guarantees.

CONCLUSIONS

Today, of the Court's five years of practice has proven that this judicial organ, being an element of the integration structure in the Eurasia, plays an important role and can form authoritative legal positions. Its two main types of jurisdiction (dispute resolution and clarification) give rise to referrals from both public and private actors possessing *locus standi*. However, some important features of supranational judicial body are missing. In particular, the Court lacks sufficient powers to ensure that the tasks will be fulfilled and the objective(s) envisaged in the Treaty of the Union will be achieved. The most regrettable change in competence, as compared to the EurAsEC Court, was the elimination of a preliminary ruling procedure.

At the same time however, there are some developments in the functioning of the Court which elevates its role in the legal order of the Union. Firstly, there is a kind of substitution in functions and procedures that fill in the normative gaps in the Court`s jurisdiction prescribed in its Statute. In some cases the clarification procedure substitutes for a normative control function and preliminary jurisdiction. So, while the founding treaty, including the Court's Statute, can be seen as a step back in terms of the development of the judicial organ of integration, the Court's practice has shown slow but visible and reasonable progress in the judicialization of the Eurasian integration. Secondly, there is public understanding and attention paid to the Court's decisions among the actors in the EAEU: its legal positions tend to become *stare decisis* and they are implemented by the Commission and the Member States. The Court can play an important role in conceptualizing the structure, the principles, and the sources of the law in the EAEU. However, following the period of its establishment the time has now come for stating and affirming its authority. Diversity in a court's practice is not exactly what is necessary for strengthening and reinforcing integration processes and establishing the credibility of a judicial organ. Therefore the tasks for the Court in the nearest future are the establishment of unification of its practice and standards, enhancement of its argumentation, and consistency in its legal positions.

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EFFECTIVENESS OF EU DIRECTIVES IN NATIONAL COURTS – JUDICIAL DIALOGUE CONTINUES: THE COURT OF JUSTICE'S JUDGMENT IN *C-545/17 PAWLAK*

Abstract: *This commentary on the Court of Justice's ruling in the Pawlak case concentrates on questions of the judicial application of EU law, in particular EU Directives. On the basis of the recent jurisprudence of the Court the authors present three issues: 1) the incidental effects of EU law for the procedural provisions of Member States; 2) the inability to rely on an EU directive by a member state's authority in order to exclude the application of national provisions which are contrary to a directive; 3) the limits of the duty to interpret national law in conformity with EU law from the perspective of the Court of Justice and the referring court. Further, the article presents the judicial practice of the Polish Supreme Court, and in particular the follow-up decision of this Court not only taking into the account the ruling of the ECJ but also showing how the limitation of a conforming interpretation can be overcome in order to give full effect to EU law. In the authors' view, this case is worth noting as an example of judicial dialogue in the EU.*

Keywords: direct effect, effectiveness, EU directive, EU law, primacy of EU law

INTRODUCTION

The judgment in the *Pawlak* case resulted from a request for a preliminary ruling referred to the Court of Justice in Luxembourg by the Polish *Sąd Najwyższy* (Supreme Court) in the context of a dispute between Mariusz Pawlak, a farmer, and *Kasa Rolniczego Ubezpieczenia Społecznego* (a unit governed by public law dealing with paying benefits for farmers (KRUS) concerning the refusal to pay compensation to the farmer for an accident at work. The substantive grounds for resolving that dispute, including the

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conditions of the right to compensation and the conditions for a refusal to pay such a compensation to the applicant concerned, were not covered by European Union law. Therefore, at the first glance this case should be regarded as not having an "element of EU law" and it seemed that the dispute needed to be resolved only in accordance with the applicable Polish law. However, the specific procedural circumstances led the Supreme Court to have doubts concerning the interpretation of EU law. In its opinion a clarification was needed as to the compatibility with EU law of a national procedural provision under which the date of receiving a document by the court is determined (i.e. whether the appeal was filed within the prescribed time limit). Depending on whether the national procedural provision at issue was found compatible or incompatible with EU law, the appeal would have to be, respectively, either rejected as lodged after the statutory time limit, or deemed to have been lodged within that time limit and, thus acceptable. Therefore, the outcome of that provision's assessment in the light of EU law had an impact on the access to the appeal procedure before Polish courts.

From the point of view of the judicial application of EU law, the judgment in the *Pawlak* case necessitates a closer analysis of three interesting issues, which are as follows: 1) the incidental effect of EU law for the procedural provisions of Member States; 2) the inability to rely on an EU directive by the member state's authority in order to exclude the application of national provisions which are contrary to a directive; and 3) the limits of the duty to interpret national law in conformity with EU law from the perspective of the Court of Justice and the referring court. The commentary on these issues is preceded by a brief presentation of the legal and factual background of the case and the main points of the Court's judgement.

1. FACTUAL AND LEGAL BACKGROUND

In accordance with Art. 165(2) of the Polish Code of Civil Procedure (*Kodeks postępowania cywilnego,* KPC) the posting of a procedural document at a Polish post office of the designated postal operator or at the post office of a postal operator providing a universal postal service in another Member State of the European Union is equivalent to the lodgement of that document directly with the court. In accordance with Polish law, *Poczta Polska S.A*, is the designated operator. The practical consequences of the provision concerned are that where a procedural document is posted at the post office of *Poczta Polska,* the court to which that letter is addressed will accept that the date of posting it is to be considered as if the letter was filed directly to the court. But when a letter with an appeal is posted at the premises of any other postal operator (other than *Poczta Polska*) the court to which the document is addressed considers the date of the actual receipt of that document by the court (instead of the date of posting it) as the date of its filing. Therefore, in practice, under Polish law the legal effects that the legislator attributed to the fact of posting a respective procedural document at a postal operator's office were different depending on whether it was posted at the designated operator's office or at any

other operator's; which in turn leads to privileging the designated operator in comparison with any other postal operator functioning on the postal services market.

In turn, in accordance with Art. 7(1) of Directive 97/67 on common rules for the development of the internal market of Community postal services,[1] Member States should refrain from conferring or maintaining in force exclusive or special rights as regards the establishment and provision of postal services. The exceptions to this rule are set out in Art. 8 of that directive, according to which

> [t]he provisions of Article 7 shall be without prejudice to Member States' right to organise the siting of letter boxes on the public highway, the issue of postage stamps and the registered mail service used in the course of judicial or administrative procedures in accordance with their national legislation.

As indicated above, the dispute between the farmer and KRUS related to the refusal to pay compensation for an accident at work. The court of the first instance accepted the farmer's complaint, and as a result the president of KRUS appealed against that judgment to the court of the second instance. However, the procedural document was posted at the post office of an operator other than the designated operator and was served on the court after the expiry of the statutory time limit for lodging the appeal. Since in that case the procedural document was served by a postal operator other than the designated operator, the date of its submission was determined by the date of its receipt by the court, and not by the "postmark date." Consequently, the appeal was dismissed inadmissible as a result of the failure to comply with the procedural time limit. The president of KRUS appealed to the Supreme Court against the decision of the court of the second instance, raising, *inter alia*, the incompatibility of Art. 165(2) KPC with EU law.

In considering the case, the Supreme Court took into account, first of all, the discrepancies included in its case law regarding the interpretation of that provision.[2] In that case law the prevailing standpoint did not take into account the EU context of the effects of posting a document at a post office. Accordingly, the posting of a procedural document at a Polish post office of an operator other than the designated operator was considered, in instances where that document was received after the expiry of the statutory time limit for carrying out a procedural act, as a failure to comply with the time limit, and as a result the procedural act was considered ineffective.[3] However, in some cases (albeit a minority), the adjudicating panels of the Supreme Court recognized the EU law element (Directive 97/67) and held that the posting of a document, within the prescribed time limit, at a Polish post office of an operator other than the designated operator had a legal effect equivalent to lodging that document with the court.[4] In

[1] OJ 1998 L 15, p. 14, OJ L 15, 21.1.1998, p. 14.

[2] Order of the Supreme Court of 19 July 2017, case III UZP 3/17.

[3] Orders of the Supreme Court: of 3 June 2015, case V CZ 33/15; of 8 June 2015, case III SW 41/15; of 14 July 2015, case II UZ 10/15; of 25 August 2015, case II UZ 16/15; of 14 April 2016, case IV CZ 15/16; of 20 April 2016, case II UZ 75/15 and of 17 May 2016, case II PZ 2/16.

[4] Orders of the Supreme Court: of 23 October 2015, case V CZ 40/15; of 17 March 2016, case V CZ 7/16.

those decisions the Supreme Court held that Art. 165(2) KPC should be interpreted in a manner consistent with EU law, although without any specific guidelines on how to apply the provision of Polish law in compliance with EU law, while in another case the Supreme Court restored the deadline for lodging the procedural document with the court.

Taking the foregoing into account, the Supreme Court decided to refer three questions to the Court of Justice as regards the interpretation of EU law. They concerned several issues dealing with the general question of the compatibility of the provision of Polish law with EU law. These specific issues included: 1) whether the legal problem submitted to the court fell within the scope of Directive 97/67, 2) whether Art. 165(2) KPC could be regarded as "a special right" within the meaning of Art. 7(1) in conjunction with Art. 8 of Directive 97/67 (the first question of the Supreme Court). Furthermore, the Supreme Court sought to establish the consequences of a finding that EU law precludes the application of Art. 165(2) KPC, should it be impossible for the national court to interpret it in conformity with EU law. To this end, the Supreme Court suggested the possibility of applying the so-called *Jonkmann* rule, i.e. accrual of the benefits – arising from the conferral of a special right on the operator designated in breach of Art. 7(1) of the directive – to all other postal operators, with the result that the posting of a procedural document at a national post office of an operator which provides a universal service but is not the designated operator must be regarded as equivalent to the lodgement of that document with the court (the second question). In the third question, the Supreme Court sought to determine whether Art. 7(1) of Directive 97/67 might be relied on by a party which is an emanation of a member state.

2. THE JUDGMENT OF THE COURT OF JUSTICE

First, the Court of Justice established that Art. 165(2) KPC conferred on the *Poczta Polska* operator an "exclusive or special right" within the meaning of Art. 7(1) of Directive 97/67.[5] However, since that concept has not been defined in the directive itself, the Court of Justice referred to settled case law relating to the interpretation of that concept included in Art. 106(1) TFEU. In that regard, it recalled that

> [a] State measure may be regarded as granting a special or exclusive right within the meaning of Article 106(1) TFEU where it confers protection on a limited number of undertakings and which may substantially affect the ability of other undertakings to exercise the economic activity in question in the same geographical area under substantially equivalent conditions.[6]

According to the Court of Justice, the provision of Polish law in question

[5] Case C-545/17, *Mariusz Pawlak v. Prezes Kasy Rolniczego Ubezpieczenia Społecznego*, EU:C:2019:260, para. 65.

[6] Case C-475/99, *Firma Ambulanz Glöckner v. Landkreis Südwestpfalz,* EU:C:2001:577, para. 24; Case C-327/12, *SOA Nazionale Costruttori*, EU:C:2013:827, para. 41.

> seems to confer a benefit on a limited number of undertakings, since it reserves to the designated operator, or another entity providing a universal service in another member state, the service of sending procedural documents to the court and the privilege of recognising the procedural documents lodged with that operator, or that other entity, to be the documents lodged with the court.[7]

It also considered that such a provision could substantially affect the ability of other undertakings to exercise their respective economic activities in the same area under substantially equivalent conditions, within the meaning of settled case law.[8]

Subsequently, after studying the content of Art. 8 of Directive 97/67, the Court of Justice held that the first sentence of Art. 7(1), in conjunction with Art. 8 of Directive 97/67

> precludes (…) the provision of national law which considers equivalent to lodging a procedural document with the court concerned, only lodging such a document at the postal office of one operator designated to provide a universal service, and without any objective justification based on the public order policy or public security considerations.[9]

As regards deciding what consequences should be drawn from the incompatibility of the national procedural provision with EU law by the national court in the dispute concerned, the Court of Justice recalled the requirement for the national court to interpret national law

> [a]s far as possible, in the light of the wording and the purpose of the directive in question, in order to achieve the result pursued by the directive and thereby comply with the third paragraph of Art. 288 TFEU. The requirement for national law to be interpreted in conformity with European Union law is inherent in the system of the Treaty, since it permits the national court, within the limits of its jurisdiction, to ensure the full effectiveness of European Union law when it determines the dispute before it.[10]

It also pointed out that the requirement to interpret national law in conformity with EU law is limited "[b]y the general principles of law, particularly those of legal certainty and non-retroactivity, and that obligation cannot serve as the basis for an interpretation of national law *contra legem*."[11]

Emphasising the significance of the principle of legal certainty in the context of the provisions establishing procedural time limits, the Court of Justice recalled that "[t]he purpose of having time-limits for bringing legal proceedings is to ensure legal certainty by preventing Community measures which produce legal effects from being called in question indefinitely as well as on the requirements of good administration of justice and procedural economy."[12] and found that the same reasons underpinned the

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[7] Judgment *Pawlak*, para. 62.
[8] *Ibidem*, para. 63.
[9] *Ibidem,* para. 79.
[10] *Ibidem*, para. 83 and cases referred to therein.
[11] *Ibidem*, para. 85 and cases referred to therein.
[12] *Ibidem*, para. 87.

requirement to comply with the procedural time limits set out in the legal orders of respective member states. Consequently, the Court of Justice accepted that the principle of legal certainty and the prohibition against interpreting national law *contra legem* formed the limitations on the requirement to interpret national law in conformity with EU law.[13]

Subsequently, with reference to the possibility of relying on a provision of a directive for the purpose of not applying, in a dispute against an individual, a national provision which is contrary to the directive, the Court of Justice held that allowing for the possibility of relying, by an emanation of a member state, on the provisions of the directive which that state had not properly transposed into national law, against an individual, would amount to enabling that state to benefit from its breach of EU law.[14] As a consequence, since the president of KRUS should be regarded as an emanation of the state within the meaning of settled case law of the Court of Justice, it could not rely on the provision of the directive against the individual.

