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Introduction

Private property rights are among the most cherished values in the United States. Their enforceability is essential for commercial, industrial, and agricultural development and long-term capital investment. They are also important to everyday life. About two-thirds of Americans live in a home that they own, and millions of single-family homes are built and purchased annually.[1] Real estate investment and finance are at the core of the national economy, and disruptions in the real estate market can have a worldwide impact.

A reliable public real estate recording system is vital for private property ownership and the formation of capital for economic development.[2] In all countries with private property, the recording system has three main purposes: to give reliable information about ownership rights, to prevent fraud, and to minimize transactional costs.[3] Unlike in most countries, in the United States the government does not play a central function in achieving these purposes. While the local government register of deeds maintains a system of public information about ownership rights, the parties to a transaction are solely responsible for the reliability of that information, and they must rely on due diligence and private insurance to minimize the risks of fraud.

Evolution of Self-Regulating System

The real estate conveyance recording system in the United States can trace its origins back four centuries to the English settlements. The first office of a register of deeds on

1 <https://www.nar.realtor/research-and-statistics/quick-real-estate-statistics>.

2 H. De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*, "Basic Books", New York 2000, p. 149.

3 A. Garro, *Recordation of Interests in Land*, in: *Encyclopedia of Comparative Law Vol. VI Ch. 8*, ed. A. N. Yiannopoulos, Tübingen 2004, p. 4.

the continent was in Plymouth, Massachusetts, which provided a book for recording a land transfer.[4] The Massachusetts law that required such recording is fundamentally the same as the laws in each state today. State law establishes a local government register of deeds, an office that enables private parties to confirm the rights of someone offering to sell and to protect themselves against wrongful claims by recording their instruments.[5]

State laws all provide that when an instrument has been recorded with a register of deeds, it gives "constructive notice" to the world. This means that everyone is bound by what is contained within the instrument regardless of actual knowledge. Consequently, a purchaser or lender has the burden of searching the records and assessing the nature of ownership title to ensure the seller can convey the rights being promised. In most states, the register is an elected local government official.[6]

Only Hawaii and Alaska, the newest states, have a centralized state recording system with local branch offices. All registers record instruments sequentially as they receive them, and they maintain an index for public search. These records are fully available to anyone during office hours, and increasingly they are publicly accessible on the Internet. Anyone may record instruments with a register of deeds provided the submissions meet certain format requirements and all applicable recording fees are paid.[7] This open system contrasts with the more restricted access that is typical in other countries. Even in the English system, from which the United States system emerged, the law provides that "no person other than the owners of the record of estates and interests are permitted to inspect the land records".[8]

In the United States, the rights that follow from recording are determined by state law. State laws give certain priorities to those who first record their interests in the registries. Someone who fails to record risks having someone else acquire a superior right by recording the conveyance first. The most common type of statute is known as a "race-notice" statute. For example, a Massachusetts law provides that a conveyance "shall not be valid as against any person, except the grantor or lessor, his heirs and devisees and persons having actual notice of it, unless it . . . is recorded in the registry of deeds for the county or district in which the land to which it relates lies".[9] This means that a purchaser must both record and lack actual knowledge of a prior conveyance to be protected against someone else who obtains and records a deed claiming the same property. A few

4 J. Beale Jr., *The origin of the system of recording deeds in America*, "The Green Bag" 1907, no. 19, pp. 335–339.

5 C. Szypszak, *Local Government Registers of Deeds and the Enduring Reliance on Common Sense Judgment in a Technocratic Tide*, "Real Estate Law Journal" 2015, no. 44, p. 352.

6 *Ibidem*, pp. 352–363.

7 E. Roscoe, C. Szypszak, *Privacy and Public Real Estate Records: Preserving Legacy System Reliability Against Modern Threats*, "The Urban Lawyer" 2017, no. 49, pp. 362–364.

8 A. Garro, *op. cit.*, p. 102.

9 Massachusetts General Laws. ch. 183, § 4 (2011).

states have a statute that is known as a "race" system, which is characterized simply as "first to record, first in right." For instance, a North Carolina statute provides that no instrument of conveyance "shall be valid to pass any property interest as against lien creditors or purchasers for a valuable consideration, but from the time of registration thereof in the county where the land lies".[10] This has been interpreted to mean that those who record first will have title even if they knew someone else was already conveyed the same property. However, even in the few states with this type of race recording statute, in some circumstances the courts will not allow the statute to protect a party based on general equitable principles.[11]

These priorities based on recording entail several kinds of risk. Owners and lenders are left to their own resources for searching the records and understanding their legal significance. This involves careful use of indexes, and an ability to interpret real estate instruments, most of which are not required to be in any form other than what is acceptable to the particular parties to them. The system also involves what is known as "off-record" risks that cannot be found at the registry, such as forgeries or claims based on actual use of the property. These risks, to some degree, are due to the nature of the unique self-regulating recording system. In essence, those acquiring property interests must protect themselves–it is a "user beware" system[12].

This system has persisted despite efforts to change it into something more like systems in other countries. More than a century ago, some policy makers were concerned about how the risky existing recording system might impair real estate development, and they looked to adopt a registration system based on the Australian method devised by Sir Robert Torrens, which he modeled on how ships were registered. In the Torrens system, a public official examines applications for transfers of title and issues a certificate of ownership if everything is in order. The Torrens system also typically provides a government guaranty to reimburse someone deprived of a property interest if registration incorrectly describes the property or wrongfully gives ownership to another. Twenty-one states in the United States enacted some type of Torrens registration process.[13] However, this registration approach quickly ran into legal trouble. In 1896, one year after Illinois enacted a Torrens-type system, in *People v. Chase* (1896)[14] the Illinois Supreme Court declared the law to be unconstitutional because it gave the registers of deeds powers to determine property rights, which only a judge can do in the United States system of separation of powers. Courts in other states had similar views about

10 North Carolina General Statutes Annotated, 2017, § 47–18(a).

11 C. Szypszak, *North Carolina's Real Estate Recording Laws: The Ghost of 1885*, "North Carolina Central Law Journal" 2006, no. 28, pp. 212–216.

12 C. Szypszak, *Public Registries and Private Solutions: An Evolving American Real Estate Conveyance Regime*, "Whittier Law Review" 2003, no. 24, pp. 668–670.

13 R. R. Powell, *Powell on Real Property*, New York 2014, p. 83.01[3], 83–5 to 83–7.

14 *People v. Chase*, 46 N.E. 454 Ill. 1896.

the unconstitutionality of having a register of deeds declare ownership. Legislatures responded by requiring a court decree before property could be registered, which made the system much more cumbersome and costly than the Australian model.[15]

The Torrens assurance fund, which is intended to compensate for loss resulting from improper registration, also proved ineffective in the United States. No recovery from a fund would be allowed unless the harmed party first sought recovery from someone who caused the harm through fraud, negligence, or other wrongdoing. Consequently, unless the loss is due solely to registration error, collection from the fund will necessarily entail litigation with another private party–just as in the usual system. The notion of state payment for loss of title also was not supported with realistic funding resources. In California, the statewide fund became bankrupt, leading to the repeal of Torrens registration in that state, and in Nebraska, assurance fund solvency problems led to abandonment of the system.[16] The emptiness of this type of financial guaranty is not unique to the United States. Claims against such a fund are rare in other countries as well.[17]

The Torrens system's limitations under American law and public policy resulted in its complete abandonment in most of the states that adopted it, and very infrequent use in the others. In those states that enacted Torrens systems, registration is optional. An advocate for Torrens registration called it the "most infrequently used method of land conveyancing in the United States".[18] In practice, Torrens registration appeals to some commercial interests in unusual circumstances, such as urban redevelopers who need to establish boundaries in areas subject to prior survey discrepancies, and timber companies who want to be certain about ownership of large tracts before cutting the timber. However, the cost and delay of a court proceeding, and the absence of any guaranty, make it unattractive for most transactions.[19]

Public Officials and Private Risk

As described above, in the race-notice or race recording system in the United States, real estate recording is not just a matter of memorializing an event. It legally operates to establish rights. Consequently, a failure to record promptly and properly can have severe consequences, including the loss of ownership or the inability to enforce a mortgage loan against the property.

15 C. Szypszak, *Public registries…*, pp. 673–682.
16 B. C. Schick, I. H. Plotkin, *Torrens in the United States*, Lexington 1978, pp. 63–64.
17 A. Garro, *op. cit.*, p. 125.
18 J.V.B. II, *Yes Virginia - There is a Torrens Act*, "University of Richmond Law Review" 1975, no. 9, p. 301.
19 C. Szypszak, *Public Registries…*, pp. 680–682.

In most countries, the public official responsible for land registration acts as a gatekeeper, ensuring that those who record have the right to do so, and that they record instruments in a proper form.[20] Registers of deeds in the United States do not check to see whether someone recording a document has a legitimate interest in the rights it describes, or whether the conveyance complies with any applicable regulations. One reason why the American real estate conveyance system is so efficient is that the parties are free to structure and consummate their arrangements without need for government review or approval. Parties are left to protect themselves with legal advisors, who perform due diligence in title searches, and with private assurance mechanisms, principally title insurance. The vast majority of both residential and commercial transactions occur in this system without any title problems.[21]

Registers do not entirely ignore the instruments presented to them. To discourage false filings, they check submissions for some evidence of authentic execution before recording.[22]. The signing of real estate instruments in the United States usually involves a notary public, just as they do in other countries. American notaries are commissioned by state authorities and take an oath to follow the law.[23] Unlike in most other countries, they play a very limited role. In essence, they observe someone's signature and complete a certificate on the instrument to record this event. They are prohibited from drafting or completing the instruments,[24] and they do not record them.

In their limited review of authenticity, registers of deeds check to see that signatures on deeds and mortgages have been notarized in this manner. They do this only by looking for the signature and seal of the notary, not by checking the notaries' commissioning status.[25] In many cases, the register will be unfamiliar with the notary and have no way to know if the person in fact is currently commissioned, nor is there any independent record by which to confirm the notary's capacity or notarial act. The formality is some disincentive to fraud or hasty filings that cause problems, but of limited use in protecting against fraud.