3. COMMENTARY

3.1. The shrinking scope of purely internal cases – the incidental effect of EU law for the procedural provisions of Member States

The first stage of the judicial application of EU law in any proceeding is to establish that the case to be decided by the national court involves an element of EU law, i.e. that the reconstruction of the legal basis for the adjudication of a given case requires taking into account not only the provisions of national law, but also the provisions of EU law. EU law may affect not only the substantive provisions underlying the final judicial decision to be delivered by national courts, but also the procedural provisions applicable for the purpose of claiming certain rights by individuals. As regards the latter aspect, the Court of Justice, as early as in the mid-1970s, formulated the principle of the procedural autonomy of member states, according to which "[i]n the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law."[15] However, this does not mean that national procedural provisions remain completely outside the scope of the application

[13] *Ibidem*, para. 88.

[14] *Ibidem*, para. 89.

[15] Case 33/76, *Rewe-Zentralfinanz eG and Rewe-Zentral AG v. Landwirtschaftskammer für das Saarland*, EU:C:1976:188, para. 5; Case 45/76 *Comet BV v. Produktschap voor Siergewassen,* EU:C:1976:191, paras. 13, 16; *see also* A. Wróbel, *Autonomia proceduralna państw członkowskich. Zasada efektywności i zasada efektywnej ochrony sądowej w prawie Unii Europejskiej* [Procedural autonomy of EU Member States: Principle of Effectivness and Effective Judicial Protection], 67(1) Ruch Prawniczy, Ekonomiczny i Społeczny 35 (2005); D.-U. Galetta, *Procedural Autonomy of EU Member States: Paradise Lost? A Study on the "Functionalized Procedural Competence" of EU Member States*, Springer, Heidelberg: 2010.

of EU law. In particular, the Court of Justice requires that "[s]uch legislative provisions may not discriminate against persons to whom Community law gives rights to equal treatment or restrict fundamental freedoms guaranteed by Community law."[16]

This is one of the perspectives[17] from which the Court of Justice interprets EU law when national courts refer questions in view of any doubts relating to national procedural rules. For example, in the context of assessing the compliance with EU law of the imposition on a foreign national not resident in the Member State where he initiates proceedings of an obligation to provide a security deposit to guarantee payment of the costs of the judicial proceedings which the person may be ordered to pay, the Court held that such a national procedural rule is liable to affect the economic activity of traders from other Member States on the market of the host member state. Even if such a procedural provision is not specifically intended to regulate an activity of a commercial nature, it still has the effect of placing such traders in a less advantageous position than the nationals of that State as regards access to courts.[18] In this regard, "[t]he possibility to bring actions in the courts of a Member State in the same way as nationals of this State is a corollary of the fundamental freedoms, in particular free movement of goods and services." This means that in principle any procedural provision of a member state which could put an EU citizen at a disadvantage compared to that state's treatment of its own citizens may fall within the scope of EU law. However, the assessment of national provisions in the light of EU law must be carried out individually in each case. For this reason, in the case of the security deposit, which was required only from nationals of member states other than those of the member state in which the proceedings were held, the Court of Justice had no doubts that it constituted discrimination on the grounds of nationality within the meaning of present Art. 18 TFEU, and therefore – in the absence of an objective justification – it had to be considered as discrimination prohibited by EU law.[19]

It is true that in *Pawlak* case the situation was different from the above. Member states regulate, by means of the provisions of secondary law, the market of postal services in such a way that not only shapes the provisions of substantive law, but also the procedural provisions affecting the course of the court proceedings. However, a similar rule was applied in this case, i.e. that the procedural autonomy of a member state was also subject to limitations if the procedural provisions concern a provision of secondary law incidentally applicable in the main proceedings and are contained in a piece of

[16] Case 186/87, *Ian William Cowan v. Trésor public,* EU:C:1989:47, para. 19.

[17] It has also been established that the national procedural rules must be in conformity with principles of equivalence and effectiveness *sensu stricto*, judgment *REWE*, EU:C:1976:188, para. 5; judgment *Comet*, EU:C:1976:191, paras. 13, 16.

[18] Case C-43/95, *Data Delecta Aktiebolag and Ronny Forsberg v. MSL Dynamics Ltd.,* EU:C:1996:357, para. 12; Case C-323/95, *David Charles Hayes and Jeannette Karen Hayes v. Kronenberger GmbH*, EU:C:1997:169, para. 15.

[19] Judgment *Data Delecta*, EU:C:1996:357, para. 12; judgment *David Charles Hayes*, ECLI:EU:C:1997:169, para. 17; Case C-122/96 *Saldanha*, EU:C:1997:458, paras. 17, 20; Case C-291/09, *Guarnieri & Cie*, EU:C:2011:217, para. 19.

legislation devoted to the functioning of the internal market, not to national procedural rules per se.

3.2. Principles for the application of directives by national courts in proceedings involving individuals

3.2.1. Relation between primacy and the direct effect of EU law

The Supreme Court, in the *Pawlak* case, sought to determine the consequences of recognising the solution provided for in Art. 165(2) KPC as a special right within the meaning of Art. 7(1) of Directive 97/67 The need to obtain the opinion of the Court of Justice in this regard was due to the Supreme Court's fear, at the stage of referral of the preliminary questions, that any possible interpretation of Art. 165(2) KPC in conformity with EU law would be considered a *contra legem* interpretation. That sparked the interest of the national court in the issue of the limits of admissibility of a refusal to apply a provision of national law, due to its noncompliance with a directive, in a dispute between an individual and an entity which is an emanation of the state.

As regards the possible refusal to apply national provisions on the grounds that they are contrary to an EU directive, the judgment in the *Pawlak* case is in line with case law of the Court of Justice relating to the relationship between the principle of primacy and the principle of direct effect which has developed over the last few years. The principle of the primacy of EU law, as stated by the Court of Justice in the judgment in the *Simmenthal* case,[20] operates in such a way that the national court "should not see" the national provisions which are contrary to EU law. This "invisibility" of those national provisions incompatible with EU law means, in practice, that the national court cannot include these provisions in the legal basis of its decision. They cannot constitute a normative model for it to apply in dispute resolution. In the *Pawlak* case, compliance with the rule resulting from *Simmenthal* judgment should have meant that the national court did not "see" the provisions requiring it to dismiss an appeal as lodged after the time limit when the appeal was posted within the time limit but through an operator not being the designated operator, and physically reached the competent court after the expiry of the time limit provided for in the national procedure. However, the first issue in the *Pawlak* case for the national court was whether the application of the national provision should be refused on the ground that it was contrary to the directive; and secondly whether the refusal to apply the provision would lead to issuing a judicial decision favourable to the party to the proceedings that was an emanation of the member state (i.e. the pension authority KRUS).

The Court of Justice a long time ago ruled out the possibility of deriving, from the directive, rights that could be claimed before a national court from another party

[20] Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, EU:C:1978:49, para. 21; for further developments *see* in particular Case C-187/00 *Kutz-Bauer*, EU:C:2003:168, para. 73; Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others*, EU:C:2005:270; Case C-314/08 *Filipiak,* EU:C:2009:719.

to a judicial proceeding that was not an emanation of the Member State.[21] In the absence of a national provision conferring on the individual the right provided for in the EU directive, it was only possible to seek compensation from a member state, since the Court of Justice deemed it admissible to claim the right before a national court only from a member state and its authorities, as broadly understood (emanations).[22] However, it still remained unclear whether the exclusion of the so-called horizontal direct effect of directives would not allow for use of the principle of primacy in disputes between individuals if it appeared that the national provisions applicable to decide the case proved to be contrary to the directive. The Court of Justice repeatedly and explicitly stated – in preliminary rulings issued in disputes between individuals – that certain national provisions were contrary to the directive, and therefore should not be applied by national courts. At the same time, in several cases Court acknowledged the so-called "incidental direct effect" of directives. On the basis of this approach, concepts were formulated in the legal scholarship for resolving apparent inconsistencies in the jurisprudence of the Court of Justice by separating the application of the principle of primacy from the principle of direct effect.[23]

It was only after some time that the Court of Justice clarified that in the context of a dispute between individuals regarding the provisions of a national law falling within the scope of application of an EU directive, the application of national provisions could not be refused because of their incompatibility with the directive if such refusal led to an individual who was one party to the proceedings obtaining a benefit not provided for in the national provisions "normally" applicable for the adjudication of a case, while at the same time charging the other party with an obligation under other provisions of national law which were in compliance with the directive.[24] It follows from the case law that in such circumstances a finding that a provision of national law is incompatible with a provision of the directive not only cannot give rise to the substitution effect in the disputes between individuals (meaning that instead of or in addition to national law a provision of a directive is included in the legal basis for deciding the case), but it cannot have an exclusionary effect either (meaning that national provisions incompatible with

[21] Case C-91/92, *Paola Faccini Dori v. Recreb Srl,* EU:C:1994:292, para. 20 – in the context of the right of cancellation which could not be invoked in proceedings between a consumer and a trader.

[22] Case C-122/17, *David Smith v. Patrick Meade and Others,* EU:C:2018:631, para. 45 and cases referred therein.

[23] M. Szpunar, *Bezpośredni skutek prawa wspólnotowego – jego istota oraz próba uporządkowania terminologii* [Direct effect of community law – its essence and the attempt to organize terminology], 2 Europejski Przegląd Sądowy 4 (2005); K. Lenaerts, T. Corthaut, *Of birds and hedges: the role of primacy in invoking norms of EU law*, 31(3) European Law Review 287 (2006).

[24] Case C-144/04, *Werner Mangold v. Rüdiger Helm,* EU:C:2005:709 – conclusion of a contract for indefinite duration instead of a fixed-term contract; Case C-555/07, *Seda Kücükdeveci v. Swedex GmbH & Co. KG.,* EU:C:2010:21 – a longer notice period resulting from taking into account the length of employment before the age of 25; Case C-351/12, *OSA,* EU:C:2014:110 – An obligation to pay a licence fee to a collecting society for making available to guests, through the tv sets in hotel rooms, works to which that society was entitled.

the directive are removed from the legal basis of the decision). However, that position can be treated as a fairly obvious consequence of the judgment in the *Faccini Dori* case – since if it is not possible to directly acquire a right against another individual on the basis of the directive itself, such right cannot be acquired indirectly either. The acquisition of such a right could result from the modification of the legal basis for deciding the case by removing from it the "normally" applicable national provisions contrary to the directive, and basing the decision on other "normally" applicable provisions of national law or on new provisions of national law which became applicable in the case only after the removal, from its legal basis, of the provisions of national law which, as a rule, had been ("normally") applied to resolve the respective category of disputes. However, it remained unclear, especially in the light of the judgments of the Court of Justice regarding the directive on the notification of technical regulations,[25] whether it was possible to use the directive as a model for control of the compliance of national provisions with EU law even if, as a result of the refusal to apply the national provisions incompatible with EU law, no obligation was imposed on an individual, but the individual, being a party to the proceedings, was deprived of a right he/she had been entitled to under national law or, for instance, the procedural situation of the other party was improved (e.g. as would be the case for KRUS in the *Pawlak* case by declaring that the appeal had been lodged within the time limit).

In the period between referring the request for a preliminary ruling by the Supreme Court and issuing the judgment by the Court of Justice in the case under comment, several important judgments were issued which included clarifications on this issue. In the *Smith*,[26] *Egenberger*[27] and *Cresco Investigation*[28] judgments the Court of Justice adopted the following reasoning: 1) since a directive in itself cannot create obligations for an individual, it cannot be relied on against the individual; 2) since a provision of a directive cannot be relied on against an individual, even a clear, precise and unconditional provision of the directive cannot be applied as such, at all, by the national court in a dispute exclusively between individuals; 3) since a provision of a directive may not be relied on in a dispute between individuals, it may not be used in such a dispute to exclude the application of a member state's rule contrary to that directive either; 4) a national court is obliged to refrain from applying a provision of national law that is contrary to a directive only where that directive is relied on against a member state, the organs of its administration, such as decentralised authorities, or organisations or bodies which are subject to the authority or control of the state or which have been required by a member state to perform a task in the public interest and, for that purpose, possess

[25] Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services, OJ L 241, 17.9.2015, p. 1.

[26] Judgment *Smith,* EU:C:2018:631, paras. 42-45.

[27] Case C-414/16, *Vera Egenberger v. Evangelisches Werk für Diakonie und Entwicklung e.V.,* EU:C:2018:257.

[28] Case C-193/17, *Cresco Investigation GmbH v. Markus Achatzi,* EU:C:2019:43.

special powers beyond those which result from the normal rules applicable to relations between individuals. The only derogation was provided for in Directive 2015/1535 (replacing Directive 98/34) since the "[d]irective, which created neither rights nor obligations for individuals, did not determine the substantive content of the legal rule on the basis of which the national court had to decide the case before it, meaning that the case law to the effect that a directive that has not been transposed may not be relied on by one individual against another was not relevant in such a situation."[29] Thus the Court of Justice finally ended a long-standing discussion that had been present in the legal scholarship, i.e. whether the concept of direct effect should be understood as a subjective direct effect (conferring a right) only, or also an objective one (the mere possibility of relying on a provision of EU law), finally supporting a dual understanding of the (nature) of direct effect, in accordance with the concepts of, among others, S. Prechal.[30]

The case law referred to also explained indirectly how the scope of application of the *Simmenthal* formula should be understood, since it was not clear to date from case law of the Court of Justice whether the national court was obliged to refuse to apply a provision of national law which was contrary to a "directly applicable"[31] provision of EU law or to a "directly effective" one. In addition, the Court of Justice repeatedly referred to the *Simmenthal* formula in the context of the need for national courts to ensure the effectiveness of EU law, without considering whether the provisions from which the normative model was reconstructed in a given case for the purposes of assessing the compliance of national law with EU law was itself directly effective.[32] However, in the light of the *Smith*, *Egenberger* and *Cresco Investigation* judgments, it should be found that the *Simmenthal* formula is applicable only if a provision of EU law is directly effective. This means, firstly, that for the applicability of the principle of primacy a respective provision of EU law must meet the conditions for direct effect (i.e. it must be clear, precise, unconditional and complete). Secondly, such a provision can be applied in a particular case only after considering in which act of EU law it has been included, because some of these acts (e.g. directives) can produce direct effect – irrespective of the way their provisions are worded – only in some proceedings before national courts.