The extent to which the system relies on self-regulation rather than any public official's involvement can be seen with how the excise tax on conveyances typically is imposed and collected in in the United States. For example, North Carolina's tax, is $1 on each $500, or part thereof, of the amount paid for the property.[26] Registers do not

20 A. Garro, *op. cit*, pp. 101–103.

21 C. Szypszak, *Real Estate Records, the Captive public, and Opportunities for the Public Good*, "Gonzaga Law Review", 2007, no. 43, p. 16.

22 C. Szypszak, *Local government* …, pp. 363–364.

23 North Carolina General Statutes Annotated, 2017, § 10B-3(13).

24 North Carolina General Statutes Annotated, 2017, § 20(k).

25 C. Szypszak, *North Carolina Guidebook for Registers of Deeds*, "Chapel Hill, NC: UNC School of Government", 2016, pp. 111–129.

26 North Carolina General Statutes Annotated of 2017.

investigate the economic reality of the transaction. They rely on the person who presents the instrument for recording to state the amount paid for the property on which the tax is based.[27] The register of deeds puts a stamp on the instrument in the public record to show the amount paid. Officials in other countries may be incredulous that this kind of an honor system could function. Yet there is widespread compliance, in large part because parties realize that the amount of the tax, shown on the public record, is a representation about the value of the property. They may have difficulty later explaining the property value when looking to sell to a purchaser or to obtain a mortgage loan if they originally misreported the value when they paid the tax.

The Parties' Professionals

Given the very limited role played by public officials in a land transaction in the United States, the parties must rely on other professionals to consummate a real estate transaction in a way that protects their rights. Most transactions involve two professionals: brokers and attorneys.

No law in the United States requires anyone to hire a broker to sell or to buy real estate, but there are more than two million licensed real estate professionals and about nine out of ten home sales involve a broker.[28] Most parties to sales view brokers as a valuable source of information about the property because of their knowledge of the local market. State laws require individuals to be licensed before they may represent someone as a broker.[29] State commissions have education and examination requirements, rules for representing clients, and procedures for complaints and discipline including loss of license. A broker owes a fiduciary duty to the client, which means the broker must act in the client's best interest. As the court instructed in *Clouse v. Gordon* (1994)[30], brokers can be responsible for fraud or misrepresentation only if the broker actively conceals known material facts. Brokers do not have an obligation to investigate property conditions for the parties.

Most brokers work for sellers and are paid by them, even when they deal with buyers. The amount of the typical commission is substantial, usually between five and eight percent of the sale price. Brokers therefore have strong financial incentive to consummate a sale and to demonstrate value of their service through efficient management of

27 National Conference of State Legislatures, 2018

28 <https://www.nar.realtor/research-and-statistics/quick-real-estate-statistics>.

29 North Carolina General Statutes Annotated, 2017, § 93A-1.

30 Clouse v. Gordon, 115 N.C. App. 500, 445 S.E.2d 428 1994.

the transaction. Their desire to be perceived as instrumental in the process also is incentive to resist any changes in the system that would diminish their role.[31]

United States law similarly does not require any party buying or selling real estate to hire a lawyer for the transaction, but most parties do engage lawyers. There is no standard fee for routine matters such as preparing a deed, doing title work, and handling a closing, but fees tend to be similar for such services within a community. In a typical transaction, the lawyer's fee is much less than one percent of the purchase price.

Drafting legal instruments is the practice of law and it can only be done for someone by a lawyer licensed within the state. Lawyers–or someone under their supervision–confirm the rights of the seller and ensure proper instruments are recorded. One of the most important functions for which parties rely on lawyers' expertise is the search of the public records to determine the validity of the seller's interests. Unlike most countries that have tract indexes–in which a searcher can see all of the ownership information pertaining to a particular parcel by looking up the parcel number–most jurisdictions in the United States use a grantor-grantee index. Parties must rely on their professionals' ability to find all records that convey interests in any particular parcel of real estate. This requires linking current and historical owner names in the operative instruments of conveyance, which is known as developing the "chain of title." In most states, the lawyers' professional association publishes title examination standards as guidance for how to conduct such a search.[32] Most searches can be done within a few hours if there is an unbroken chain to the current owner for the length of a reasonable search period–something like thirty years of ownership, which depends on local custom and the requirements of the title insurance company.

These professionals face free-market incentives to provide reliable advice at a competitive price. One remarkable feature of this system is that if the parties are motivated to close a transaction quickly, these professionals can get it done within hours, without need for awaiting any government approvals in connection with instrument recording.

Title Insurance

Unlike countries that provide government assurances of title, in the United States a system emerged in the form of private title insurance. Title insurance developed with the

31 C. Szypszak, *Real Estate Records, the Captive Public, and Opportunities for the Public Good*, "Gonzaga Law Review", 2007, no. 43, pp. 16–18; A. M. Olazábal, *Redefining Realtor Relationships and Responsibilities: The Failure of State Regulatory Responses*, "Harvard Journal on Legislation" 2003, no. 40, p. 65.

32 R. B. Johnson, *Basic Principles of Title Examination for the General Practitioner*, "The Practical Lawyer" 1961, no. 7, pp. 39–45.

mortgage lending market. As described above, the Torrens system available in other countries did not succeed in the United States. Purchasers and lenders needed a different standardized and practical method of obtaining indemnity against loss, and the title insurance industry developed as a relatively efficient and reliable means to assure lenders that the borrower can give a valuable mortgage interest in real estate title as security for the loan. Title insurance also proved important in the development of the secondary mortgage market, enabling loan originators to package their mortgages with title insurance policies that are transferable, and giving investors standardized institutional protection of mortgage enforceability based on title.[33] These developments led to widespread reliance on title insurance to the point where, in the words of a federal court in *Schwartz v. Commonwealth Land Title Insurance Company* (1974)[34], "it is a matter of common knowledge and experience that in the usual situation, title insurance is indispensable to the occurrence of the real estate sale: a seller would be unable to sell his property at its reasonable value if no title company was willing to insure title."

Title insurance is usually a relatively small cost in conveyances. The total charge for title search and the issuance of a policy is around one percent of the property's price. A one-time insurance premium is paid for coverage during the full length of ownership, which protects against certain claims in connection with title to the property.[35] Once issued, a title insurance policy provides protection against a variety of risks such as a claim to title based on actual possession and lack of its marketability due to an adverse claim based on title. A title insurance policy is a contract, and the title insurance company's obligations are defined by the terms of the policy. State regulators require title insurance companies to file their policies and rates, but the precise terms of coverage are determined in the competitive market of insurance companies.[36]

Before issuing a policy, the title insurance agent, who is a lawyer, searches the records and determines the nature of the title. The insurance is not intended to be a means for owners and lenders to obtain indemnity against known title problems or risks that cannot be avoided based on examination of the title records. Coverage will not be provided over an identified problem unless the insurer determines the risk is small enough to accept or other protections are provided, such as indemnity is obtained from another party. Standard policy language excludes a number of risks from coverage, such as the effects of land use regulations, bankruptcy, or government expropriation. Additionally, by their terms owners' policies usually do not cover several categories of matters that are not disclosed in the registry records. As a federal court said in *Schwartz v. Commonwealth Land*

33 C. Szypszak, *Public Registries and Private Solutions: An Evolving American Real Estate Conveyance Regime*, "Whittier Law Review" 2003, no. 24, pp. 682–692.

34 *Schwartz v. Commonwealth Land Title Insurance Company*, 374 F. Supp. 564, 574 E.D. Pa. 1974.

35 C. Szypszak, Public registries …, p. 684.

36 C. Szypszak, Public registries …, pp. 682–692.

Title Insurance Company (1974)[37], "title insurance companies are only liable for what they do not find, or if they become victims of false affidavits tendered to remove title objections. Against this background it would be in our view unrealistic, indeed ostrich-like, to separate the title search process from the pure insurance aspect of the title insurer's activities ..."

Although title insurance will not cover title problems that are known, those who purchase policies benefit from the insurer's incentive to identify risks. In essence, title insurance is more risk *prevention* than risk assumption.[38] With most forms of insurance, such as health insurance, insurance companies use much of the policy premiums they collect to pay for insureds' claims. Title insurance is fundamentally different. Title insurers pay a very small part of their premiums to customers who suffer losses due to a covered matter. The majority of the premiums are retained by the lawyer who searches the title before issuing a policy, reflecting the preventative nature of the policy issuance process. Surveys indicate that about one-third of real estate closings reveal a title issue that is discovered in this process, most commonly the need to confirm that a prior mortgage has been paid and is no longer effective, or for unpaid taxes.[39] These kinds of problems are addressed by the parties before the policy is issued. In other words, getting the policy results in the problems being resolved before the owner takes title and the lender closes the mortgage loan. Based on losses reported to state insurance regulators, title insurers pay out only about three percent of their revenue for losses to insureds.[40]

Even in unusual circumstances in which title problems went undetected and claims are made, title insurers often can cure the problems by obtaining instruments that can be recorded, such as when mortgages had been paid but no records were filed that the mortgages are no longer enforceable. Title insurers also often can solve problems by negotiating with those who have competing claims, or if necessary with litigation.

Modern Threats from Frivolous Liens

The unregulated nature of the recording system in the United States leaves open a three-headed threat: the difficulty of identifying instruments that are illegitimate; the ease with which information about ownership can be learned by someone seeking to cause harm; and the ease with which such a fraudulent or frivolous filing can be made.

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37 *Schwartz v. Commonwealth Land Title Insurance Company*, 374 F. Supp. 564, 574 E.D. Pa. 1974.
38 C. Szypszak, *Public registries…*, pp. 688–692.
39 J.W. Eaton, D.J. Eaton, *The American Title Insurance Industry: How a Cartel Fleeces the American Consumer*, New York, 2007, pp. 18–19.
40 *Ibidem*, pp. 71–72.