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[29] Judgment *Smith,* EU:C:2018:631, para. 53.

[30] S. Prechal, *Directives in EC Law*, Oxford University Press, Oxford: 2005.

[31] *See e.g.* judgment *Simmenthal,* EU:C:1978:49, para. 17; Case C-378/17, *The Minister for Justice and Equality and The Commissioner of the Garda Síochána v. Workplace Relations Commission*, EU:C:2018:979; para. 36; Case C-384/17, *Dooel Uvoz-Izvoz Skopje Link Logistic N&N v. Budapest Rendőrfőkapitánya,* EU: C:2018:810, paras. 60-62.

[32] *See recently* Case C-234/17, *XC and Others v. Generalprokuratur,* EU:C:2018:853, para. 44; Case C-283/16, *M. S. v. P. S.,* EU:C:2017:104, para. 50; Case C-664/15, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v. Bezirkshauptmannschaft Gmünd,* EU:C:2017:987, para. 57; Joined cases C-52/16 i C-113/16 *'SEGRO' Kft. v. Vas Megyei Kormányhivatal Sárvári Járási Földhivatala and Günther Horváth v. Vas Megyei Kormányhivatal,* EU:C:2018:157, para. 46.

3.2.2. Exclusion of the horizontal direct effect of EU directives

In addition, in its judgment in the *Pawlak* case the Court of Justice confirmed that the incompatibility of a national provision with an EU directive cannot be relied on effectively by a party which is an emanation of the member state (in *Pawlak*, the pension authority KRUS). The term "relying on" (or "invoking") used by the Court of Justice is not fully adequate, as it implies the initiative of the parties to the proceedings, whereas in the procedural rules of many member states, including Poland, it is the court that selects the relevant legal basis for the claim raised by the party against the factual background referred to (and evidenced) by it. Therefore, it would be better to take the point into account in such a way that the national court cannot apply the EU directive in a dispute between an individual and an emanation of a member state in the sense that it could not use the provisions of the directive as a legal basis to formulate an EU normative model for assessing the compliance of national law with it, if refusing to apply the national provisions because of their conflict with the directive would lead to conferring any benefit on a party being the "emanation of the State" in the meaning of EU law.

However, it does not matter at all whether the omission of national provisions incompatible with the directive leads to the imposition of any obligation on an individual. It should be noted that in the *Pawlak* case, if the application of the national provision was refused in the main proceedings, in the end it would just allow for recognizing that the appeal of the pension authority (the member state) had been lodged within the time limit. This would open up the possibility for the court of the second instance to hear, on substantive grounds, the appeal of that party to the proceedings that was an emanation of the member state. The outcome of the examination of the appeal is not determined in any way by the national provision to which the question in the *Pawlak* case referred. Therefore, following the reasoning of the Court of Justice applied in the judgment in *Smith* case, the individual's situation in terms of substantive law (his right to or, no right to, a pension) would not change in any way.

In addition, it follows from the Court of Justice's judgment in *Pawlak* case that for the purposes of the principles of the application of EU law by national courts in so-called "incidental proceedings" – which involve the resolution of a certain procedural issue where the dispute in fact is not between two parties to the civil proceedings but between one party (in this case a member state) and a court (an authority of a member state) – the *Portgas* rule is not applicable.[33] Therefore, the national court, acting in its procedural role, is not – for the purposes of the principle of direct effect and the principle of primacy – treated as a member state. A national court can have this status only as a party to the proceedings (e.g. in a case concerning the claims of a court employee).

Therefore, the Court of Justice explained in its judgment in the *Pawlak* case that where one party to the civil proceedings was a member state (i.e. an entity which was its emanation) and the other a private entity (an individual), the national court could

[33] Case C-425/12 *Portgás – Sociedade de Produção e Distribuição de Gás SA v. Ministério da Agricultura, do Mar, do Ambiente e do Ordenamento do Território,* EU:C:2013:829, paras. 24-25.

not refuse to apply a national provision if the principle of the EU law's primacy led to any benefit (even if it was procedural only) for the state (or its emanation). However, it remains unclear whether judgments such as *Smith* preclude the possibility of not applying Art. 165(2) KPC in a dispute between individuals on the ground that it is contrary to Art. 7 of Directive 97/67. On the one hand, the *Smith* judgment may result in the view that in disputes between individuals, the provisions of a directive cannot be applied independently at all, in the sense that the provisions thereof cannot constitute a binding legal basis for deciding the case, nor can they serve to remove the national provisions contrary to EU law from that basis. On the other hand however, one could wonder whether the regulation resulting from the first sentence of Art. 7(1) of Directive 97/67 has the status of a rule defining "the substantive content of the legal rule on the basis of which the national court had to decide the case before it", as referred to in paragraph 53 of the judgment in the *Smith* case, since it can be argued that the first sentence of Art. 7(1) of Directive 97/67 does not affect the rights and obligations of the parties to the national legal relationship under substantive law. Should this be the case, by reference to the reasoning of the Court of Justice on the grounds of Directive 2015/1535 (formerly Directive 98/34), it could be assumed that the provision of the directive referred to could be applicable to issuing a decision on formal issues (admittance of an appeal), which would be compatible with EU law. However, it appears that for the reason of systematic coherence such an option should be excluded and it should be assumed, ultimately, that in a dispute between individuals the application of any provision of national law, including a procedural law, cannot be refused due to its incompatibility with an EU directive.

This, in turn, means that the interpretation of the first sentence of Art. 7(1) of Directive 97/67 made by the Court of Justice in its judgment in the *Pawlak* case would have a very limited application in practice if the national court held that it could not interpret, in conformity with EU law, the national procedural provision conferring a special right on the designated postal operator in a manner incompatible with EU law.

3.3. The limits of the duty to interpret national law in conformity with EU law from the perspectives of the Court of Justice and the referring court

Taking the above into consideration, the judgment in *Pawlak* case deserves analysis also, and perhaps above all, because of the way in which the effectiveness of EU law in the national legal order is ensured by a national court fulfilling its duty of interpretation in conformity with EU law. Interpretation may give rise to a providing a different meaning to a national provision. As a result of such an interpretation in conformity with EU law, a party to the main proceedings may acquire rights and where an obligation is imposed on [that party] which would not bind an individual, under an "ordinary" (simple, mostly linguistic) interpretation. Moreover, the status of the party to the proceedings as an individual or a member state is not relevant. Therefore, the interpretation of national law in conformity with EU law can be made both in favour of and to the detriment of individuals and a member state (or its emanation).

The judgment in and of itself does not bring much new to the understanding of the duty to interpret national law in conformity with EU law. However, what draws attention is the specific dialogue in that respect between the national court and the Court of Justice. In one of the questions referred for a preliminary ruling, the Supreme Court emphasised that if the Court of Justice found that the rule provided for in that provision was a special right contrary to Directive 97/67, then it could not interpret Art. 165(2) KPC in conformity with EU law by applying ordinary interpretative rules recognised in national law. In the preliminary assessment of the Supreme Court, an interpretation of Art. 165(2) KPC in conformance with EU law would entail the need to give to this provision a completely different meaning than that resulting from its literal interpretation, since the provision literally states that only "posting a procedural document at a Polish post office of the operator obliged to provide a universal service [...] is equivalent to lodging it with the court", while EU law infers that "posting a procedural document at a Polish post office of any operator entitled to provide a universal postal service [...] is equivalent to lodging it with the court." In addition, in the reference for a preliminary ruling, the Supreme Court pointed out that in accordance with national law the provisions of a procedural law are subject to a restrictive interpretation, whereas the interpretation of Art. 165(2) KPC in conformity with EU law would require a broad interpretation.

In this context, it should be noted that the Court of Justice in its judgment in the *Pawlak* case explicitly accepted the limits of interpretation in conformity with EU law, which the referring court had drawn attention to in its reference for a preliminary ruling. According to settled case law of the Court of Justice, the prohibition against interpreting national law *contra legem* is such a limit, justified by the principle of legal certainty.[34] This general principle of EU law is one of the barriers to the principle of effectiveness.[35] The principle of legal certainty also implies the admissibility of the introduction by the national legislator of provisions regarding the time limits for appeals and the accompanying procedural time limits. The former are intended to prevent the risk of undermining the permanence of legal relationships shaped by acts of the individual application of law. The latter are intended for the purposes of procedural economy and the proper administration of justice, thus enforcing the right of the parties to have their case heard without unjustifiable delay. The rules regarding procedural time limits in EU proceedings have the same function.[36] Thus, the national provisions containing such a rule as Art. 165(2) KPC have been recognised by the Court of Justice as serving to ensure the principle of legal certainty.[37] In turn, such a qualification justified the acceptance by the Court of Justice of the impossibility to

[34] Judgment *Pawlak*, para. 85 and cases referred there.

[35] D. Kornobis-Romanowska*, Pewność prawa w UE. Pomiędzy autonomią jednostki a skutecznością prawa UE* [Legal certainty in the EU. Between autonomy of individuals and effectiveness of EU law], C.H. Beck, Warszawa: 2018, pp. 142-146.

[36] Judgment *Pawlak*, para. 87.

[37] *Ibidem*, para. 88.

interpret, in conformity with EU law, a national procedural provision intended for the implementation of the values falling within the regulatory scope of the principle of legal certainty.

The Supreme Court, when deciding the case after obtaining the response of the Court of Justice in its *Pawlak* judgment, did not make use of the permission of the Court of Justice to limit the principle of the effectiveness of EU law by the principle of legal certainty and adopt a restrictive interpretation of the national procedural law in question. In its decision resolving the problem of lodging an appeal within the time limit through an undesignated operator,[38] the Supreme Court found that the interpretation of Art. 165(2) KPC in conformity with EU law was admissible and proper and held that this provision should be understood as meaning that "the posting of a procedural document through a postal operator other than the designated operator is also equivalent to lodging the procedural document with the court." A similar change of opinion by the Supreme Court regarding the limits of the interpretation of national law in conformity with EU law has already occurred. In the question referred for a preliminary ruling in *Polkomtel*,[39] the Supreme Court also expressed doubts as to the admissibility of an interpretation of the provision of national telecommunication law in conformity with EU law. However, in the judgment[40] issued after the preliminary ruling had been issued by the Court of Justice, the Supreme Court finally interpreted the national provision in conformity with EU law, according to the guidelines of the Court of Justice. However, it did not explain in more detail what interpretative measures were used to achieve such an effect. The adjudicating panel of the Supreme Court in the main proceedings in the *Pawlak* case behaved differently, and its reasoning could be of interest to a reader interested in the limits of the interpretation of national law in conformity with EU law in the practical operation of national courts.

According to the classic formula that had already been used by the Court of Justice, the interpretation in conformity with EU law should be "based on interpretation methods recognised in that law" and with their assistance "decide whether, and to what extent, the interpretation of a provision of national law can be made in accordance with a respective directive without interpreting that national provision *contra legem*."[41] Whereas in the Polish legal writings it has been argued that should it be impossible to ensure a situation of compliance between national law and EU law by a linguistic interpretation, the possibility of departing from that interpretation's result (incompatible with EU law) by the application of the methodology offered by the concept of a derivative interpretation of law could be considered.[42]

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[38] Order of the Supreme Court (seven judge chamber) of 29 August 2019, case III UZP 3/17.

[39] Case C-397/14, *Polkomtel sp. z o.o. v. Prezes Urzędu Komunikacji Elektronicznej,* EU:C:2016:256.

[40] Judgment of the Supreme Court of 9 June 2016, case III SK 28/13.

[41] Judgment *Pawlak*, para. 84.

[42] A. Sołtys, *Obowiązek wykładni prawa krajowego zgodnie z prawem unijnym jako instrument zapewniania efektywności prawa Unii Europejskiej*, Wolters Kluwer, Warszawa: 2015, pp. 539-542 and the literature referred therein.

The methodology applied by the Supreme Court shows that the starting point for departing from the results of the linguistic interpretation of a procedural provision is the EU normative model, as decoded by the Court of Justice in its judgment. Undoubtedly, the interpretation of EU law by the Court of Justice in response to a question referred by a national court, which clearly shows the contradiction between the national solution and EU law, is a direct encouragement for the national court to explore more thoroughly the admissibility of modifying the results of the "ordinary" interpretation. It is apparent from the *Pawlak* judgment that Art. 165(2) KPC is contrary to Art. 7(1) of Directive 97/67. This noncompliance justifies the assumption, based on the principle of primacy confirmed in Art. 91(3) of the Constitution of the Republic of Poland, according to which a norm of national law (decoded after "ordinary" interpretation) is contrary to a norm of EU law placed higher in the hierarchy of sources of law of that legal order. Pursuant to the national constitutional rule and the *Simmenthal* rule such national norm should not be applied, absent any limitations on the direct effect of directives. However, departing from the results of the linguistic interpretation of Art. 165(2) KPC is justified in such a situation by the same systemic considerations (conflict of norms at EU/national level). It seems that an analogous approach should be taken in all cases of the *acte eclairé* doctrine's application. In particular, the interpretation of the same provision of EU law in response to a question raised by a court from another member state would also entitle the Polish court to apply such a measure.