The nature of these threats has changed in recent years due to greater complexity in secured real estate financing. Most real estate transactions are residential conveyances for which lenders use standard, federally approved forms. However, a chief virtue of the system is that the parties are left to draft their instruments in any way that meets their transactional objectives, and registers of deeds do not have legal authority to impose any uniformity requirements. Even the standard loan transactions increasingly now involve legal instruments that the normal person would not understand. This is in large part due to the secondary mortgage market, in which mortgage loans are assigned to securitized trusts. Most owners are not even aware that their loans are held in these pools or that assignment instruments are recorded for them–their loans are managed through a servicing company, which remains the same even as the loan is transferred in the secondary market. In fact, most residential mortgage loans in the United States are now held in the name of the Mortgage Electronic Registration Systems, Inc. ("MERS"), a nominee to which the loan is assigned and by which it is held as the real interest in the loan is transferred. This minimizes transaction costs by eliminating the need to record assignments every time the loan changes hands. As a result, very few owners would be able to tell whether a strange financial instrument is for a legitimate mortgage transfer arrangement or is being filed by someone trying to cause harm with a frivolous document.[41]

There is no simple remedy if someone files a frivolous document. The law in the United States has always enabled owners to seek a court order declaring a recording void, and such an order can be recorded with the register of deeds to clear the title issue. This may not be an efficient remedy, however, because harm may have already occurred resulting from delay upon detecting the fraudulent instrument. Those who file fraudulent documents also are subject to criminal prosecution for a number of crimes, including statutory and common law fraud, as well as violation of laws specifically aimed at fraudulent liens. Although this may punish the wrongdoing, it will not address the costs to the owner for dealing with the delay and otherwise having to clear problems caused by the frivolous filing.

Those who depend on the existing system's openness and efficiency–lenders, attorneys, brokers, and title insurers–want to preserve the system's core features. Some policy makers see openness as enabling fraud, and they look to restrict access to the public real estate records. For example, Florida statutes now enable law enforcement officers, judges, states attorneys and a number of other public officials and their families to request redaction of their home addresses from the public records, including real estate records.[42] However, restricting access can effectively make the records less complete and reliable, while not entirely preventing wrongdoers from getting the information they seek because other public sources of information are available. For example, much informa-

41 E. Roscoe, C. Szypszak, *Privacy and Public Real Estate Records: Preserving Legacy System Reliability Against Modern Threats*, "The Urban Lawyer" 2017, no. 49, pp. 364–368.

42 Florida Statutes Annotated of 2017.

tion is contained in local real estate tax records. In the United States, local government taxes real estate within its jurisdiction, and, for billing and collection purposes, it tracks and publishes owners' names and addresses. Most local governments now make this information available through their websites with searchable databases. To some degree, availability of this information is constitutionally necessary–taxes must be proportional, so owners must be able to compare the tax valuation of their property to the valuation of other properties. As long as this information must remain open, limiting access to conveyance records offers little protection.[43]

Other states have enacted measures that do not restrict access to the system but instead attempt to give affected owners earlier notice of a potential problem. The laws governing real estate recordings already require some types of information to be disclosed when an instrument is filed. For example, state laws typically require the buyer's address be on a deed, which is used for real estate tax billing.[44] Others require a deed to identify the person who drafted it, which is used to create an obstacle to the unauthorized practice of preparing a deed for someone else without being a licensed lawyer.[45] Similarly, states may require some form of notice to be given to an owner when an instrument is recorded that has the apparent characteristics of a fraudulent lien. This is similar to the procedure in some civil law countries such as Switzerland that require the recorder to notify owners if someone attempts to make an entry in the land register without the owner's knowledge.[46] In the United States, Texas law authorizes the registering official to send notice to a person named in an instrument if the register has a reasonable belief that the instrument submitted for filing is fraudulent.[47] The procedure is not entirely reliable, because the register must first detect the attempted fraud, which is difficult in a United States system that does not require instruments to be in any certain form. Private companies also have begun to offer such services, by which they scan the electronic versions of the open public records and provide notice to customers that something with their names has been filed. This is similar to the credit monitoring services provided from major credit bureaus.

Regardless of what minor requirements may be enacted, the continued reliability of the self-regulated recording system largely depends on the due diligence and judgment of those who rely upon it. Success in causing harm with frivolous filings depends on the reaction of those who view the instrument during a pending transaction. The filer of a harmful instrument wants buyers and lenders to delay or withdraw out of concern that the filing could be enforced against the property. In most cases, this intent can be defeated if the party

43 E. Roscoe, C. Szypszak, *Privacy and public…*, pp. 374–378.
44 New Hampshire Revised Statutes Annotated of 2016.
45 North Carolina General Statutes Annotated of 2017, § 47–17.1.
46 Swiss Civil Code of 2012, Code of Obligations, § 969.
47 Texas Government Code of 2016.

who finds the instrument treats it for what it is worth–nothing legitimate–which in most cases should be readily apparent, rather than make hasty decisions that turn a frivolous filing into something with a real impact.

Methods also exist for owners to put a layer of legal protection between themselves and the public records of ownership by using traditional ownership forms that individuals can create with standard organizational filings. Owners can take title in the name of an entity or trustee that will appear as the current owner in the register's index and in the public tax records. Two common entity forms in which an individual can hold sole ownership are corporations and limited liability companies, each of which allow use of a fictitious name adopted upon formation.[48] Another common ownership form is a trust, which technically is not a legal entity, but rather an agreement between someone transferring property to another–the trustee–with direction about how the property is to be held and transferred. Those who benefit from the trust–the beneficiaries–need not be disclosed in the real estate filings.[49] Use of such techniques adds a layer of confidentiality, but it does not prevent someone who understands entities and trusts from doing off-record investigation to find out who holds the ownership interests in them.

Conclusion

The recording system in the United States enables sellers, buyers, and lenders to consummate property transfers efficiently and without any need for government approval or involvement. They rely on an open local government register of deeds system that has remained fundamentally the same despite changes in the nature of real estate transactions and threats to its reliability. Purchasers and lenders can protect against risks involved in this conveyancing system with their own due diligence and responsibility, including engaging professionals to perform expert research to verify claims of ownership and assess risks, and arranging for insurance against the possibility of major loss. Though this system shares many of the functions found in other countries, it is unique in the passive nature of government's involvement.

48 Model Business Corporations Act of 2016; Revised Uniform Limited Liability Company Act of 2006.

49 Uniform Trust Code of 2010.

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SUMMARY

Legal Protection of Property Rights in the Self-Regulating United States Local Recording System

In all legal systems with private property, the government provides a mechanism for owners and lenders to make a public record of their rights. In most countries, the government restricts access to this public record and allows entries into it only after a public official approves it. By contrast, no government entity in the United States regulates, confirms, or guarantees the typical real estate ownership transfer. How this works is not readily understood even within the United States, where owners and lenders rely on attorneys and other professionals to examine and understand the public record and to record instruments that protect their clients' property rights. This article describes the laws and legal customs that underlie this self-regulating system, including how they differ fundamentally from land registration in other countries, and the emerging challenges to its reliability.

Keywords: property rights, land recording, registers of deeds, real estate conveyances.

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The Civil Liability of Asset Managers – a Polish Perspective[1]

Introduction

This paper focuses on the civil liability of asset managers in Polish law. Following the transformation of the economic system and the development of the capital market in Poland, the importance of asset management has been gradually increasing, though it remains disproportionally lower when compared to the role of collective asset management in the form of investment funds.[2] In practice, individual asset management services are available to wealthy clients only.[3] Even though the practical importance of this institution has been growing, it has not yet been thoroughly discussed in legal literature or case law.[4]

A client who wishes to contract the management of their asset portfolio needs to accept the risk of agency costs, arising from the large scope of discretion awarded to the investment firm for making and executing investment decisions on the client's account. A contract – the typical agency cost-restricting tool – is not sufficient to protect the client, since potentially improper contract performance can be difficult to identify.[5] EU law, which has co-shaped the Polish legal system in this respect, regulates the provision of brokerage services on a number of levels.[6] Consequently, the provision of asset management services is subject to a specific normative dualism. Firstly, these services are provided on the basis of contracts made with investors. Secondly, the provision of brokerage

1 This publication is a result of a project financed by National Centre of Science (Narodowe Centrum Nauki) according to the decision no DEC-2013/09/B/HS5/00289.

2 *Cf.* S. Buczek ed., *Asset Management – zarządzanie aktywami w Polsce*, Warszawa, 2006, p. 9; A. W. Kawecki, *Civil Law Legal Systems: Poland*, in: *Liability of Asset Managers*, D. Busch, D. A. DeMott, Oxford 2012, p. 251 et seq., p. 262.

3 *Cf.* S. Buczek, *op.cit.*, note 1, 9 et seq.

4 However, this is not typical of Poland only: D. A. DeMott, *Regulatory techniques and liability regimes for asset managers*, "Capital Markets Law Journal" 2012, no. 7/4, pp. 423–431.

5 *Ibidem*, p. 424.

6 *Ibidem*.

services is regulated in an extensive manner in public law based on the MiFID I directive[7], designed to ensure investor protection. The mutual relationship between these two normative levels is one of the core issues discussed in this paper.

In this context, one important aspect is the private law enforcement of the investment firm's obligations toward its clients – both when it comes to obligations under contract and public law. Importantly, civil law protection awarded to an investment firm's clients is characterized by flexibility[8], which ensures its effectiveness even in the most untypical circumstances. This flexibility can provide necessary supplementation to the administrative supervision of the compliance of investment firms with their obligations toward their clients.

The chief purpose of both MiFID directives is to harmonize the rules applicable to investment firms providing brokerage services in Europe, and to protect the interests investors using brokerage services.[9] Although the civil liability of investment firms offering brokerage services is part of what is broadly construed as investor protection, the regulations on this matter have been left to the member states' discretion. There is no doubt that discrepancies between member states in this respect diminish the harmonizing effect of both directives.[10] This paper sets out to determine the basic rules of civil liability of asset management firms in Polish law, and present suggestions for the most common problems in this field.

The Legal Nature of an Asset Management Contract

An investment firm undertakes to manage a client's financial instruments and cash in such a way as to ensure attainment of a goal specified in the contract, that is, practically speaking, to generate profit. An investment firm manages its client's asset portfolio on the basis of a relatively broad power of attorney, which authorizes it to acquire and sell financial instruments in the client's name and on their account, though transactions executed by an investment firm in its own name but on the client's account are

7 The directive 2004/39/EC of the European Parliament and the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (EU OJ L 145 of 30.04.2004, p.1. Since 3 January 2018 they should be replaced by the regulations included in its recast version – the directive of the European Parliament and the Council 2014/65/EU of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (EU OJ L 173 of 12.06.2014, p. 349); hereinafter: MiFID II.

8 *Ibidem*.

9 V. N. Moloney, *EU Securities and Financial Markets*, Oxford 2014, p. 340.

10 D. Busch, *Why MiFID matters to private law—the example of MiFID's impact on an asset manager's civil liability*, "Capital Markets Law Journal" 2012, no. 7/4, pp. 386–413, p. 388 et seq.

sometimes encountered as well.[11] As a result, the obligation to manage the client's assets involves the obligation to make and follow through on investment decisions concerning a portfolio of financial assets belonging to a specific client, in order to generate profit.[12]

When performing its management-related obligations, an investment firm substantially makes investment decisions about the client's account on its own, relying on its own expertise and experience, and enjoys a significant degree of discretion in this respect. The discretion of the investment firm is typically restricted by the client's portfolio management policy, agreed between the parties.[13] The purpose of this policy is to specify the level of risk applicable to investments made on the client's account to ensure that it matches the client's preferences. The discretional competence of the investment firm to determine the client's financial situation is subject to additional restrictions stemming from the duty of loyalty to the client, which means that this competence may be exercised only in the client's best interests.[14]

In Polish law, basic regulations on asset management contracts are laid out in Article 75 of the Act on Trade in Financial Instruments and the executive deed to this act, namely the Regulation of the Council of Ministers on the procedure and conditions of conduct applicable to investment firms and banks referred to in Article 70(2) of the Act on Trade in Financial Instruments, and to custodian banks (hereinafter: RPCC), which transposed the MiFID I directive to the Polish legal system.[15]

As a rule, investment firms are obliged to act diligently – they must act to maximize the portfolio return (profitability) rate. Such a classification is supported by the fact that asset management outcomes typically do not depend on the efforts of the investment firm alone, but are affected by external factors such as the macroeconomic environment, or market trends, which may result in the loss of value of a specific class of financial instruments.[16]

Given Article 75(1) ATFI, and the general nature of the expression "within the cash and financial instruments entrusted by the client at the asset management entity's disposal", one must assume that the investment firm can also execute transactions involving the acquisition and sales of financial instruments on the client's account, but in its own name. In other words, under Article 75(1) ATFI the term 'asset management' is inclusive

11 *Ibidem*.

12 *Ibidem.*

13 *Ibidem.*

14 On the legal nature of the portfolio management contract in Polish law see: A. Chłopecki in:, *System Prawa Prywatnego vol. 19*, ed. A. Szumański, Warszawa 2006, p. 972 et seq. Likewise, P. Zapadka, in: M. Wierzbowski, L. Sobolewski, P. Wajda, *Prawo rynku kapitałowego. Komentarz*, Warszawa 2014, p. 905.

15 Regulation of the Council of Ministers on the procedure and conditions of conduct applicable to investment firms and banks referred to in Article 70(2) of the Act on Trade in Financial Instruments, and to trust banks (consolidated text: Journal of Laws 2015.878 as amended).

16 *Cf.* A. Chłopecki, *op.cit*., note 13, 972 et seq. Likewise P. Zapadka, *op.cit*., note 13, pp. 905–906.

of situations where the investment firm, as a type of trust, manages financial instruments which formally belong to it, in its client's own interests.

Public Law Regulations Applicable to Asset Management

Introduction

The MiFID I and MiFID II directives subject asset management to general rules applicable to brokerage activity. Polish RPCC rules, implementing MiFID provisions, set forth a number of requirements for investment firms offering asset portfolio management services. These rules include the requirement to obtain a license from a supervisory body to conduct such activity. The management itself is subjected to general provisions on the conduct of business rules, which include the investment firm's duty of loyalty to the client, their pre- and post-contract information and disclosure obligations, and the pre-contract 'Know Your Client' procedure, for establishing whether a specific service is appropriate for the client (see Article 19 MiFID I and Articles 24–25 MiFID II). When it comes to the last of the obligations mentioned above, investment firms have more explorative obligations in this respect, all of which are intended to help ascertain the client's investment goals, financial situation, risk appetite and investment experience (Section 16(1) and 16(5) RPCC).

The Public Law Nature of the MiFID Rules

Pursuant to the prevailing opinion in the legal literature of most European countries, rules set forth in the MiFID directive are, as such, public law rules. They impose certain obligations on investment firms, and their enforcement has been generally entrusted to supervisory authorities (cf. Article 167 ATFI).[17] However, it is important to note that Italian law assumes the dual – public and private law – nature of at least some of these rules.[18] Additionally, certain representatives of the German legal sciences support this view.[19]

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17 V. I. Koller in: *Wertpapierhandelsgesetz*, H. D. Assmann, U. H. Schneider, Köln, 2012, p. 1361 et seq.; Moloney, *op.cit*., note 8, 601. Paradoxically, public law rules laid down in the MiFID directive on the provision of investment services are derived from private law of certain member states (mainly Germany and the Netherlands), and, to be more specific, from the case law on contractual obligations of investment firms toward their clients – see O. O. Cherednychenko, *Full harmonization of Retail Financial Services Contract Law in Europe* in: *Financial Services, Financial Crisis and General European Contract Law*, ed. S. Grundmann, Y. M. Atamer Alphen aan den Rijn 2011, 249, footnote 142.

18 D. Busch, A. DeMott, *op.cit.*, note 1, 538.

19 T. M. J. Möllers in: *Kölner Kommentar zum WpHG*, ed. H. Hirte, T. M. J. Möllers, Köln–Berlin–München 2007, p. 1276. V. M. Casper, C. Altgen, *Civil Law Legal Systems: Germany*, in: *op.cit*., D. Busch, A. DeMott, note 1, 101 and literature referenced therein.

The key argument in favour of the view that most of the norms arising from the MiFID directive and implemented in Polish law are of a public law nature, is that they are applicable regardless of the contract between the client and the investment firm. What's more, their aim is typically not to protect the interests of a specific client only, but also to protect the more broadly construed public interest, such as building social trust in capital market institutions and equity market efficiency. Nonetheless, it seems that the dual – public/private law – nature of any specified rule implementing the MiFID directive should not be excluded in advance. This issue should instead be settled on a case-by-case basis, through interpretation of relevant provisions of national law shaping a specific institution.

However, the public law nature of the MiFID directive's rules does not change the fact that some of them directly reference the rules on providing brokerage (investment) services by investment firms (conduct of business rules), and thereby to the relationship between service provider and client, which is also a subject of contractual civil law relationships. This in turn generates a number of detailed legal issues related to the mutual relationships between these two legal normative layers.

There are no major doubts in legal literature that public law rules applicable to the provision of brokerage services affect, to a certain degree, the interpretation of private law and the content of the contractual duties of institutions providing brokerage services. In German doctrine it has been assumed that public law rules have a kind of 'radiating' effect (*Austrahlungseffekt*) on civil law relationships.[20] Some scholars even argue that the national legislator cannot completely exempt civil law relationships from the influence of the MiFID directive, since this would undermine the possibility of achieving certain objectives of this directive, including investor protection.[21]

When it comes to Polish law, it is important to note that the rules laid down in the MiFID directive and provisions implementing this law may affect the interpretation of contracts on brokerage services (Article 65 of the Polish Civil Code), as well as relevant provisions of the Civil Code on the manner of performance of obligations under these contracts (Articles 354 and 355 of the Civil Code). In the latter case, public law provisions can provide guidance when interpreting the "social-economic purpose of an obligation' of an investment firm in a brokerage contract, as well as the relevant rules of conduct and customs (Article 354 of the Civil Code)[22]. This is a consequence of the fact that Article 354 CC, in conjunction with Article 83a ATFI, serves as a normative basis

20 See e.f. I. Koller, *op.cit*. note 16, 1361; M. Casper, C. Altgen, *op.cit*. note 18, 105 and literature listed therein. See also: M. Tison, *The civil law effects of MiFID in a comparative law perspective*, in: *Festschrift für Klaus J. Hopt. Unternehmen, Markt und Verantwortung*, Berlin–New York 2010, p. 2621 et seq.

21 M. Tison, *op.cit.*, note 19, 2622 et seq.

22 Likewise: A. Kawecki, *op.cit.* note 1, 262.

for an investment firm's obligation to act in its client's interest and observe the duty of loyalty. Pursuant to Article 83a(3) ATFI, an investment firm providing brokerage services must take account of the client's best interests.

As a result, we must assume that courts settling cases of improper performance of contractual obligations by brokerage firms should take special account of the content of obligations imposed on such firms by public law. This pertains to the obligation to exercise orders on the most favourable terms to the client (see section 47 et seq. RPCC), as well as other factors an investment company must consider when deciding where to execute an order (section 48(1)-(4) RPCC). However, civil courts are not bound by the verbatim wording of the provisions of administrative law included in the regulation, but rather must interpret the contract binding the parties[23] under Article 65 CC on a case-by-case basis.

There is much more controversy when it comes to the question of whether civil courts can interpret the investment firm's contractual obligation to act in their client's interests in a more restrictive manner than prescribed in the MiFID directive. It is also disputable whether MiFID directives restrict the Polish legislator's or Polish courts' freedom to shape public law rules determining relationships that create obligations between brokerage service providers and their clients.