Next, the clarity as to the EU normative model makes it possible to take into account other arguments, starting with the purpose for the introduction of this particular national rule. The Supreme Court ruled that it was introduced into national law to implement an EU directive properly and to enforce an earlier judgment of the Court of Justice.[43] That justifies departing from the linguistic interpretation of the provision of national law, since the intention of the legislator was to introduce a rule which was in full compliance with EU law. However, the judgment in *Pawlak* case, issued subsequently, showed that this intention was not fully and correctly implemented, because the national legislator had misread the EU normative standard resulting from Art. 7(1) of Directive 97/67. It was thus up to a national court to correct this legislative error.

Another argument that the Supreme Court took into account when extending the limits of admissibility of an interpretation in conformity with EU law is the national (internal) systemic interpretation and the assessment of the rationality of the interpreted provision. In Polish procedural laws, the privilege of a designated operator had been introduced simultaneously into all three procedures (civil, criminal and court-administrative procedure), and subsequently it was withdrawn from the criminal procedure only. In the context of that change, the legislator assumed that this privilege no longer had any rational justification. Also, during the proceedings in the *Pawlak* case, as was noted by the Court of Justice itself, the Polish Government was not able

[43] Case C-325/11 *Krystyna Alder and Ewald Alder v. Sabina Orlowska and Czeslaw Orlowski,* EU: C:2012:824.

to provide any rational justification for maintaining the special right at issue in that case. This finding allowed the Supreme Court to consider the solution adopted in Art. 165(2) KPC (interpreted strictly) as being unreasonable.

In consequence, a national court should consider whether the application of a strictly linguistically interpreted provision will not lead to issuing an unfair decision. It results from the Supreme Court's decision that it would be unfair to dismiss the appeal of the pension authority (KRUS) as lodged after the time limit, because the use of a postal operator other than the designated operator resulted from the imposition on the pension authority, by the national legislator, of an obligation to select a postal operator providing services to that authority under a tender procedure. That tender has been won by an undesignated operator. As a result, maintaining the results of the linguistic interpretation of Art. 165(2) KPC would lead to an unjustified deterioration of the procedural situation of public institutions using the services of an undesignated operator. They would be placed in a situation wherein the time limit for bringing any procedural document would have be reduced by the time needed by an undesignated operator to submit the procedural document to the court's office before the expiry of the time limit provided for in the procedural law. Therefore, the principle of equality of the parties to the proceedings, which is a guiding principle of civil procedure, would be violated. The reference to the principle underlying the national procedure resulted in the inability to refer to constitutional values, such as the right to a court or prohibition of discrimination in cases involving state authorities.

The last argument to be addressed when deviating from the results of the linguistic interpretation of a national provision falling within the scope of the directive is to establish the actual function of the national rule in the context of the applicable general principles. The Court of Justice treated Art. 165(2) KPC as a provision implementing the principle of legal certainty, the respect for which justifies the introduction of limitations on the principle of effectiveness of EU law. However, the provision should be regarded not so much as aimed at the introduction of time limits to enforce the requirement of legal certainty in relation to lodging the appeal remedies, but rather as a provision aimed at facilitating public access to court. This provision transforms *de iure* each office of the designated operator into an administrative office of the competent court. Since no rational and noteworthy objective arguments for maintaining the privileged status of the designated operator have been raised, the suggestion of facilitating the individuals' access to court additionally authorises the extension, by means of a non-linguistic interpretation, of the solution provided for in Art. 165(2) KPC to include other postal operators.

CONCLUSIONS

It results from the above considerations that the *Pawlak* judgment rendered by the Court of Justice and the subsequent ruling of the Polish Supreme Court are noteworthy for several reasons. Firstly, this is so because of the interpretation of the term "exclusive

or special rights" within the meaning of Art. 7(1) of Directive 97/67 and Art. 106(1) TFEU. The Court of Justice, in answering the question referred for a preliminary ruling by the Polish Supreme Court, held that an exclusive or special right, within the meaning of the above-mentioned provisions of EU law, referred to granting a special procedural significance to the documents posted at the post offices of one postal operator, to the exclusion of all other operators. Thus the Court of Justice confirmed that the limitation of the procedural autonomy of member states could involve not only the principles of equivalence, of effectiveness or of non-discrimination on the grounds of nationality, but also a provision of EU secondary law requiring member states, as in this case, to regulate the market of postal services appropriately.

Secondly, these rulings further clarify the limits of the judicial application of directives and the interrelationships between the principles of direct effect and primacy. It must be assumed that the national court is not under an obligation to disapply national rules contrary to EU directives if such a disapplication leads to a result favourable for the Member State or its emanation.

Thirdly, a comprehensive use of a set of arguments resulting from the application of different interpretative tools allows national courts to defend a conforming interpretation of a national rule which otherwise – and at a first glance – should be considered as *contra legem*.

Last but not least, the *Pawlak* case deserves attention because of the dialogue between the Court of Justice and the Supreme Court dealing with the main proceedings. Firstly, the Supreme Court, before referring the questions for a preliminary ruling, reviewed its case law and found an inability to interpret the national law in conformity with EU law. This noncompliance justifies the assumption based on the principle of primacy confirmed in Art. 91(3) of the Constitution of the Republic of Poland, according to which a norm of national law (decoded after "ordinary" interpretation) is contrary to a norm of EU law placed higher in the hierarchy of sources of law of that legal order. Pursuant to the national constitutional rule and the *Simmenthal* rule, such a national norm should not be applied, absent any limitations on the direct effect of directives. It thus proposed a solution involving the application of the so-called *Jonkmann* rule. Next, the Court of Justice first confirmed the previous position regarding the possibility of relying on EU directives' provisions against individuals, and it subsequently accepted that the interpretation of national law in conformity with EU law – which could be used to remove a conflict of a national provision with EU law – might be subject to limitations (as indicated by the Supreme Court). However, in the end the Supreme Court, having regard in particular to the need to ensure the effectiveness of EU law, reconsidered the possibility of interpretation of the national procedural provision in question in conformity with EU law, and made such an interpretation. Thus it was the need to ensure the effectiveness of EU law that convinced the national court to overcome national limitations in applying the interpretation of national provisions in conformity with EU law.

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*Patrycja Grzebyk**

Marco Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar Publishing, Cheltenham: 2019, pp. 720

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Anyone who is a researcher or a teacher in International Humanitarian Law (IHL) has had the opportunity to read some of Marco Sassòli's works. One of his best-known publications – titled *How Does Law Protect in War. Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* (ICRC, English editions – 1999, 2005, 2011; French editions in 2003 and 2012) – was originally co-authored with Antoine A. Bouvier, and then jointly with Anne Quintin (from the third edition) and Julia Grignon (the online platform). This casebook, which has also been available online since 2014 (https://casebook.icrc.org) is an extremely useful resource tool, systematically updated and available in several language versions (Arabic, Chinese, English, French, Russian, Serbo-Croatian, Spanish). However, despite the fact that *How Does Law Protect in War* contains some introductory remarks to each of the chapters, which explain basic notions or rules of IHL, the publication is still only a casebook – not a handbook of IHL. Since it lacks detailed analyses, many problems are just remarked upon, with suggestions for further readings, and the explanations are very limited and rudimentary, thus leaving a reader with a feeling of wanting more.

Sassòli, who is also known for his tremendous teaching skills, was both tempted and encouraged – especially by his numerous students – to write a handbook on International Humanitarian Law. He finally decided to take up the challenge and he managed to achieve it in a great fashion. He has just published *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare*, Edward Elgar 2019.

However, do not be fooled by the title. It is not just a classic handbook which will make students' and researchers' lives easier by explaining the principles applied in armed conflicts in short and simple words. This is a full-fledged monograph, a treatise on IHL which confirms Sassòli's position as a master in all debates concerning IHL-related issues. Sassòli poses further questions, raises doubts, and provokes his readers to rethink their allegedly well-founded opinions. This is the *opus magnum* of a mature and

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sophisticated researcher who recapitulates all his knowledge, years of teaching, numerous publications, struggles to answer difficult questions, attempts to prove the relevance of IHL, participation in discussions, and last but not least his extensive practice.

Sassòli gained massive experience in the field of IHL when he worked for the ICRC from 1985-1997 (both at the headquarters and in the field, *inter alia* as head of the ICRC delegations in Jordan and Syria and as Protection Coordinator for the former Yugoslavia). During a sabbatical leave in 2011, he again joined the ICRC as Legal Adviser to its delegation in Islamabad. In consequence, Sassòli juggles examples from different armed conflicts. Not without meaning is the fact that Sassòli was based for years in Geneva (where headquarters of the UN and ICRC are located), from where he could participate in discussions and processes directed by ICRC or Swiss government (which plays the role of a depositary of the Geneva Conventions and their Additional Protocols). He could observe the changes in the ICRC's approach to IHL questions and its style of work. That is why his latest book, *International Humanitarian Law. Rules, Controversies, and Solutions to Problems Arising in Warfare*, contains such great insights into the development of IHL, the role of different institutions and people, and is full of anecdotes and thoughtful remarks from his decades-long perspective.

The reader receives a lengthy 628 page-long analysis of IHL (not counting indexes and introductory pages), of which every sentence is meaningful and requires full focus. Sassòli does not "lose" too much space to the bibliography or footnotes – a task which would mainly serve the purpose of mapping out the relevant literature which is covered in the collection of references contained in the aforementioned casebook. In his Introduction he explains that the two publications complement each other. However, there are still references (in several languages) not only to classic academic papers, but also to policy papers, blogs, and reports, proving that the author is *en courant* with the current debates.

The book's content is divided into 11 parts (Introduction; History; A general overview of IHL based upon its major delimitations; The sources of IHL; Respect of the law; Scope of application; International and non-international armed conflicts; The protective regimes; IHL and other branches of international law; Selected cross-cutting issues – which include the questions of authorization, terrorism, drones, lethal autonomous weapons, arms transfers, cyber warfare, PMSCS, gender, cultural heritage, humanitarian assistance, and non-state armed groups; Conclusion). What is remarkable in the case of this handbook is that there are no weak parts – the author feels comfortable in every aspect of IHL and has his reasoned opinions on each of the points discussed.

The handbook is an interesting read throughout, which is a great achievement when one takes into account that some issues, like the organization of camps for prisoners of war or the obligation to handle human remains, do not seem at first sight to be particularly fascinating issues. Sassòli chose to put references to particular provisions in footnotes, which makes his lectures smoother, but at the same time he always explains the reasoning behind particular solutions, and does not avoid expressing empathy (but not tolerance) even for those who violate the law. He uses many explanatory examples, and

explains non-legal factors which weaken or strengthen the respect for IHL. This is why his book is not only an expression of Sassòli's pre-eminent position on IHL-related problems and issues – which in and of itself is extremely valuable for researchers – but at the same time it is an accessible handbook for advanced (!) students (those who are starting their adventures with IHL should rather pick some less challenging lectures, like the Nils Melzer's *International Humanitarian Law: A Comprehensive Introduction*, 2019).

The great value of Sassòli's book is that it is written not from the narrow perspective of an IHL specialist, but that of a researcher with a profound knowledge of international law (Sassòli has lectured on international law (IL) at the University of Geneva for years), which is why he is able to clearly show the meaning of principles of general international law for IHL and at the same time precisely point out all the differences between, e.g., the classic understanding of sources of international law and its specific application to IHL. He demonstrates an extensive knowledge of IL literature and also of academia as such. As a researcher I enjoyed his rather sarcastic remarks concerning the temptation to be innovative and claim 'a paradigm shift' even against the wording of the law. The author has such strong positions that he does not have to hide his criticism even in reference to the ICRC, an organization with which he worked very closely and much appreciates its role.

In his analysis, he is open to argumentation derived from other branches of international law (like Human Rights Law or International Criminal Law (ICL)), which is still rare among IHL experts. An example of this profound, broad analysis is the subchapter devoted to terrorism, wherein he refers to different anti-terrorism conventions, judgments of international tribunals, and the history of anti-terrorism practice of different states in order to prove that the terrorist label cannot be used during armed conflict to deprive certain groups of their rights. He reminds readers that from the perspective of IHL as well as of ICL, attacks against military objectives (e.g. armed forces) cannot be considered as a violation of international law even if their aim was to spread terror among the civilian population. He stresses – which might be controversial – that it could happen that heavily armed terrorists must be classified in international armed conflicts according to IHL as civilians if they do not have combatant and/or POW status. Is this acceptable for states, or public opinion as broadly understood? Not necessarily, but Sassòli points out that "[i]n law, borderline cases never correspond to the ideal typical category envisioned by law-makers but nevertheless fall under its provisions" (p. 505). He thus meticulously explains different situations and shows what is and what is not possible during antiterrorism operations conducted during armed conflicts. Of course there are some points which might be debatable (e.g. when the author – based on the 1999 Convention for the Suppression of the Financing of Terrorism – argues that during armed conflicts only attacks against civilians can be criminalized; despite the fact that the 1999 Convention mentions "[a]ny act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization

to do or to abstain from doing any act." Thus the literal interpretation of this provision would suggest that attacks against members of armed forces who are not engaged in hostilities at a given time can also be treated as offences under international law.

Sassòli's positions can be described as realistic – not in terms of legal or international relations' realism methodology, but rather as pragmatism requiring only that which is feasible, achievable. This "realist", practical approach is stressed throughout whole book. He explains why some limitations are necessary and in the interest of the fighting parties, but at the same time he stresses that all obligations must be feasible. The will to alleviate suffering cannot disregard military necessity – the (majority of) wars are conducted in order to win them, and if everything is banned the fighting parties will disregard humanitarian provisions altogether. The legal provisions on the role of non-state actors in armed conflicts cannot disregard the fact that it is states which dictate the terms of the law and its practice, etc. The fact that there are significant gaps in the international framework does not push him into urging that the Geneva Conventions and their Additional Protocols must be revised, as he is fully aware that in the contemporary situation states would use this opportunity to weaken their obligations.