Comparative studies point to two diverse views. The first assumes that since the MiFID directive does not interfere with the content of contracts made in member states, but only sets public law rules, national legislators and judicial authorities enjoy full discretion in terms of determination and interpretation of private law rules.[24] Following this reasoning, the investment's firm duty of care and loyalty stemming from public law is a specific interpretative guideline for civil courts settling issue around the specific content of the civil law duty of care and loyalty, without imposing restrictions on civil courts in this respect.[25]

The second view is that the freedom of member states to determine and interpret private law rules applicable to brokerage (investment) services is hardly compatible with the maximum standard of harmonization introduced by the MiFID directive and its objectives. Pursuant to the prevailing view in the literature, MiFID directive rules should be viewed as maximum regulation, which is supported by the detailed nature of these provisions and their objective – the integration of the European capital market and

23 M. Casper, C. Altgen, *op.cit.* note 18, 105.

24 M. Tison, *op.cit.* note 19, 2632; O. O. Cherednychenko, *op.cit.*, note 16, 254.

25 See the British Appellate Court's judgement: *Gorham & others v. British Telecommunications plc*, Trustees of the BT Pension Scheme & Standard Life Assurance Company, 2000 1 WLR 2129 and the Dutch Supreme Court's judgement: *De T v. Dexia Bank Nederland NV*, HR 5 Jun. 2009, RvdW 2009, 683; *Levob Bank NV v. B and GBD*, HR 5 June 2009, RvdW 2009, p. 684; *Stichting Gedupeerden Spaarconstructie v. Aegon Bank NV*, HR 5 June 2009, RvdW 2009, p. 685 – quoted in: O.O. Cherednychenko, op.cit., note 16, 254 et seq.

facilitation of the cross-border operations of investment firms.[26] This would mean that member states cannot introduce regulations governing brokerage services offered by investment firms that would be stricter than EU law, as this would hinder cross-border provision of such services on the EU common market.[27] The introduction of different civil law regulations as applicable to contracts would form an obstacle to the provision of cross-border brokerage services, as the investment firm would have to adjust its operations to mandatory private law rules which determine the content of their contractual relationships.[28]

In this matter, I support the relative autonomy of member states' private law. It seems that the national legislator can shape the private law rules which impose additional or more stringent obligations on brokerage firms than the duties laid down in the MiFID directive. Likewise, civil courts in member states can also independently interpret contracts for investment services between investment firms and their clients, which includes the right to infer more extensive obligations of the service provider than set forth in the MiFID directive[29]. Contracts for investment services can broaden the scope of duties of investment firms towards their clients.[30]

Investor protection, guaranteed by the MiFID directive, is based on the assumption that the institutions operating under this directive will do so in the same manner in every single member state. However, it is obvious that this assumption is not in line with the facts – terms and conditions governing the provision of brokerage (investment) services differ from state to state, and from multiple perspectives: the legal systems, institutional environments, level of individual investors' education, etc. The MiFID directive ensures the appropriate level of security in countries whose capital market is well developed. Meanwhile, in countries such as Poland, where the level of investor education is low, the protection that the MiFID directive ensures may turn out to be insufficient.[31] In this context 'local' private law can serve as an effective, case-tailored supplementation, remedying the potential gaps in investor protection.[32]

However, there are some limits to the autonomy of private law in this field. It seems that the extension of a brokerage firm's duties based on contractual provisions cannot

26 P. O. Mülbert, *The Eclipse of Contract Law in the Investment Firm-Client Relationship: The Impact of the MiFID on the Law of Contract from a German Perspective* in: *Investor Protection in Europe. Corporate Law Making, The MiFID and Beyond*, ed. G. Ferrrarini, E. Wymeersch, Oxford 2007, 300 et seq.

27 M. Tison, *op.cit.*, note 19, 2632; O. O. Cherednychenko, *op.cit.*, note 16, 254.

28 P. O. Mülbert, *op.cit*. note 25, 300 et seq.

29 Likewise: A. Kawecki, *op.cit.* note 1, 263.

30 More on the subject see below.

31 L. Enriques, *Conflict of interest in Investment Services: The Price and Uncertain Impact of MiFID's Regulatory Framework* in: G. Ferrrarini, E. Wymeersch, *op.cit*., note 25 334 et seq.

32 *Ibidem.*

completely prevent the attainment of the MiFID directive's objectives, and the freedom of services on the common market. The obligatory content – that prescribed by imperative legal rules – of contractual legal relationships in the scope under discussion cannot create a situation where investment firms in the EU have to deal with radically diverse systems of service provisions depending on the member state.

Validity of a Contractual Exemption from Duties Laid Down in the MiFID Directive

We must assume that a contract or its specific provisions, which are less favourable to the investor than public law rules on investment services, are invalid (article 58(1)-(3) CC)[33]. Furthermore, it is also disputable whether an investment firm or a bank's liability for damage arising out of failure to comply with the MiFID directive can be waived. However, it would be admissible to impose additional duties on an investment firm or a bank which go beyond the standard laid down in the MiFID directive.[34]

The Impact of the Infringement of Duties Laid Down in the MiFID Directive on the Validity of Contracts for Investment Services

It has been assumed in Polish legal sciences that a contract for brokerage services made by an entity running brokerage services without a required license is invalid[35]. This view is consistent with established case law of the Supreme Court on an analogous question of law concerning other regulated types of business activity and with legal literature which supports this reasoning[36]. Also Italy, Ireland and, as it seems, France have adopted a similar view both in legal literature and case law (though in France this issue is still hotly debated in literature and judicial practice is inconsistent).[37] Nonetheless, it is worth noting that many other EU states represent a different viewpoint, which means that this matter is highly debatable[38]. First of all, it is argued that the system of granting licenses for operations on the financial market is to protect the public interest. Meanwhile, the sanction of invalidity of a legal transaction executed by an unauthorized person is not always in the best interest of the client with whom the contract has been made.[39]

33 A. Kawecki, *op.cit*., note 1, 263.

34 *Ibid.*

35 *Ibid.*

36 Supreme Court judgement of 19 January 2011 V CSK 173/10 on invalidity of a contract for real estate agency conclude by a person without a realtor's license. See also the Supreme Court resolution of 17 July 2007 III CZP 69/07 on invalidity of a contract for real estate management. See also M. Gutowski, *Ważność umowy zawartej w zakresie działalności licencjonowanej przez osobę nieposiadającą wymaganej licencji*, „Monitor Prawniczy" 2009, no. 3, p. 168 et seq.

37 D. Busch, D. A. DeMott, *Liability*..., p. 542.

38 M. Tison, *op.cit*., note 19, D. Busch, D. A. DeMott, *op.cit.*, note 1, 542. In German law, see: M. Casper, C. Altgen, *op.cit.*, note 18, 131 et seq.

39 M. Tison, *op.cit*., note 19.

I believe that the sanction of invalidity of a legal transaction in the case of an investment firm's infringement of relevant public law rules should be applied cautiously, taking account of the circumstances of a specific case. Contrary to the prevailing view, I believe that a contract for brokerage services concluded by an entity running brokerage services without a required license is valid. I am not persuaded by the opinion, widespread in Polish legal literature and case law, that "since the legislator rations a specific activity and imposes an obligation of a license to run it, it should not accept the existence of valid contracts made by unauthorized entities or extend protection to claims arising out of such contracts".[40] This would mean that the same axiological arguments which support licensing of a specific activity underpin the view that contracts made by entities without the required license should be eliminated, making a relevant legal transaction invalid[41]. Meanwhile, we are dealing with two separate issues. It is a separate matter to punish an entity running its business without a license with administrative law or even criminal law penalties, as such penalties 'hurt' primarily the 'perpetrator' who has infringed public interest protected by these rules. Meanwhile, the sanction of invalidity of a legal transaction interferes with the interest of a client who has made a contract with an investment firm operating without a license and is, in a way, a victim of this conduct. From the perspective of the client's interest, the sanction of invalidity of a legal transaction will not always bring about positive effects, as the client will often become aware of the shortcomings of the counterparty after the fact, that is after they have transferred their funds or financial instruments for management, or have used investment consulting services. It may turn out that claims under contract offer a much better protection of the client's interests than claims under unjustified enrichment or potential claims under *culpa in contrahendo*.[42]

Rules Applicable to "Inducements" Received by Asset Managing Entities

The European legislator, followed by the Polish one, has introduced public law regulations intended specifically to address the issue of fees received or given by the investment firm in connection with the portfolio management service. This pertains, for instance, to benefits obtained from other investment firms by the agency of which the managing firm executes orders to acquire or sell financial instruments within the managed portfolio in exchange for directing a "stream of orders" to them. One important feature of such inducement is that they may encourage investment firms to infringe their duty of loyalty by using services of investment firms whose terms are not the most favourable (e.g. the cheapest) to the clients. These regulations apply to all benefits related to the provision of

40 M. Gutowski, *op.cit.*, note 35, 173.

41 *Ibidem.*

42 V. P. Machnikowski, in: *System Prawa Prywatnego. Prawo zobowiązań – część ogólna*, *vol. 5*, ed. E. Łętowska Warszawa 2013, p. 476 et seq.

brokerage services, without limitation to performances that would typically be classified as 'inducements'.[43]

Section 8 RPCC in conjunction with Article 26 of the directive 2006/73/EC (Article 24(9) MiFID II) introduces a general assumption that an investment firm that gives or is given a benefit in connection with the provision of an investment (brokerage) service infringes the duty of loyalty toward its client. Therefore, the regulations being analysed do not apply to such benefits received or given by the investment firm which are not related in any way to the brokerage service provided to clients.[44] Furthermore, this assumption does not apply if the investment firm operates on the basis of one of the three exceptions stipulated by these regulations: the first one is rather obvious and pertains to situations where the benefit to the investment firm is paid by the client (section 8(2) RPCC); the second one (section 2(2) RPCC) concerns equally typical benefits such as fees and commissions necessary for the provision of a specific brokerage service (e.g. fees for deposit services, fees for transaction settlement or clearing of the transaction – see Article 24(9) in fine MiFID II);[45] the third exception applies to all other benefits which were classified as admissible by the legislator. Such benefits must meet two criteria: first, the client has received information on such benefits, their nature, amount or manner of calculation before entering into the brokerage contract;[46] second, they are received or given to improve the quality of the brokerage service provided by the investment firm to the client (Section 8(2)(3) RPCC).[47]

In the context of the MiFID II directive, the European legislator has decided to go even further when it comes to the restrictions aimed at the protection of investors' interests (see recital 74 MiFID II). An investment firm, as a rule, cannot give or be given any benefits from third parties, from issuers of any financial instruments or providers of financial products. The only exception from this rule are small financial benefits which may improve the quality of service provided to the client and have no negative impact on the investment firm's compliance with its duty to act in the client's best interest and on condition that they have been explicitly disclosed (Article 24(7)(b) and Article 28 MiFID II).

What is more, the European legislator has assumed that benefits received by an investment firm offering portfolio management services in breach of the regulations that restrict the admissibility of accepting such benefits must be transferred to clients (see recital 74 MiFID II). Pursuant to Article 24(9) MiFID II, in relevant cases the investment

43 CESR Level 3 Recommendations on Inducements, Cesr/07–316, 2017.

44 *Ibidem*, 5.

45 *Cf.* Maciej Kurzajewski, *Usługi maklerskie*, Warszawa 2014, p. 184 et seq.; *Cf.* CESR Level 3 Recommendations on Inducements. under MiFID, Cesr/07–316, 2017.

46 With respect to the level of detail of the information see also Section 8(3) RPCC.

47 *Cf.* M. Kurzajewski, *op.cit.*, note 44, 198 et seq.

firm must also inform the client about mechanisms for transferring the fee, commission, monetary or non-monetary benefit received in relation to the provision of the investment or ancillary service.[48]

The answer to the question whether, in the view of currently binding Polish law, an investment firm providing an investment service to a client has a contractual duty to return the "inducement" to the client may be seen as controversial. It is a consequence of discrepancies concerning the interpretation of the second sentence of Article 740 of the Civil Code introducing the obligation of the service provider to return "everything received from them when performing the order" to the client. Older literature on the topic supported the view that "this kind of benefits should be given to the ordering party", since it "prevents, to a certain extent, improper conduct of the provider".[49] "The provider accepting the order cannot act in a third party's interest. They cannot accept any gifts, performances or similar benefits from others".[50]

This view does not distinguish sufficiently between the two layers of the issue under discussion, namely: a potential breach of the duty of loyalty to the ordering party which stems from the acceptance of an 'inducement' from a third party, and the obligation to return the benefit under the second sentence of Article 740 of the Civil Code. In consequence, one should agree with the view presented in more recent literature that the provider is not obliged to transfer to the client any benefits obtained in connection with the performance of the order, but for itself, and not for the client.[51] It is a completely separate matter that the acceptance of a benefit from a third party typically puts the provider in a situation of conflict of interest, which in turn may lead to the breach of the duty of loyalty to the client if the service is not performed in the exclusive interest of the client.[52] It seems, however, that the task of transposing the MiFID II provisions on inducements to the Polish system will involve legislative changes in this respect, including the introduction of an explicit obligation to return the benefits related to the provision of a brokerage service illegally received by the investment firm.

48 In German law *cf.* M. Casper, C. Altgen, *op.cit*., note 18, 110; P. O. Mülbert, *Auswirkungen der art. 19 ff MiFID auf das Zivilrecht am Beispiel von Vertriebsvergütungen im Effektengeschäft der Kreditinstitute*, „Zeitschrift für das gesamte handelsrecht" 2008, no. 172, pp. 170–209.

49 A. Szpunar, in: *System prawa cywilnego. Prawo zobowiązań, część ogólna, vol. 3, part 2*, ed. Z. Radwański Wrocław 1981, p. 398 et seq.

50 *Ibid*., 398.

51 *Ibidem* Likewise: K. Kopaczyńska-Pieczniak in: *Kodeks cywilny. Komentarz, vol. III*, ed. A. Kidyba, Warszawa 2014, p. 627.

52 On this duty *cf.* A. Szpunar, *op.cit.* note 48, 396 et seq.

Civil Liability of the Managing Entity

A service provider who improperly performs its duty to manage an asset portfolio is liable for damage under Article 471 of the Civil Code. However, it is important to add that such a fact can also be classified as a breach of public law governing this service. A breach of public law rules governing the business conduct with respect to asset management can result in liability for damages under Article 145 of the Civil Code.[53]

Nonetheless, a mere decrease in the value of assets entrusted in management is not tantamount to a breach of the obligation by the managing entity. As a rule, the obligation of the investment firm to manage a portfolio involves a duty of diligent conduct, and not an obligation to attain a specific result. The firm does not guarantee any specific financial results of the service it offers. A decrease of the portfolio value cannot automatically be considered a remediable damage suffered by the investor. A decrease in the value of assets may be caused by factors which are beyond the influence of the managing entity[54], such as the macroeconomic situation.

Typical examples of a breach of duty by the managing entity include[55]: asset management incompatible with the client's investment goals agreed between the parties or in breach of the portfolio management policy; acquisition of an asset portfolio without the fundamental analysis required in a specific case; improper advisory of the managing entity when deciding on the portfolio management policy with the client; provision of a service unsuitable for a specific client or transaction churning.[56]

When breached by an investment firm, most public law provisions implementing the MiFID directive into Polish law can create liability for damage toward investors under Article 415 et seq. CC.[57] It is a consequence of the fact that the direct purpose of these provisions is to protect investors' interest. One case of such a breach is the provision of asset management services without performing the Know Your Client procedure confirming that the service is appropriate for a specific person (section 16(5) RPCC), or, potentially, a breach of the firm's disclosure obligations before entering into a contract for the provision of the service (Article 19(3) of MiFID I directive and section 13 RPCC), in particular the failure to inform the client of risks inherent to investments in a specific type of financial instruments.

As a rule, the damage arising from the breach of the firm's duties is calculated as the difference between the actual value of the asset portfolio and its hypothetical value had the breach not occurred.[58] A damage to be remedied may take the form of a loss

53 M. Casper, C. Altgen, *op.cit.*, note 18, 107; A. Kawecki, *op.cit.*, note 1, 266.

54 C. Benicke, *Wertpapiervermögensverwaltung*, Tübingen 2006, p. 832 et seq.

55 *Ibidem*, p. 813.

56 *Ibidem*, p. 812.

57 Likewise: A. Kawecki, *op.cit.*, note 1, 266.

58 V. Z. Radwański, A. Olejniczak, *Zobowiązania-część ogólna*, Warszawa 2014, p. 93; M. Kaliński, *Szkoda na mieniu i jej naprawienie*, Warszawa 2014, p. 188 et seq.

(e.g. a decrease of the value of a purchased instrument) and lost benefits (e.g. the increase of the value of instruments in which the funds would have been invested).[59]

In this context, a fundamental question typically debated in literature is the scope of analysis of the client's financial situation that is required to determine the amount of damage suffered by them. In particular, it is necessary to determine whether - in order to assess the actual value of the victim's assets after the event causing damage has taken place - one should take account of: (i) the total value of the managed portfolio, that is of all its components, both instruments and cash; or (ii) specified financial instruments or a transaction pertaining to such instruments by which the managing entity breached its obligation.[60] In practice, to answer this question is to determine whether negative consequences of the event causing damage and pertaining to certain financial instruments can be compensated by benefits generated by other instruments in the same portfolio.[61]

When analyzing this issue from the perspective of Polish law, we must conclude that to determine the actual value of victim's assets it is necessary to take account of the entire financial situation of the victim after the event causing damage occurred, instead of limiting ourselves to direct consequences of such an event.[62] Meanwhile, the core of the analyzed problem is rather the admissibility of accounting benefits obtained by the client towards damage (*compensatio lucri cum damno*). The answer to this question depends directly on the nature of the event causing damage and on the type of the infringed management duty. If the infringed duty concerned the entire asset portfolio, to calculate the damage suffered by the client one should take account of the actual value of the entire portfolio, inclusive of potential benefits (*compensatio lucri cum damno)* arising of improper portfolio management. However, if the infringed duty involved an acquisition of a specific type of assets, for instance shares in X, without relevant fundamental analysis, the procedure applied should be different. In this case, when calculating the actual value of a victim's assets, benefits arising from the purchase of shares in Y and Z cannot be used to set off the damage arising from the acquisition of shares in X. It is a consequence of the fact that the damage and benefit were not caused by the same event.[63]

The most pronounced difficulty when calculating the damage involves the determination of a hypothetical value of the managed portfolio assuming that the infringement would not have taken place. One specific feature of liability for infringement of a duty by an entity managing a portfolio of quoted assets is that a model (projection) of a hypothetical value of the managed portfolio assuming that the damaging event has not taken

59 M. Casper, C. Altgen, *op.cit.*, note 18, 126; *cf.* K. Zacharzewski, *Szkoda giełdowa i jej naprawienie*, Toruń 2015, p. 408.

60 K. Zacharzewski, *op.cit.*, note 58, 422 et seq. In German literature v. M. Casper, C. Altgen, *op.cit.*, note 18, 127; C. Benicke, *op.cit.*, note 53, 837 et seq.

61 C. Benicke, *op.cit.*, note 53, 837 et seq.

62 Z. Radwański, A. Olejniczak, *op.cit.*, note 57, 93.

63 *Ibidem*, 94.

place is required not only to calculate the potential lost benefits[64], but also the loss of an investment firm's client(*damnum emergens)*.[65]

When developing a model of hypothetical behaviour of a correctly managed portfolio, the primary source of data includes the outcomes of the 'healthy' part of the portfolio.[66] Such an extrapolation of the correctly managed portion to the entire portfolio is obviously possible only when, first of all, at least a part of the portfolio was managed correctly, and, secondly, the correctly managed portfolio structure is in a specified way similar to the incorrect structure of the entire portfolio.[67]

Nonetheless, the foregoing intellectual operation will be inappropriate if the correct portion of the portfolio, in compliance with the contract, does not correspond to the structure of the incorrect portion of the portfolio. In such a case, to calculate the hypothetical value of the incorrect portion of the portfolio which has been improperly managed, one needs a model based on other, objective ratios. First of all, it is necessary to take account of the contract of management, and the agreed portfolio management policy in particular, in the scope applicable to the portion concerned. If the policy lays down the requirements concerning the structure of this portion of the portfolio, they should obviously be considered, as they narrow down the circle of potential factors that influence the portfolio structure. However, it may be possible to use the value of units in most popular investment funds with a similar management policy as a benchmark.[68] If relevant data is available, it is also admissible to take account of results generated by other entities managing asset portfolios of a similar structure.[69] In the process of building the model of hypothetical portfolio value, common sense experience suggests that it is reasonable to conclude that the investment firm would not have left client's funds idle for a longer period without an important reason.[70]

The duty to remedy damage arising out of the breach of a contractual obligation laid down in the contract for portfolio management can be proportionally decreased if the victim has contributed to the damage, pursuant to Article 362 CC. The most obvious case of such a contribution in the circumstances being discussed is the provision of untrue or incomplete data of a victim's financial standing and personal situation to the investment firm, which may result in issuing incorrect recommendations with respect to the asset portfolio management.[71] However, as a rule, the lack of a client's response to the fact that the service has not been performed in compliance with the contract (e.g. excessively risky portfolio management policy) and failure to notify the investment firm

64 *Ibidem*, p. 93.
65 C. Benicke, *op.cit.*, note 53, 865.
66 C. Benicke, *op.cit.*, note 53, 865.
67 *Ibidem*, v. M. Casper, C. Altgen, *op.cit.*, note 18, 127.
68 C. Benicke, *op.cit.*, note 53, 846; M. Casper, C. Altgen, *op.cit.*, note 18, 126.
69 M. Casper, C. Altgen, *op.cit.*, note 18, 127.
70 Otherwise: *Ibidem*.
71 C. Benicke, *op.cit.*, note 53,882.

of one's complaints or comments cannot be classified as the victim's contribution to damage.[72] A client using the asset management service is not obliged to monitor on an ongoing basis how the service is being performed and file complaints on the breach of the managing entity's duties.[73]

Conclusion

In view of the current economic situation, and the forecasted persisting low interest rates, we are likely to observe a gradual increase to the practical importance of asset management contracts in Poland and other countries of Central and Eastern Europe. Consequently, the significance of civil law liability of investment firms for improper performance of asset management contract will also become more pronounced, since shortcomings in this respect are difficult to identify by supervisory bodies and are typically of incidental nature.