This handbook constitutes proof that it was well worthwhile to wait with the publication of the handbook until the subject matured in the researcher's mind, and to treat handbook as the opportunity to summarize years of research and as a crowning achievement. In sum, the book. *International Humanitarian Law. Rules, Controversies, and Solutions to Problems Arising in Warfare*, confirms Sassòli's position as an expert in the role of IHL, and specialists in other branches of international law should also take notice of this fascinating (how rarely can we can use this expression in reference to a handbook!) publication. The result is splendid. A giant, on whose arms other IHL researchers can grow, has spoken. It is well worthwhile to listen to him.

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*Przemysław Saganek**

Lukasz Gruszczynski (ed.), *The Regulation of E-cigarettes: International, European and National Challenges*, Edward Elgar Publishing, Cheltenham: 2019, pp. 320

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One of the most important trends in the law studies is connected with the legal evaluation of new economic and/or social phenomena and technological developments. The book edited by L. Gruszczynski[1] refers to a matter which has elements of all of them, although it describes just one group of products. E-cigarettes seem to be a niche subject, perhaps no more interesting than thousands of other products (at least other than water, food and energy). It may however be astonishing for scholars engaged in the traditional way of approaching international law (subjects of law, its sources, responsibility etc.) how many interesting perspectives, unexpected legal conclusions, and real challenges are connected with e-cigarettes. It must be stressed that term "e-cigarettes" is just an everyday shorthand term; the scientific term used in the book is ENDS (i.e. Electronic Nicotine Delivery Systems).[2] For reasons of simplicity the former term will be used here, however.

L. Gruszczynski – both the editor and author/co-author of three contributions (an introduction and two chapters) – is a recognized specialist in international law who has long been engaged in the legal analyses of matters connected with tobacco and cigarettes. His great achievement was to convince eminent authors to cooperate in the making of a publication which is not a loose collection of separate texts, but a systemically organized whole. The book is a product of the work of 18 specialists. It is worth noting that some of them are lawyers, some specialists in medical sciences, and other experts in psychology. The resultant collaboration consists of 11 contributions. Their methodologies differ to a high extent owing to the specialities of the respective authors. The book is divided into three (unequal) parts. The first refers to the interrelationship between science and

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[1] L. Gruszczynski (ed.), *The Regulation of E-cigarettes: International, European and National Challenges*, Edward Elgar Publishing, Cheltenham: 2019.

[2] *Cf.* L. Gruszczynski, *Introduction: Regulating e-cigarettes in the face of uncertainty*, in: Gruszczynski (ed.), *supra* note 1, p. 5.

the law on e-cigarettes. The second part presents the problem of e-cigarettes from the perspective of international and European law. Last but not least the perspective of domestic law is examined in the last part. There is no doubt that the second part is the most important and interesting for international lawyers. It is also the longest, comprising five chapters. They refer to the relationship of e-cigarettes to the Framework Convention on Tobacco Control (Framework agreement, or Convention), to human rights, and to WTO law and EU law (two texts).

It would be neither possible nor wise to try to summarize all the texts (though it will be necessary to refer to some of them in more detail). It may be more interesting to start with the interrelationships among them, which are numerous. One of them deals with the nature of e-cigarettes, which can be looked at from different perspectives. Let us start with the legal qualifications. From this perspective one should ask in particular whether e-cigarettes are tobacco products. If so, the rules on the Framework agreement would be applicable to them. If not however, what should be done, or maybe what are States obliged not to do? The WTO perspective may caution against measures which are discriminatory with respect to e-cigarettes, even if they are not tobacco products but are similar to them. There is nowadays no doubt as to the powers of the EU to regulate these matters (though in the past their strict interrelationship to human health was an obstacle to recognition of such powers on the part of the pre-Amsterdam EC). The perspective of human rights may lead to a much more complex set of possible or even mandatory reactions on the part of States. The comparison of texts adopting those perspectives makes it clear that extra-legal analyses are indispensable for many (even if not all) of the legal qualifications of e-cigarettes. For this reason one should very highly evaluate the decision to devote the entire Part I to natural sciences dealing with e-cigarettes. The authors of chapters on the legal aspects of e-cigarettes may refer to two very valuable contributions contained in Part I, though some of them find it inevitable to adopt some assumptions on their own. The main dilemma visible in several texts is whether e-cigarettes should be deemed a danger to health, or whether they represent an opportunity for smokers to quit smoking. It may be that both answers are true, in which case a weighing of the respective merits and drawbacks would be necessary. In this regard the two main points of reference are the gateway effect, and harm reduction. The gateway effect relates to the risk of e-cigarettes as an element attracting non-smokers to start smoking (or maybe simply using e-cigarettes). Harm reduction is associated with the fact that switching from traditional combustible cigarettes to complete abstinence may be impossible for many smokers, and their switch to e-cigarettes reduces the adverse health effects.

A contribution by Ch. A. Smith, A. Herbeć and L. Shahab analyses the scientific evidence concerning e-cigarettes. It takes as a point of departure the risks connected with the constituent elements of e-cigarettes, namely nicotine, propylene glycol, glycerine, and flavours. Subsequently the authors report on several tests dealing with the effects of e-cigarettes. They examine the health effects of e-cigarettes and their impact on tobacco use and harm reduction. There are two common elements in their reports. The first

is that they all underscore the need for further studies. The second is a prima facie conclusion that e-cigarettes are less harmful than combustible cigarettes. It seems that the co-authors are impressed by the words of M. Russell: "People smoke for nicotine but they die from the tar."[3]

A slightly different perspective is adopted by the authors of a chapter on 'e-cigarettes as a disruptive technology in the history of tobacco control.' While the very title suggests a legal perspective, in fact it is a brilliant contribution by two eminent specialists in public health and the history of medicine – M. Zatoński and A. M. Brandt. They look at e-cigarettes from the perspective of their inventors and producers. There is still one more perspective which cannot be ignored, which contains a message both convincing and inspiring. E-cigarettes are looked at as an instrument in the game of Big Tobacco (leading producers of tobacco products) vs. national regulators. This can be seen as a source of confusion for the latter, with some of them being confronted even with claims to treat e-cigarettes as a medicinal product.

The value of the conclusions and observations from Part I can be easily seen in the legal analyses of the remaining two parts. One should very highly appreciate the discussion concerning the application of the Framework Convention on Tobacco Products to e-cigarettes (by L. Gruszczynski). The basic underlying question is whether e-cigarettes are tobacco products. If so, several obligations provided in the Convention would be applicable to them. The analysis takes as a point of departure the technical properties of e-cigarettes and confronts them with the conventional definition of tobacco products. Gruszczynski's text is insightful in and of itself, but its added value is as an illustration of the classification problems encountered in analyses of this type. The initial conclusion, i.e. that e-cigarettes are not tobacco products because they do not contain tobacco leaf must be confronted with the fact that a slight widening of the meaning of the basic terms can also lead to a contrary conclusion (as e-cigarettes contain nicotine obtained from tobacco leaf). The same applies to the adoption of the teleological interpretation of the Convention. This well illustrates the dilemma for regulators, the possible victory of Big Tobacco and the potential of future disputes (rather "show no mercy" disputes if we take into consideration that Big Tobacco means big money). One should add to this that it would be naive to expect the fourth generation of e-cigarettes to be the last word. On the contrary, the game has just started. For example, what are the legal implications if nicotine is obtained from products other than tobacco? Would such nicotine not be similar to nicotine obtained from tobacco leaves?

The analyses of e-cigarettes from the perspective of the WTO rules should also be greatly appreciated. Though one might expect that the main point of reference would be Art. XX of GATT 1994, the authors of the chapter decided to take as a point of departure the prohibition of discrimination. This refers first of all to the situation of e-cigarettes as compared to traditional combustible cigarettes. This analysis is applied both with respect to Art. III of GATT, the Agreement on Technical Barriers to Trade, as

[3] Ch. Smith, A. Herbeć, L. Shahab, *Review of the Scientific Evidence Relating to Electronic Cigarettes: Where do we stand now?*, in: Gruszczynski (ed.), *supra* note 1, p. 53.

well as to Art. XX of GATT. The co-authors (M. Foltea and B. Mercurio) try to predict the future decision of panels/the Appellate Body with respect to a possible ban of e-cigarettes. One can only regret that the analysis is not extended to cover matters other than the similarity between traditional and electronic cigarettes. It seems to me that the main reason for this is the fact that the exact influence of e-cigarettes on human health is still unknown (although they are suspected to be much less harmful than the that of combustible tobacco).

The contribution on the human rights perspective seems to me the most controversial. In my opinion the main underlying human rights-related question concerning smoking (assuming that the use of e-cigarettes is smoking[4]) is whether there is a human right to smoke and possibly a human right not to be a passive smoker against one's will. While the latter could be easily associated with the right to health, it is much more difficult to find human rights terminology for the former. Perhaps it should be associated with the right of personal freedom. In any case this important perspective is completely outside the scope of interest of the co-authors of the respective chapter. This seems all the more unsatisfactory given that the process of prohibiting smoking in more and more places was referred to in the book.[5] What is more doubtful is the adoption of the right to health as a main point of reference. The co-authors seem to treat this second generation right as if it constitutes the basis for a claim. What is even more striking are the sets of obligations of States advocated by the co-authors. On one hand they speak in favour of taking a strict attitude toward e-cigarettes as products harmful to health. At the same time, they also assert a need to guarantee access to e-cigarettes if they are to be treated as medicinal product.

EU law is the topic of two chapters. Both describe Directive 2014/40 and the ECJ ruling in case C-477/14 Pillbox, in which the Court upheld its provisions on e-cigarettes. A systemic presentation of both elements can be found in the chapter by L. Gruszczynski and A. Pudło. What is of special value is their review of domestic law solutions. They compare the solutions adopted by Member States with respect to e-cigarettes before the adoption of the Directive with those adopted on the basis of express empowering provisions of the Directive. The co-authors decide to analyse the elements of the Pillbox case point-by-point. One can wonder if there is sense to devote so much space to the subsidiarity principle, taking into consideration that the EEC/EC/EU has harmonized product after product since the 1960s. One can guess that the true reason for devoting such an amount of space to this issue is the fact that the provisions on e-cigarettes were absent in the Commission's proposal and found their place in the Directive on the basis of an amendment of the European Parliament. This gives rise to serious doubts as well as to a feeling of helplessness – legal arguments can be easily used to justify almost every product of possible lobbying. The co-authors try to be as dip-

[4] For more on this dilemma *see* M.E.C. Gispen and J.D. Veraldi, *A human rights approach to the regulation of electronic cigarettes*, in: Gruszczynski (ed.) *supra* note 1, p. 91.

[5] *Cf.* M. Zatoński and A.M. Brandt, *Divide and Conquer? E-cigarettes as Disruptive Technology in the History of Tobacco Control*, in: Gruszczynski (ed.) *supra* note 1, p. 25.

lomatic as possible toward the ECJ. A much more critical attitude is adopted by G.A. Ferro and C. Nicolosi in their text on the precautionary principle in the EU law. They do not hesitate to call the attitude of the ECJ as mistaken.

The comparison of several texts makes it possible to offer a few more general observations. One of them refers to attitudes toward the sources of law. Some authors show a tendency to treat several non-binding acts as sources of law. I take a very critical attitude to argumentation of this kind. One of the main virtues of lawyers is their ability to distinguish between law and non-law. In fact combining the two is becoming a very widespread and far-reaching tendency, which can be easily traced in the works of the International Law Commission as well. Non-binding resolutions start to be treated as sources of "unwritten law", while in fact they are "written non-law." That is why I highly appreciate the perceptiveness of L. Gruszczynski in pointing out this matter.

The texts on the EU law are a natural introduction to the analyses of domestic provisions. The editor did not adopt the simple method of presenting one legal order prohibiting e-cigarettes, one regulating them heavily, and one adopting a laissez-faire attitude. On the contrary three texts are devoted to the provisions in place in, respectively, the USA, China (and Taiwan), as well as in Australia. They show the subtleties and difficulties of domestic laws dealing with e-cigarettes.

This book is a very useful tool for both theoreticians and practitioners of law. It is also a sign of the times. I hope that the future will bring with it similar contributions on new products with important legal implications.

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*Marcin Kałduński**

Antonio Augusto Cançado Trindade, *The Access of Individuals to International Justice,* Oxford University Press, Oxford: 2011, pp. 236

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Antonio Augusto Cançado Trindade, *Vers un nouveau jus gentium humanisé: Recueil des opinions individuelles du juge A.A. Cançado Trindade*, L'Harmattan, Paris: 2018, pp. 1038

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It is not common for a judge in office at the World Court to publish a book on important subject of international law. But Judge Antonio Augusto Cançado Trindade is widely recognized as an outstanding and eminent defender of individuals and human rights in the contemporary international society. To this end, he successfully undertook a challenging venture to publish a book with all the bearing of a system of international law, a treatise, which was a significant attempt at reinstating the whole *corpus juris* as an obligatory, normative framework of contemporary international community in the years to come.[1] Moreover, he has also published enormously on the topic of human rights and the protection of individuals under both domestic and international law. As a judge, both in the Inter-American Court of Human Rights during the period 1991-2006 and in the International Court of Justice (since 2007 until present), he not only disseminated his approach to international law, but also introduced his methods of legal thinking into the world of legal practice. To tell the truth, Judge Cançado Trindade espouses a strong faith in the international legal order to fulfill the needs of mankind in general and each individual human being in particular, as opposed to selfish and particular self-interests of States. Therefore, he is preoccupied with, *inter alia*, human rights, international humanitarian law (in particular, with the crimes against

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[1] A.A. Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium*, Martinus Nijhoff, Leiden, Boston: 2010.

humanity and war crimes), self-determination of people, environmental protection and disarmament.