MiFID I-derived public law regulations on provision of brokerage services are particularly important for the countries of Central and Eastern Europe, given the relatively limited experience of the judiciary and legal scholars in settling disputes and complex legal problems arising in this context. The public law duty of loyalty of an investment firm to its clients introduced by the MiFID directives (Article 19(1) of MiFID I and Article 24(1) of MiFID II) is a new category in the legal system and legal discourse of these states and has not been fully explored yet. It stems from the institution of fiduciary duties developed in the common law system that allows for flexible limitation of the conduct of a fiduciary enjoying discretional competence to affect the financial standing of the person entrusting their assets.[74]

In a way, the investment firm's duty of loyalty to its client introduced by the MiFID directives plays an important educational role transforming the legal culture of these states. Consequently, it can be assumed that unlike certain mature capital markets, such as the German market, where the MiFID I directive was described as potentially relaxing the excessive severity of the private law and conspicuous activity of courts in terms of investor protection, in Poland and probably in other 'new Europe' states alike it will rather motivate supervisory authorities and civil courts to become more active in this area.

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72 *Ibidem*, 882 et seq.

73 For exceptions from this rule v. Benicke, *op.cit.*, note 53, 890 et seq. M. Casper, C. Altgen, *op.cit.*, note 18, 128. et seq.

74 V. K. Pistor, C. Xu, *Fiduciary Duty in Transitional Civil Law Jurisdictions Lessons from the Incomplete Law Theory*, in: *Global Markets, Domestic Institutions: Corporate Law and Governance in a New Era of Cross-Border Deals*, ed. C. J. Milhaupt, New York 2003, p. 78 et seq.

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SUMMARY

The Civil Liability of Asset Managers – a Polish Perspective[75]

This paper focuses on the civil liability of asset managers in Polish law. Following the transformation of the economic system and the development of the capital market in Poland, the importance of asset management has been gradually increasing, though it remains disproportionally lower when compared to the role of collective asset management in the form of investment funds. The chief purpose of both MiFID directives is to harmonize the rules applicable to investment firms providing brokerage services in Europe, and to protect the interests of investors using brokerage services. Although the civil liability of investment firms offering brokerage services is part of what is broadly construed as investor protection, the regulations on this matter have been left to the member states' discretion. There is no doubt that discrepancies between member states in this respect diminish the harmonizing effect of both directives. This paper sets out to determine the basic rules of civil liability of asset managers in Polish law, and present suggestions for the most common problems in this field.

Keywords: civil liability, brokerage services, asset management, MiFID, harmonization.

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The Use of the "Dry Submarine" Technique and Other Allegations in Proceedings Before the United Nations Committee on Enforced Disappearaances. Remarks on the *Yrusta v. Argentina* case no. 1/2013

Introduction

The United Nations[1] adopted the International Convention for the Protection of All Persons from Enforced Disappearance on 20 December 2006.[2] The Convention entered into force on 23 December 2010.[3] The Convention consists of three parts. Part I contains substantive provisions which establish the obligations of States to prevent and combat enforced disappearances and the crimes associated with them. Part II contains provisions which guarantee procedural protection from acts prohibited by the preceding part of the Convention. Part III opens with a provision which establishes the primacy of national laws or international laws binding upon States Parties which more effectively protect against enforced disappearances.[4] In addition, Part III contains closing clauses typical for treaties and defines the relationship between the Convention and international humanitarian law.[5]

The Convention not only reflects international law, but also develops it with regulations concerning the prevention of enforced disappearances and the punishment for such offenses. Article 2 defines enforced disappearance as the "arrest, detention, abduction or any other form of deprivation of liberty by agents of the State, or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or

1 Hereinafter: UN.

2 International Convention for the Protection of all Persons from Enforced Disappearance adopted by the General Assembly of the United Nations on 20 December 2006, United Nation Treaty Series (hereinafter: UNTS), vol. 2716, A/RES/61/177, hereinafter: the Convention.

3 *Ibidem.*

4 Article 37 A/RES/61/177.

5 Article 43 A/RES/61/177.

whereabouts of the disappeared person, which place such a person outside the protection of the law".[6] The Convention confirms that enforced disappearance constitutes a crime against humanity and gives rise to liability for violation of international law.[7] Imposing a ban on enforced disappearance, which is not to be revoked under any circumstances, even exceptional ones such as a state of war, is significant progress indeed.[8]

Among the measures to prevent enforced disappearances, the Convention introduces a clear prohibition on the maintenance of secret detention facilities, and requires the introduction of a minimum level of guarantees related to deprivation of liberty, including the compilation and maintenance of one or more up-to-date official registers or records of persons deprived of liberty, and the right of such persons to communicate with – and be visited by – family, counsel or another person of their choice.[9] States Parties are obliged to punish a person who has committed the offence of enforced disappearance if the person is in the State's territory, and if the state has not extradited that person or surrendered him or her to an international criminal tribunal whose jurisdiction it has recognized.[10] Significantly, enforced disappearance for the purpose of extradition between States Parties to the Convention is not considered to be a political offence, an offence connected with a political offence, or an offence inspired by political motives. Therefore, States Parties cannot refuse a request for extradition based on such an offence on these grounds alone.[11]

An innovation which is not present in other legislative solutions is the actual definition of victim which appears in the Convention. For the purpose of the Convention, a victim does not only mean the disappeared person, but also any individual who has suffered harm as the direct result of an enforced disappearance, such as family members.[12] The victim is provided with the right to know the truth regarding the circumstances of the enforced disappearance, the progress of the investigation and the fate of the missing person.[13]

Each State Party to the Convention is also to take appropriate measures to ensure that victims of enforced disappearance have the right to obtain just satisfaction and, where appropriate, other forms of reparation, including restitution, rehabilitation, satisfaction, and a guarantee of non-repetition in the future. States are obliged to take appropriate steps regarding the legal situation of disappeared persons whose fate has not been clari-

6 Article 2 A/RES/61/177.
7 Article 5 A/RES/61/177.
8 Article 1 A/RES/61/177.
9 Article 17 (1), (2) (f) and (3) A/RES/61/177.
10 Article 11 (1) A/RES/61/177.
11 Article 13 (1) A/RES/61/177.
12 Article 24 (1) A/RES/61/177.
13 Article 24 (2) A/RES/61/177.

fied and that of their relatives, in fields such as social welfare, financial matters, family law and property rights.[14]

The final provision of Part I of the Convention concerns the protection of a particular group of persons, namely children.[15] Each State Party must take the necessary measures to prevent and punish the wrongful removal of children who are subjected to enforced disa pearance, children whose father, mother or legal guardian is subjected to enforced disappearance or children born during the imprisonment of a mother. The Convention obliges States Parties to respect the welfare of children who are direct or indirect victims of enforced disappearance, and in the course of searching for them and their identification, protect their right to preserve their identity – or have it re-established – including their nationality, name and family relations. States Parties shall also take the necessary measures to prevent and punish the falsification, concealment or destruction of documents confirming their true identity.

Part II of the Convention establishes the methods for its implementation and, to this end, establishes the Committee on Enforced Disappearances (the Committee). By virtue of the powers conferred upon it, the Committee examines the reports of the States Parties on the measures they have taken to fulfil their obligations under the Convention.[16] As part of the search and disappearance procedure, the Committee requests that States Parties provide information on the person sought, and makes the recommendations it deems necessary to protect the person concerned.[17] The Committee also examines the communications of individuals claiming to be victims of violations of the Convention[18] and communications from States Parties claiming that another State Party is not fulfilling its obligations under the Convention.[19] If the Committee receives information indicating that another State Party has seriously violated the provisions of the Convention, it may, after consultation with the State Party concerned, request that one or more of its members visit and report back to it promptly.[20] Finally, if the information received indicates that enforced disappearances are widespread or systematic, the Committee may urgently bring the matter to the attention of the General Assembly of the United Nations, through the Secretary-General of the United Nations.[21]

14 Article 24 (4), (5) and (6) A/RES/61/177.
15 Article 25 A/RES/61/177.
16 Article 29 A/RES/61/177.
17 Article 30 A/RES/61/177.
18 Article 31 A/RES/61/177.
19 Article 32 A/RES/61/177.
20 Article 33 A/RES/61/177.
21 Article 34 A/RES/61/177.

The *Yrusta v. Argentina* case

Facts and allegations

On March 11, 2016, the Committee issued its first views on the first case it considered, and so far the only one on an individual action.[22] The authors of the communication, the sisters of Roberto Agustín Yrusta, brought the case against Argentina, due to the disappearance of their brother. The sisters claimed that they had been victims of violations of those provisions of the Convention which: prohibit enforced disappearances[23]; require that appropriate measures be taken to prosecute enforced disappearances and punish those responsible for these crimes[24]; establish the right to report that another person has been the victim of enforced disappearance, guaranteeing a comprehensive and impartial investigation and stipulating that it must proceed even in the absence of a formal complaint when there are reasonable grounds for believing that a person has been the victim of enforced disappearance[25]; oblige the State Party to cooperate and provide legal assistance to victims of enforced disappearance, as well as to search for, locate and release missing persons, and, in the event of their death, assist with the exhumation, identification and return of their remains[26]; stipulate that the authorities which are responsible for deciding on the deprivation of liberty must be clearly indicated in the national legislation, and establish the right of a person deprived of liberty to communicate with and see their counsel or person of his or her choice[27]; guarantee a person with a legitimate interest the right to obtain basic information concerning the circumstances of deprivation of liberty to, and protect this person from ill-treatment in the search for such information[28]; guarantee the right to a prompt and effective judicial remedy as a means of obtaining without delay information referred to in paragraph 1 of Article 18[29]; oblige States to ensure the training of public officials on the issue of enforced disappearances[30]; define the concept of victim and establish the rights involved in the proceedings which shed light on enforced disappearance and to remedy the resulting damage.[31]

In 2005 Roberto Agustín Yrusta was sentenced to 8 years imprisonment for aggravated robbery involving the use of a firearm. For more than 3 years of his prison sentence in the Province of Córdoba, Mr. Yrusta was subjected to torture and inhuman

22 Decision of 12 April 2016 of the Committee on Enforced Disappearances (hereinafter: CED) no. 1/2013 in the case *Yrusta v. Argentina*, CED/C/10/D/1/2013.
23 Articles 1 and 2 A/RES/61/177.
24 Article 3 A/RES/61/177.
25 Article 12 (1) and (2) A/RES/61/177.
26 Article 15 A/RES/61/177.
27 Article 17 (2) (c) and (d) A/RES/61/177.
28 Article 18 A/RES/61/177.
29 Article 20 A/RES/61/177.
30 Article 23 A/RES/61/177.
31 Article 24 A/RES/61/177.

and degrading treatment. This involved solitary confinement, being shackled to a bed, intimidation, beating, the use of the "dry submarine" technique[32], and transfers from one cell to another. In 2012, Mr. Yrusta filed a complaint against members of the Córdoba Prison Service at the competent provincial court. At the end of the same year, he gave an interview to local television during which he spoke publicly about how he was being treated by prison officers. Mr. Yrusta's family claimed that from that time on their brother's ill-treatment intensified.