The books present a characteristic feature of his views and progressive approach to international law sometimes referred to as "humanization of international law" (*The Access,* p. 49). His concepts such as "universal juridical conscience", "***droit au Droit***", "*ius necessarium*", and "*recta ratio*" form the basis and the foundation on which his vision of international law has been structured. Interestingly, the author speaks impliedly of the role and responsibilities of international lawyers in the contemporary world. International law has evolved, explains Judge Cançado Trindade. Human beings have benefited therefrom, and international law has thus enriched and justified, freeing itself from the chains of statism, and meeting its original vocation, that of a true *jus gentium*. We have been witnessing for almost two decades the evolution of international law to the International Law of Human Rights. This law, essentially victim-oriented, discloses the new ethos of our times: that of the emerging primacy of the *raison d'humanité* over the old *raison d'État* (*The Access,* p. 208).[2] In this vein, the books contend that the right of access to justice constitutes a cornerstone of the international protection of human rights.

Therefore, both books seem to suggest that the more human-oriented approach is an overarching and indispensable element for systematic conception of international law. Thus, the fundamental task of an international lawyer is to cement the right of access to justice for all people in all circumstances against all odds, in every situation and without regard to any obstacles whatsoever.[3] In the end, a new international law (a new universal *jus gentium*) of our time will be shaped with an individual positioned at its very centre.

The access to justice is a basic and fundamental right of individuals. Indeed, Judge Cançado Trindade places a great weight on the access to justice and the right to individual petition both in his scholarly writing and judicial practice.[4] In his view, such access represents the essence of the international protection of human rights. It forms the foundation of legal protection granted to individuals under international treaties. It comprises both due process of law, the right to fair trail and the execution of judgments in good faith. In his own words:

> [t]he right of access to justice *lato sensu* comprises not only the formal access to justice (the right to institute legal proceedings), by means of an effective remedy, but also the guarantees of the due process of law (with equality of arms, conforming the *procès équi-*

[2] *Ibidem*, at 28.

[3] A. Kozłowski, *The Normative Dimension of the Conception of the Individual Presented in Opinions of Judge Antônio Augusto Cançado Trindade of the ICJ: Fundamental Elements*, 5(2) Wroclaw Review of Law, Administration & Economics 1 (2015), at 3; R.P. Barnidge, Jr., *The Contribution of Judge Antônio Augusto Cançado Trindade to the Adjudication of International Human Rights at the International Court of Justice*, in: J.A. Green, C.P.M. Waters (eds.), *Adjudicating International Human Rights: Essays in Honour of Sandy Ghandhi,* Martinus Nijhoff, Leiden, Boston: 2014, pp. 34-49.

[4] *See e.g.* Separate Opinion Separate opinion in the case of *Unilateral Declaration of Independence*, Advisory Opinion, 22 July 2010, ICJ Rep 2010, pp. 553, 602, paras. 90, 196. *The Access,* p. xxvii; *Vers un noveau* Jus Gentium, part II, section 4.

> *table*), up to the judgment (as the *prestation juridictionnelle*), with its faithful execution, with the provision of the reparation due. The realization of justice is in itself a form of reparation, granting satisfaction to the victim. In this way those victimized by oppression have their right to the law (*droit au Droit*) duly vindicated.[5]

In the same line, Judge Cançado Trindade claims that the government of a State which incurs grave and systematic violations of human rights ceases to represent the people or population victimized.[6] It seems therefore that such a State foregoes its very right of existence, since its primary purpose is to effectively protect its own individuals (both nationals and other human persons under its jurisdiction).

Judge Cançado Trindade's *Access to Justice* forms the main part of the present review. The whole book is filled with valuable reflections which might give rise to a polemic and be contested under various theoretical headings, but their value is that they are in many respects thought-provoking. Additionally, Judge Cançado Trindade formulated his own original conclusions with respects to access to international justice, in the area which – as the reader will see – is one of the most prominent aspects in the protection of human rights.

Judge Cançado Trindade's book on *the Access to Justice* aims to provide an encompassing, systematic framework for access to international justice. He admits it himself while stressing that the approach pursued in the book purports to dedicate special attention to the consolidation of the position of individuals before international tribunals, in particular those of human rights (*The Access,* p. xxviii). The book consists of eleven chapter: the historical recovery of the individuals as subject of the law of nations (I), the exercise of the rights of access to international justice: the right of international individual petition (II), access to justice at international level and the right to an effective domestic remedy (III), the interrelation between the access to justice (right to an effective remedy) and the guarantees of the due process of law (IV), access to international justice in relation to the interaction between international law and domestic law (V), access to justice: the safeguard and preservation of the integrity of international jurisdiction (VI), new developments in the notion of "potential victim": the preventive dimension of protection (VII), the protection of victims in situations of great adversity and defencelessness (VIII and IX), access to justice of victims of massacres and crimes of State (X), the overcoming of obstacles to direct access to justice (XI). The reader is introduced to basic problems of the book in the concise and synthetic introduction and the results of the research are presented in the final conclusions. It is quite visible that, from the perspective of the whole book, the theoretical parts seem to be most important. Of course, it does not mean that other considerations, in particular of practical nature, do not deserve careful attention.

The review will focus especially on a cursory overview of the book's content, naturally, with some attention being paid to *Vers un nouveau jus gentium humanisé*. The

[5] Dissenting opinion in the case concerning the *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 3 February 2012, ICJ Rep 2012, p. 179, at 289, para. 310.

[6] *See* Separate Opinion in the case of *Unilateral Declaration of Independence*, Advisory Opinion, 22 July 2010, ICJ Rep 2010, p. 553, at 602, para. 180.

monograph begins with some historical background exposing the author's approach to international law. Eventually, Judge Cançado Trindade concludes with an obvious observation that the individual is a subject of both domestic and international law endowed with basic rights and obligations. All law exists for the human being and the law of nations is no exception to that (*The Access,* p. 13). To confirm that, the book continues with the analysis of the right of international individual petition to which the author refers as the judicial mechanism of the emancipation of the human being vis-à-vis his own State. In this regard, Judge Cançado Trindade argues that only through the individual petitions – an important and most dynamic mechanisms of international protection of human rights – the direct access of the individual to justice at international level is guaranteed. It proves that the process of humanization of international law is an undeniable reality.

The book continues in the next chapter with the vast reassessment of the access to justice at the international level and the right to an effective domestic remedy. The author focuses especially, and rightly so, on the *Castillo Paéz versus Peru* case (1997) and Art. 25 of the American Convention. He also discusses the converging case law of both the European Court and the Inter-American Court to conclude that the right to a domestic remedy constitutes one of the basic pillars of the rule of law in a democratic society. Consequently, Judge Cançado Trindade turns his attention to the interrelation between the access to justice and the guarantees of due process (chapter IV). Again, he reviews the case law of both the European Court and the Inter-American Court. Several important and apt observations have been made here, for example, that the correct administration of justice is one of the essential elements of the *État de Droit* and it includes by necessity the faithful execution of judgments (*The Access,* p. 72). All in all, the State are under a duty to provide full access to justice, by means of effective domestic remedies, in conformity with the guarantees of the due process of law. Only in such a scenario the realization of justice is fully secured.

Perhaps the most stimulating aspects of Judge Cançado Trindade's ideas are to be found in the next chapter. The author also devotes much of his attention to the access to international justice in relation to the interaction between international law and domestic law. This part seems to be of special relevance for the book as a whole. He rightly points to Art. 27 of the VCLT to argue that States cannot invoke the international difficulties or gaps in domestic law in order to justify non-compliance with the obligations provided for by the human rights treaties. He also persuasively suggests that both domestic law and international law cannot be seen in isolation and in a compartmentalized way: both are intertwined and constantly interact. Therefore, one may speak of efficient and genuine human rights only if domestic law and international are taken as the single law devoted to the protection of human person. To this end, the States must fulfil its general obligation to bring domestic law into conformity with human rights treaties. It will improve the national systems of judicial protection. It should also be noted that the consolidation of domestic law and international law with a view to effectuating human rights is clearly visible through the evolution of the rule of exhaustion of local

remedies (which is not unlimited) and the principle of complementarily prevailing in international criminal law.

The book proceeds on with an exposé on the institutional aspect of the international protection of human rights. Access to justice by individuals requires an international structure with full integrity and effectiveness, including the secure execution of judgments and the compliance with the conventional obligations by States. Judge Cançado Trindade traces the development of international human rights tribunals and their converging case law to conclude that it sets certain limits on State voluntarism. He also emphasizes the primacy of consideration of *ordre public* over the will of individual States.

The Judge sees it fit to stress the importance of the new developments in the notion of the "potential victim" as central element in the international *contentieux* of human rights which experienced a noticeable enlargement in the recent years due to the activity of human rights tribunals. Then he moves forward to discuss in two parts the protection of victims in situations of great adversity or defencelessness (in particular, migrants and civilian in situations of armed conflicts). More importantly, the author elaborates on the access to justice of victims of massacres and crimes of State (chapter X). The human right tribunals have always experienced certain difficulties in trying the cases and determining international responsibility as well as the condition of a victim. To ensure effective protection, Judge Cançado Trindade correctly expends the notion of direct victim. He also emphasizes the victims' right to redress. It is his view that the crimes of State do exist despite the work of the International Law Commission and its decision not to include the notion of crimes of State into the draft articles on State responsibility. He opines that crimes of State have been not only State-sponsored, but also State-conceived, State-planned, State-financed and eventually executed by States in their own capacities (*The Access,* p. 191). Moreover, the concept of crimes refers to the most heinous acts that breach basic human rights. Humankind has undergone indescribable sufferings until attaining the degree of human consciousness that sets the *raison d'État* limits. Therefore, the notion of crimes should be applied in order to underline the atrocity of acts of States.

The relevance of the individual right of access to justice is thus beyond question (*Vers un noveau* Jus Gentium, part II, section 4).[7] The concluding chapter of the book deals with the perspectives of the ongoing development of the access to justice. It also includes a set of important observations. In chapter XI, Judge Cançado Trindade persuasively explains why the laws of self-amnesty are utterly at variance with human rights treaties. His attention has also been focused on the obligation of States to ensure the effective access to justice and the guarantees of due process. He also believes that the material content of *jus cogens* has expanded and at present encompasses the absolute prohibition of all forms of torture, the basic principle of equality and non-

[7] *See* Dissenting opinion in the case concerning the *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 3 February 2012, ICJ Rep 2012, p. 179, at 289, para. 69.

discrimination, and the right to access to justice. The human rights values have formed the basic foundation of the international legal order and these values care to ascribe to human rights concrete expression (*The Access,* p. 205). It may be discussed whether his conception of the content of *jus cogens* reflects the prevailing international law as it exists now, as it still seems that there is no consensus as to which human rights are indeed considered *jus cogens*. But for Judge Cançado Trindade, the rights of human person are prior and superior to the rights of States, and, seemingly, therefore the basic human rights form a part of *jus cogens*. The human rights include the peremptory access to justice which comprises, *inter alia*, the right to initiate proceedings (and, in particular, the international individual petition) before international tribunals and the guarantees of due process of law as well as the right to due protection by means of the faithful compliance with, or execution of, the judicial decisions of those tribunals (*The Access,* p. 210). Ultimately, both the Inter-American and the European Courts have safeguarded the access to international justice as they have overcome obstacles to the individual petitioners' direct access to justice. This reassuring evolution is due to the awakening of the universal juridical conscience, heralding a new *jus gentium*, which Judge Cançado Trindade identifies as the "ultimate material source of law", noting the limitations of positivism and the misapplication of the rule of State consent.[8]

It needs to be mentioned that the book on access to justice clearly reflects prodigious research and erudition. The author took into account the decisions of international courts and tribunals as well as the work of the International Law Commission. He also relies on an impressive number of publications written on the subject which includes authors from various States and legal cultures. Therefore, the book is a result of diligent and arduous work. The reading of the book confirms that the author critically assessed the current state of international law and arrived at many interesting and significant conclusions. Each section of the book is extensively footnoted with detailed, multinational and relevant references to the normative texts and instruments, the universal and regional case law and an ample choice of legal writing. The book is accompanied by an extensive list of cases; a table of international treaties, conventions, and instruments; and a 17-page selected bibliography. It is well suited for international human rights courses at postgraduate university level and could also be an important guide for international human rights practitioners. This observation is reinforced by the fact that the book's content and structure is the outcome of a general course on international human rights law delivered by Judge Cançado Trindade at the Academy of European Law of the European University Institute in Florence in June 2007.

In sum, both books are definitely worth reading. In particular, the book on Access to Justice has several strengths. First of all, it is still timely in addressing the current dilemmas of human rights. It tries to persuade the reader that the individual access to international justice is an important step in the evolution of international law. Judge

[8] Cançado Trindade, *supra* note 1, pp. 144 and 166. He also notes that: "[m]any international lawyers nowadays seldom dare to go beyond positive law, being on the contrary receptive, if not subservient to relations of power and dominance, and thus paying a disservice to International Law."

Cançado Trindade warns us that the failure to develop and protect the access to justice poses a significant threat to the development of international law and, ultimately, to the international community of States. Indirectly, he suggests that that the college of international lawyers and, in particular, international judges, have a particular role in defending the international rule of law and ensuring protection of vulnerable interests of individuals. Therefore, the author's idea should become the law at some point of the near future. Therefore, the book has its original significance for the future: it contributes to the correct evolution of international law by way of academic scholarship. Judge Cançado Trindade must be applauded for taking up again a difficult and complex subject. His considerations are interesting and valuable. His theoretical discussion on various aspects of access to justice presents an in-depth analysis and compels to rethinking of the concept of access to justice. The breadth of issues and the richness of arguments certainly proves that the author fully committed himself to the subject matter. It is increasingly understood in the field of the theory of human rights and international law as a whole that the full understanding of international law can only be achieved with a sound grasp of human rights and, in particular, the access of individuals to justice. Therefore, the added value of the book is the discussion on the legal foundation of public international law. Besides, the book remains an excellent stand-alone resource; perhaps not a one-stop shop, but a point of departure for more detailed discussion of various aspects of human rights and international law itself.

Of course, it is not possible, in a review of such books, to comment in detail on every aspect demanding special attention. Nevertheless, it follows from this brief description that the books under review are well-researched and very erudite pieces, giving evidence of the author's sound knowledge of international law. Judge Cançado Trindade does not avoid a discussion of thorny issues and confidently presents and defends his views. I would venture to conclude that anyone with a genuine interest in international law would immediately identify the books as an impressive example of the work on international human rights and the basis of international law.

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Julien Chaisse (ed.), *China's International Investment Strategy: Bilateral, Regional, and Global Law and Policy*, Oxford University Press, Oxford: 2019, pp. 560

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Since the implementation of its reforms and opening-up policies in 1978, China's outward foreign direct investment (OFDI) has become one of the largest worldwide in terms of stock and flow. The volume of China's OFDI reached USD 143.04 billion in 2018, which accounted for about 10% of the world's total. By the end of 2018, the stock level had been stable at over USD 1.98 trillion, and there were about 43,000 overseas investment enterprises in over 80% of the world's countries and regions.[1] China also has a large network of international investment treaties; it has concluded 137 bilateral investment treaties and 16 free trade agreements, covering 24 countries and regions. In addition, by the end of 2019 about 138 countries and 30 international organizations had signed the One Belt And One Road cooperation document with China.[2] China's OFDI has formed a pattern of diversified investments with respect to both the location of their investments and investment subjects.

In this context, the 2019 book under review. titled: "China's International Investment Strategy: Bilateral, Regional, and Global Law and Policy" constitutes a substantial contribution to this vivid and vast subject. Chinese law and policy is – like China itself – very broad and complex. The book's Editor undertook the very difficult task of presenting, in only one volume, this profound and vast subject. The complexity of this issue stems from at least two main sources. Firstly, when discussing Chinese Law and Policy, we are referring to the treaty-making practice of China, with its immense amount of

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[1] *See* the official website of the Ministry of Commerce of PRC (MOFCOM): "Statistical communique on China's outbound direct investment (ODI) in 2018", available at: http://fec.mofcom.gov.cn/article/tjsj/tjgb/201910/20191002907954.shtml (accessed 30 June 2020).

[2] *See* Belt and Road Portal, available at: https://www.yidaiyilu.gov.cn/gbjg/gbgk/77073.htm (accessed 30 June 2020).

treaties with almost all of the countries of the world.[3] Secondly, the peculiarity and complexity of the Chinese system itself should be noted, as many non-Chinese lawyers tend to forget the great diversity within China and its regions,[4] its robust and complex history, and sometimes it is very different legal system.[5] Yet the text under review not only both introduces and explains to the reader the peculiarities of the internal Chinese system, but it also explores the evolution of China's international investment laws and policies from the bilateral, regional, and global perspectives. Moreover, it elaborates upon the issues on the frontier of Chinese international investment law; covers a wide range of topics; and provides insightful inferences that allow for the further study of China's international investment laws and policies.

The wide range of contemporary and relevant issues addressed, alongside with its distinguished authors, including Julien Chaisse who, as the editor of *China's International Investment Strategy: Bilateral, Regional, and Global Law and Policy*, has set the bar of expectations amongst readers very high. So the question arises: Is the appetite of the reader satisfied by this book? As is always the case with such ambitious projects (this manuscript contains 27 chapters), there is a danger that the reader could be proverbially tossed between the various issues like a small boat navigating a rough sea. How many promising books have turned out instead be more akin to a patchwork of various articles?

This work takes us on a journey through the complexities of Chinese International Investment Strategies. As is often case, it is sometimes difficult to logically divide and organize the abundance of thought-provoking ideas and analyses into chapters and sections. But, as promised in its title, the Editor built the book's content around three "tracks", namely Bilateral, Regional, and Global, which are identified in its Introduction (see p. 3). This is the glue that binds all of its numerous and diverse chapters together; serving as a *leitmotif* throughout the monograph that plays from the very beginning to the very end. This tripartite approach to international investment law, policy, and strategy will allow the reader, in the opinion of the Editor, to better understand both contemporary and future Chinese relations. And indeed the content of the book, which addresses so many aspects, does contribute significantly to the understanding

[3] *See* UNCTAD Investment Policy Hub, available at: https://investmentpolicy.unctad.org/international-investment-agreements/countries/42/china (accessed 30 June 2020).

[4] For example, according to article 13 of the《中华人民共和国外商投资法》[Foreign Investment Law of the People's Republic of China]: "The State, in light of needs, sets up special economic zones or implements pilot policies and measures for foreign investment in some regions to promote foreign investment and expand the opening-up." available at: http://www.npc.gov.cn/npc/c30834/201903/121916e4943f416b8b0ea12e0714d683.shtml (accessed 30 June 2020).

[5] *E.g.* the legislation and institutional innovation in China's pilot free trade zones. *See* H. Xiaoyong, X. Kai, *Practice and Reflections Regarding Local Legislation in Shanghai Pilot Free Trade Zone*, 2 Local Legislation Journal 24 (2019); X. Chang, *Critical Thinking and Practical Path of Legislative Modes of China's Pilot Free-Trade Zones*, 1 Journal of ZheJiang University of Technology (Social Science) 98 (2020); G. Baihua, *The Change of the Perspective of Rule of Law from China's Free Trade Pilot Zone to Free Trade Port*, 3 Journal of Political Science and Law 109 (2019).

of Chinese law and policy. Such a vast and extensive topic as Chinese international investment strategy totally warrants 27 chapters – yet the combination of these 27 different approaches and issues is by no means chaotic, but instead harmonic and well-constructed. Even if many readers will only reach for the book to explore a particular chapter, this is still a text worth reading from cover to cover.

The book consists of five parts. The first part presents and explains the local forces of China's international investment policy, set within a landscape of inward and outward investments. It elaborates upon issues related to free trade zones, sustainable development, and taxation in China. This part gently introduces the reader to the subject by explaining the factors of Chinese policy which are crucial at both the national and/or local levels, which also plays an extremely important role in the further analysis of the international plane, such as the problem of State-Owned Enterprises. The second part consists of chapters which contribute to the understanding of the bilateral activities of China on the international plane. In this part the presentation of, and deep discussions on, the extremely important bilateral relations, such as between China-US or China-EU, alongside their negotiations in progress, are discussed. Furthermore, the general evolution of the 4th generation of Chinese BIT is addressed, in addition to their particular relations with other States; from which some general lessons may be learned. The third part moves from the bilateral to a regional prong, especially focusing on China's relations in the Asia-Pacific region. To fully understand the peculiar position of China in the region's investment policy, it has to be understood that the main focus of China's relations is not the EU or America, but their home turf and the countries of the region. Therefore, this part exhaustively presents relations with the various States or Regions within the Asia-Pacific region (from Taiwan to New Zealand) through its various form of cooperation, such as the Asia-Pacific Regional Investment Regime. This part conveys to the reader the importance to China of cooperation within the region, as it is evident that whilst most of the focus of international lawyers is on either US or EU trade with China, the figures presented demonstrate that it is still the regional interexchange in Asia that is of the utmost importance for China. Chinese investment in ASEAN is becoming increasingly significant: outward flows nearly doubled – to 14 billion – between 2013 and 2017.[6] After discussing the bilateral and regional prongs, the publication in its fourth part turns, finally, to the global perspective. This part, which is the final element of tripartite scheme of the book (Bilateral, Regional, Global) describes China's activity on the global scene. This is especially, but not only, related to its ambitious project of the Belt and Road Initiative (BRI), which affects a great portion of the World. Also on the global level, China's recent activities regarding the G20 Guiding Principles for Global Investment Policy-Making are described and analysed, showing the growing concern of China regarding its global position, as well as China's growing impact on global rules. Finally, the last part of the book, serving as the well-deserved

[6] *See* UNCTAD, *World Investment Report 2019*, p. 45, available at: https://unctad.org/en/PublicationsLibrary/wir2019_en.pdf (accessed 30 June 2020).

dessert after reading and learning about the bilateral, regional and global landscapes, presents the most vivid and contemporary issues related to Chinese investment strategy. Therefore, apart from current developments regarding investment cases with Chinese involvement, the relevance of mediation is presented.

The review of this volume and its 27 chapters does have its disadvantages, as there is no opportunity to discuss and address the content of each chapter, since mentioning the titles of all of the chapters alone would consume at least one page of this review. Instead, we prefer to present selected issues analysed in the book. This review offers some explanations and comments on the various viewpoints and perspectives put forward in the book, so as to share some opinions on, and to trigger a more in-depth discussion of, its related issues. To address such a plenitude of chapters/issues in a meaningful way, we decided to organise our review into three broad thematic issues: firstly, addressing the strategies and regulations of the Chinese investment regime; secondly, addressing the reform and evolution of the Chinese treaty practice; and thirdly focusing on the issues at the forefront of China's international investment strategy.

Strategies and Regulations

The monograph under review very thoughtfully presents and explains the most important factors, such as: a) the status quo of China's inward and outward investments; b) China's strategy at the bilateral level; c) rules adopted by China at the regional level and China's national identity; and d) the impact of China's overseas investment activities and the international economic cooperation mechanism initiated by China from a geopolitical and geo-economic perspective.

Inflows to China increased by 4%, reaching at USD 139 billions[7]. Despite trade tensions between China and the United States, foreign investors have established more than 60,000 new companies in China in 2018, a 70% increase over the number established in 2017. The study of China's foreign investment management system needs a historical perspective, which is duly provided in the monograph, especially, but not only in, part I. The spill over effect brought on by the development of China's foreign investment management system affects China's position on international investment laws and policies.[8] In addition, overseas investment offers China an opportunity to not just bolster its own economy, but also leverage its economic strength to increase its influence abroad. Since China launched the "Going Global" strategy, increasing numbers of Chinese enterprises have invested overseas. Developed countries and countries along the BRI are the primary destinations for Chinese investors. Those transformations are aptly described and explained in the book, familiarizing the reader with numbers and figures related to China's evolution. For example, Chapter 2 provides a comprehensive analysis of the risks and challenges faced by Chinese investors, which are necessary to understand and further promote the globalization of Chinese enterprises and to realize sustainable investments.

[7] *Ibidem*, p. 3.

[8] *See* Chapter 1: *China's Inward Investment: Approach and Impact*, by Michael J. Enright, pp. 23-40.

In order to accommodate inward and outward investments, China's participation in the international investment regime has underpinned its efforts to conclude IIAs and join multilateral investment-related legal instruments. Bilateral investment treaties are one of the starting points of China's international investment law and policy system. The abundant practices and problems of their bilateral treaty practices are duly presented by the Authors, mainly, but not only in, part II of the text. As China has acquired a vast overseas investment market, it has formed one of the largest investment treaty networks in the world. In this context, China needs to negotiate bilateral investment treaties with the United States and the European Union, stabilize and expand overseas markets, and strive for more comprehensive institutional safeguards for China's foreign investment. Unfortunately, economic and trade relations between China and the United States have been strained since Donald Trump took office. The negotiation of a bilateral investment treaty between the China and United States came to an abrupt halt after the Bush and Obama administrations. Chapter 7 briefly addresses the economic and diplomatic relationship between China and Canada, comparing with that of the United States. It then analyses a broad selection of key substantive and procedural obligations of the Canada – China FIPA. It focuses on market access, investment protection, expropriation, performance requirement, SOEs, public policy exception and investor-state dispute settlement.[9] This chapter analyses the many issues of the Canada – China FIPA from a comprehensive perspective. It aims to extract what experiences can be learned for the United States and other negotiating developed parties.

Due to the suspension of Sino-US negotiations, the negotiation of a bilateral investment treaty between China and the EU is a priority for China. In his speech at the G20 summit in Osaka, Japan, President Xi Jinping made it clear that China will speed up negotiations on a China-EU investment treaty[10] and continue to advance the Belt and Road initiative, actively developing the digital economy and promoting international cooperation on innovation. Based on their geopolitical and geo-economic advantages, Pakistan and Israel are also important partners for the promotion of the Belt and Road Initiative.

To fully grasp the complexity of the Chinese system, analysis should not stop at the bilateral level. Regional integration is another platform for China's international investment strategy. As Heng Wang mentioned in Chapter 13, China will no longer be a complete rule-taker at this level. With its vast network of bilateral investment treaties and growing economic power, China is looking for opportunities to become a rule-maker. The Korea-China-Japan Investment Promotion, Facilitation, and Pro-

[9] *See* Chapter 7: *Lessons Learned from the Canada-China FIPA for the US-China BIT and beyond: Chinese Whispers or Chinese Checkers?*, by Kyle Dylan Dickson-Smith, pp. 121-136.

[10] *See* MOFCOM, *Xi Jinping Attends the 14th G20 Summit and Delivers an Important Speech*, available at http://english.mofcom.gov.cn/article/counselorsreport/americaandoceanreport/201907/20190702878527.shtml. Till the end of April 2020, 28 rounds of negotiations on the bilateral investment treaty between China and EU have been held, available at: https://trade.ec.europa.eu/doclib/press/index.cfm?id=2115 (both accessed 30 June 2020).

tection Agreement (Trilateral Investment Agreement) and the RCEP provide chances for China to realize this purpose.[11] But unlike the dominance of the United States has under NAFTA/USMCA, China has shown more flexibility at the regional level. For instance, the overlap between the Trilateral Investment Agreement, China – Korea BIT and Korea – Japan BIT will strengthen the strategic flexibility for each party; the RCEP's investment rules will be low-level to maintain enough flexibility for member States to reach a broader consensus

Reforms and Evolution

The publication also provides insight regarding the ongoing transformation of the Chinese investment treaty practice. In various chapters we find mind-challenging analysis regarding the reform and innovation of China's international investment treaties and China's contribution to the evolution of the multilateral investment regime. One of the challenging issues related to evolution and reform of Chinese investment regime, specifically sustainable development, will be discussed here.

Promoting sustainable development is an opportunity for China to reform its international investment treaties. According to the UNCTAD Investment Policy Framework for Sustainable Development, it consists of an overarching set of Core Principles for Investment Policymaking that serve as design criteria for three sets of operational guidelines or action menus: (1) guidelines for national investment policies; (2) guidance for the design and use of international investment agreements; (3) an action menu for the promotion of investment in sectors related to the sustainable development goals.[12] China is facing severe pressures to sustainably develop, and the transformation of China's domestic economic structure is closely related to the sustainable development goals. During the G20 summit under China's presidency in 2016, the G20 Trade and Investment Working Group delivered the G20 Guiding Principles for Global Investment and Policymaking, with the purpose to "promote investment for inclusive economic growth and sustainable development."[13] That initiative, and the role of China in accepting G20 binding principles, was extensively discussed and explained throughout its chapters. It is suggested that a focus on sustainable development is also one of the goals for China's future reforms and innovations of their international investment treaties.

As Manjiao Chi argued in Chapter 6, in past years only a fraction of the large number of Chinese IIAs have sustainable development provisions.[14] Furthermore, it appears that China's IIAs with developed countries appear to be more sustainable development-

[11] *See* Chapter 12: *Substantive Provisions of East Asian Trilateral Investment Agreement and Their Implications*, by Won-Mog Choi, pp. 224-241.

[12] *See* UNCTAD, *Investment Policy Framework for Sustainable Development*, available at: https://investmentpolicy.unctad.org/publications/149/unctad-investment-policy-framework-for-sustainable-development (accessed 30 June 2020).

[13] *See* G20 Guiding Principles for Global Investment and Policy-making, available at: http://www.g20chn.org/English/Documents/Current/201609/t20160914_3464.html (accessed 30 June 2020).

[14] "Sustainable development provisions" in Chapter 6 refer to environment, transparency and labour rights provisions.

compatible, while those with developing countries are less so. For example, the China – Canada BIT contains several environmental provisions and transparency provisions. It is suggested that this phenomenon is caused by the fact that China adopts an implied dichotomic strategy in IIA making. It also raises the question of China's identity in international investment treaty practice. Because of the dichotomic strategy in IIA making and selective adaptation in treaty negotiation, China is right now defined as a "rule-shaker" in the international investment regime.[15] That bring us to another important observation included in the various chapters of the book. While, traditionally, China is labelled as a "rule-taker" or as a "rule-maker", various authors introduce a new category, placed somewhere in between "taker" and "maker", to properly describe the position of China nowadays as 'rule-shaker'. This new term breaks with the stereotype of developing countries always being the rule-takers, as we cannot consistently describe China as firm rule-maker.

Without a doubt, it is also important for China to promote the evolution of its international investment regimes. Over the past 40 years, China has continued to place its own treaty practice within the coordinated system of international investment agreements, while pursuing mutually beneficial cooperation and common development, upholding and advancing economic globalization, developing global partnerships, supporting multilateralism and upholding international equity and justice, as well as taking a lead in reforming and developing existing multilateral investment regimes. In order to achieve the sustainable development goals and its obligations from the Paris climate change agreement, the world's investment needs are tremendous (see Chapter 16). To achieve sustainable development, first sustainable FDI's must be created. However, outward FDI's from emerging markets face a number of constraints, and the changing climate for FDI's may stymie the outward expansion of firms headquartered in emerging markets.[16] Furthermore, emerging markets define their interests both as host countries and home countries. This phenomenon has also spread into several developed countries, such as the United States. The convergence of interests between home and host countries may facilitate the reaching of a multilateral investment agreement.

China, which held the presidency of the G20 summit in 2016, has put the issue of a multilateral framework for investment on the agenda of G20. Although G20 members remain divided over its provisions, the G20 summit managed to agree on the "G20 Guiding Principles for Global Investment Policy-making" which sets new parameters for the future development of the multilateral investment regime through its Guiding Principles, as coined in Chapter 17 *as* "a Stepping stone."[17] The Guiding Principles

[15] *See* Chapter 11: *Towards a Fourth Generation of Chinese Treaty Practice: Substantive Changes, Balancing Mechanisms, and Selective Adaption*, by Matthew Levine, pp. 205-206; Chapter 13: *The RCEP Investment Rules and China: Learning from the Malleability of Chinese FTAs*, by Heng Wang, pp. 243-244, 252-254.

[16] *See* Chapter 16: *China Moves the G20 toward an International Investment Framework and Investment Facilitation*, by Karl P. Sauvant, p. 313.

[17] *See* Chapter 17: *G20 Guiding Principles for Global Investment Policy-Making: A Stepping Stone for Multilateral Rules on Investment*, by Anna Joubin-Bret and Cristian Rodriguez Chiffelle, p. 329.

should be perceived, in our opinion, as a realistic approach for reaching consensus. To some extent, the structures and provisions of international investment treaties are converging. However, divergences still remain on general issues, such as sustainable development, inclusive growth and the State's right to regulate for public purposes. The publication very aptly analysed the short-term and long-term effects of the Guiding Principles and provides a comprehensive perspective for the further study of the role of the G20 in promoting the formation of a multilateral investment regime.

Frontier Issues

As the issues on the frontier, identified and described throughout the entirety of the text's, and not only in its the last part, we classify and mention here for a brief discussion only two of these issues, namely: firstly, issues related to Chinese State-owned enterprises (SOEs) and, secondly, the debate regarding Investor – State Dispute Settlement.

The phenomenon of SOEs, which maintain a presence in different countries around various continents, is an issue of great importance in Chinese policy and strategy – not only because of its number, but also its magnitude and importance for China's economy. SOEs are the inevitable outcome of China's Socialist Market Economy. In the process of being integrating into the global economic pattern, Chinese SOEs have played a decisive role, and also generated many conflicts and contradictions.[18] It is mainly reflected in the foreign investment screening mechanism. In recent years, the rapid rise of SOEs and their international investment activities has raised considerable concerns, particularly in relation to the potential detrimental impacts such investments may have upon the national security of host States. The United States, European Union and other developed countries have updated their regulations of national security reviews towards foreign investments and Chinese SOEs have received a great deal of attention because most of their overseas investments are in strategic sectors such as infrastructure. Meanwhile, some countries are suspicious of China's political system and its management of State-owned enterprises.[19] According to the provisions of pre-establishment, national treatment and the principle of competition neutrality, the legitimate rights and interests of Chinese State-owned enterprises to market access, investment protection and dispute settlement, in theory, should be fully respected, but this issue remains controversial amongst countries.

Chinese SOEs are also a key issue muddying economic relations between China and the United States. In the context of the trade war between China and the United States,

[18] *See* N. Gallagher, *Role of China in Investment: BITs, SOEs, Private Enterprises, and Evolution of Policy*, 31(1) ICSID Review - Foreign Investment Law Journal 88 (2016). *See also* Chapter 4: *SOE Investments and the National Security Protection: Implications for China*, by Lu Wang, p. 67.

[19] *See* Chapter 4: *SOE Investments and the National Security Protection: Implications for China*, by Lu Wang, pp. 67-86; Chapter 10: *Issues on SOEs in BITs: The (Complex) Case of the Sino-US BIT Negotiations*, by Xinquan Tu, Na Sun, and Zhen Dai, pp. 194-204; Chapter 18: *Beware of Chinese Bearing Gifts: Why China's Direct Investment Poses Political Challenges in Europe and the United States*, by Sophie Meunier, pp. 345-359.

some Chinese companies that are not SOEs under Chinese law[20] will be labelled as SOEs because of certain factors; thus they will be subject to a national security review, which will hamper their position due to a possible deprivation of market access. In addition, China and the United States have different positions on the market economy status and will further diverge on the issue of SOEs. Both Chapter 4 and Chapter 10 analyse the above problems from multiple perspectives, but this thorny issue will still continue to attract attention, as a relevant issue, both for academics and practitioners. In addition to the national security review, there is an unexplored aspect of Chinese SOEs doing business overseas. In Chapter 21, Susan Finder introduces the international fraud and corruption sanctioning system for ensuring the compliance of SOEs. This chapter gives an insightful analysis on the current situation and possible development trend of the integration of China's anti-corruption supervision system and multilateral development bank system. It provides, as do many other chapters in the compilation, a very new and fresh perspective for studying the overseas investments of Chinese SOEs.

The second issue on the frontier, the international investment dispute settlement mechanism, is presented in Chapters 23 to 27 and shares the different perspectives of scholars on this subject. Driven by globalization, the blueprint of China's investment treaty strategy is multi-layered. In Chapter 23, Matthew Hodgson and Adam Bryan are concerned about perfecting China's investment treaty strategy. They analysed the status quo and prospect of China's investment treaty strategy from bilateral (US-China BIT), regional (RCEP) and multilateral (Energy Charter Treaty) perspectives. In Chapter 25, Claire Wilson reviews the jurisdictional challenges in *Ping An v. Belgium*. It further pointed out the different positions of China and Europe on the investment dispute settlement mechanism.[21] China has participated in discussions on the reform of the ISDS mechanism under the UNCITRAL Working Group III and ICSID Amendment and has elaborated upon China's position on the relevant issues of 2019. Under UNCITRAL WG III, China supports the study of a permanent appeal mechanism as a reform proposal for resolving the main problems of the current ISDS regime. China also believes that the establishment of a more effective investment conciliation mechanism should be actively explored.[22] In the meantime, at the bilateral level, since the EU

[20] *See* Art. 2 of《国有企业境外投资财务管理办法》[Notice of the Ministry of Finance on Issuing the Measures for the Financial Management of the Overseas Investments by State-owned Enterprises]: "For the purposes of these Measures, "state-owned enterprises" means the solely state-owned enterprises, solely state-owned companies and companies in which the state has a controlling stake for which the State Council and the local people's governments respectively perform the functions of investors on behalf of the state, including the enterprises formed by the investments at the current level and level by level under the supervision and administration of the central and local state-owned assets supervision and administration institutions and other departments." Available at: http://www.pkulaw.cn (accessed 30 June 2020).

[21] *See* Chapter 25: *Protecting Chinese Investment under the Investor-State Dispute Settlement Regime: A Review in Light of Ping An v. Belgium*, by Claire Wilson, pp. 483-488.

[22] *See* Submission from the Government of China: Possible reform of investor-State dispute settlement (ISDS), United Nations Commission on International Trade Law Working Group III (Investor-State Dispute Settlement Reform), Thirty-eighth session Vienna, 14–18 October 2019, Un doc: A/CN.9/WG.III/WP.177, available at: https://undocs.org/en/A/CN.9/WG.III/WP.177 (accessed 30 June 2020).

proposed the establishment of a multilateral investment court system (MIC) in the reform of the ISDS mechanism and has reached an agreement with Canada and Vietnam on the establishment of a Multilateral Investment Court. Therefore, the question of how China could negotiate a model for an investment dispute settlement mechanism, in a bilateral investment treaty, with the EU is crucial to the evolution of the international investment regime. Mediation as an alternative to the ISDS mechanism has been discussed for some time. As Shu Shang suggests in Chapter 27, the parties to the dispute retain almost complete autonomy in mediation, which is conducive to coordinating the interests of the parties to the dispute and achieving a balanced settlement of the dispute.[23]

The various issues addressed in this part of the review are just a sampling of the many issues which are presented and discussed in the book.

* * *

China's International Investment Strategy: Bilateral, Regional, and Global Law and Policy demonstrates the importance of holistic studying the provisions of international investment treaties. At the same time, it also emphasizes the influence of geopolitics and geo-economics on its international investment strategy and the provisions of international investment treaties. This book proves, once again, that bilateral mechanisms serve as the foundation for international mechanisms and that regional integration is an important step towards multilateralization.

The text under review, in presenting the landscape of China's Investment Strategy, for obvious reasons, is missing the more recent developments in China such as: the establishment of China International Commercial Court (CICC) [24] or even the very recent problems related to the global COVID-19 pandemic, which will, without a doubt, affect China. But to understand any new phenomena regarding China Investment policy, it is essential to at least have a basic understanding of China's policy and law which is provided by this book.

The compilation presents China in a crucial moment of its development. Shy at the beginning, China became more and more present on the international stage regarding investment. From rule-taker and rather bystander in many process China today plays an active role in e.g. UNCITRAL Working Group III. The question is for how long we will perceive China as rule-shaker (as right now for sure China already abandon its rule-taker role) as it is rather inevitable that one day without doubt China will be classify for sure as rule-maker.

In 2020, China began to implement its new foreign investment laws, which marks a comprehensive reform of China's domestic foreign investment system. Negotiations on a China-EU investment treaty are in progress, and the trade war between China

[23] *See* Chapter 27: *Implementing Investor-State Mediation in China's Next Generation Investment Treaties,* by Shu Shang, pp. 516-517.

[24] *See* CICC: *A Brief Introduction of China International Commercial Court*, available at: http://cicc.court.gov.cn/html/1/219/193/195/index.html (accessed 30 June 2020).

and United State has been effectively managed. China is also continuing to promote the Belt and Road initiative and is actively participating in the multilateral reform of the international investment dispute settlement mechanism. Researchers can draw inspiration from many topics related to China's international investment strategy and benefit from the insightful opinions in this book.

This book is an essential reading for not only academics but also for policymakers to boosts its knowledge and understanding of China's international investment strategy. So, if we were to recommend any book for scholars or practitioners alike, the edited volume of Prof. Julien Chaisse would be an obvious choice as one of the most recent, but more importantly most profound, and complex legal analysis of the complexities of China's International Investment Strategy.

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