Fearing for his own life, Mr. Yrusta requested that the prison authorities in Córdoba transfer him to the prison in the Province of Santiago del Estero, where he had family. However, at the beginning of 2016 he was transferred to a prison in Coronda, in the province of Santa Fe. The prisoner, unable to read and not informed as to his whereabouts, believed that he was being transferred to the requested institution.

Mr. Yrusta's family repeatedly asked the prison authorities to provide information on their brother's whereabouts, but no answer was forthcoming. This situation lasted for more than 7 days, during which time – in the opinion of the authors – their brother became a victim of enforced disappearance. When Mr. Yrusta was able to contact his family again, it became apparent that the Coronda prison officers were subjecting him to similar ill-treatment to that which he had suffered in the previous prison.

On February 7, 2013, 10 months before the end of the sentence, the prison authorities informed the family that Mr. Yrusta had committed suicide by hanging himself in his cell. According to the Institute of Forensic Medicine in Santa Fe, the most likely cause of death was by "sudden compression of the neck by an object with elastic properties (which was not furnished along with the body of the deceased)".[33]

Mr. Yrusta's body was delivered to the family on February 8, 2013. The state of the corpse indicated that Mr. Yrusta had been beaten and that rubber bullets had been fired at him. No injuries similar to those that would result from death by hanging were found. In view of the above, it was decided to contest the version of events reported by the authorities of the State Party.

On February 26, 2013, the Yrusta family, supported by *Coordinadora Anticarcelaria de Córdoba*[34] appealed to the Santa Fe Provincial Public Defender to intervene in the case of Mr. Yrusta, which had been referred to the Santa Fe Criminal Investigation Court. On April 22, 2013, this request was denied, on the grounds that the Public Defender lacked the capacity to bring such an action. The case file was also not made available to him. Neither did the court in question allow the deceased's family to participate in the proceedings as parties to the prosecution. The Santa Fe Criminal Court of Appeal had not considered the applicants' petition by the time the initial communication was

32 Suffocation by means of a plastic bag.

33 CED/C/10/D/1/2013, para. 2.4.

34 Córdoba Anti-Prison Coordinating Committee.

submitted to the Committee. No public authority helped in any way with the process of clarifying the real causes of Roberto Agustín Yrusta's death.

The Admissibility of the Communication

According to Article 31 (1) of the Convention, the Committee shall not admit any communications if they concern a State Party which has not declared that it recognizes the Committee's competence to receive and consider communications from or on behalf of persons under its jurisdiction who claim to be victims of violation by this State Party to the provisions of the Convention. Argentina made such a declaration on June 11, 2008. The Convention entered into force for this State on December 30, 2010.

Article 31 (2) (a) of the Convention provides for the Committee does not consider anonymous communications which make it impossible to establish the identity of the persons who direct them to the Committee, and yet at the same time claim to be the victims of certain human rights violations. On this basis, the communication in the case in question was admissible because the authors clearly defined themselves in the content in such a way that they could be identified.

In accordance with Article 31 (2) (c) of the Convention, it was ensured that the case of the Yrusta family — in the form presented to the Committee — had not previously been dealt with by another international body dealing with investigations or disputes of the same nature.

The authors alleged that the State Party was in violation of Articles 1, 2, 3, 12 (1) and (2), 15, 17 (2) (c) and (d), 18, 20, 23 and 24 of the Convention, on the basis of the facts described in the communication, and namely: the alleged enforced disappearance of Mr. Yrusta; his transfer in January 2013 to another prison than that which he had requested; the torture and inhuman and degrading treatment during three years of imprisonment; the lack of information concerning the whereabouts of the prisoner while he was being transferred to another prison, the name and location of which was not revealed to the family; the impossibility of communicating with the prisoner for over 7 days, until he was finally allowed to call his family; the authors' and mother's lack of access to a court that would provide a judgment on the lawfulness of the situation within a reasonable time; the death of Mr. Yrusta in the prison to which he was transferred; the investigation into the causes and circumstances of his death; and the failure to allow the sisters of the deceased to participate in proceedings before national authorities as parties to the prosecution.

In accordance with Article 31 (2) (b), a communication is inadmissible if it constitutes an abuse of the right of submission of such communications or is incompatible with the provisions of the Convention. Therefore, the Committee had to examine whether all alleged violations of the Convention fall within its scope. In this regard, the Committee found that some of the authors' claims did not fall within the competence *ratione*

materiae of the Committee, namely: the transfer of Mr. Yrusta without his consent; the acts of torture and inhuman and degrading treatment; and his death and the subsequent investigation. However, the following allegations were seen to fall within the Committee's competence: the alleged enforced disappearance of Mr. Yrusta for a period of more than seven days after his transfer from Córdoba to Cordona; the failure to provide information to his family about the transfer; the impossibility of contacting the prisoner for more than seven days; the fact it was impossible to gain access to a court that would reach a prompt decision concerning the lawfulness of Mr. Yrusta's situation after his prison transfer; the absence of any investigation into the enforced disappearance; and refusing to allow the deceased family members to take part in the investigation into their brother's case as parties to the prosecution.

The Committee noted that in the seven days during which the authors allege that Mr. Yrusta was subject to enforced disappearance, his family repeatedly asked the prison authorities for information regarding his location, no reply was given. The Committee also took into account the authors' claim that there was no possibility of initiating legal proceedings under national law, through which a decision could be made on the lawfulness of Mr. Yrusta's situation when he was transferred to the prison in Coronda. The Committee pointed out that the State Party had not provided any information on the existence or non-existence of domestic remedies in such circumstances.

The Committee observed it had taken over one and a half years – since 26 February 2013, when the authors submitted their request to join the case as plaintiffs – for the Appeal Court to deny their appeal. In the opinion of the Committee, the State Party did not provide any convincing arguments to justify such a delay. The Argentine authorities also failed to provide information indicating which State body had the competence to represent the authors in the proceedings before the national authorities, and neglected to inform the authors concerning the progress made in investigating the alleged enforced disappearance of Mr. Yrusta for over 7 days. Finally, the State Party did not respond to the question of whether the domestic law provides for such remedies. As a result, the Committee ruled that the only remedies available to the authors were not implemented within a reasonable time, and alternatives did not exist.

With regard to the above, the Committee considered the communication admissible in respect of the alleged violations of Articles 1, 2, 12 (1) and (2), 17, 18, 20 and 24 of the Convention, and requested that the State Party submit the comments on its substance. Despite five extensions, the Argentine authorities did not comment on the case.

Assessing the Merits of the Communication

Assessment of the claims contained in the communication had to precede the decision on whether Mr. Yrusta had been subjected to enforced disappearance, as defined in Article 2 of the Convention. The authors claimed that their relative had suffered enforced

disappearance while he was being moved from Córdoba prison to Coronda, because during this time neither he nor any family members knew where he was being transported, and for seven days the family was unable to obtain information from the prison authorities as to where the prisoner was located. In addition, the prison records – to which the family and the prisoner's attorney had access – did not make it possible to identify him unambiguously, as he was represented by three different names, which in turn prevented him from being located during subsequent stages of the detention. The registers did not contain information on who had ordered the transfer and for what reasons, or on the date and place of the transfer.

For the purposes of the Convention, and in accordance with Article 2, enforced disappearance begins with the arrest, detention, abduction or any other form of deprivation of liberty. Unlawful detention or arrest may lead to enforced disappearance[35], as can the transport of as prisoner, as happened in the case in question. In addition, in order to establish that enforced disappearance has taken place, it is necessary that the deprivation of liberty be accompanied by a refusal to recognize this deprivation, or to hide the fate or location of the person, a state of affairs that thereby places the person outside the protection of the law, irrespective of the duration of the deprivation of liberty or the concealment.[36]

In the opinion of the Committee, the refusal to provide information concerning where Mr. Yrusta was at the time specified in the communication constituted a form of concealment of his fate or whereabouts, as defined in Article 2 of the Convention. Furthermore, throughout the whole time in question, Mr. Yrusta was not able to contact anyone or receive any visits. In addition, Mr. Yrusta and his family had no access to a court which could make a timely decision on the lawfulness of the prisoner's transport. The Committee held that concealing the prisoner's fate and whereabouts resulted in his being deprived of legal protection. Persons deprived of liberty following enforced disappearance cannot avail themselves of the legal remedies provided for by national law to ensure that a court can determine the legality of the deprivation of liberty, as in the case of Mr. Yrusta. Consequently, the Committee ruled that the actions that Mr. Yrusta had been subjected to for more than 7 days, in connection with his transfer to another prison, constituted enforced disappearance, contrary to Articles 1 and 2 of the Convention.

With regard to the allegations concerning Articles 17 and 18 of the Convention, it should be remembered that at the time of the events which led to the communication, Mr. Yrusta was serving a prison sentence. According to Article 17, nobody should be detained in secret locations, and the State Party should ensure that records of persons deprived of their liberty are maintained and updated. Whereas Article 18 (1) (d) guarantees that any person with a legitimate interest – such as relatives of the detainee, their agent or attor-

35 General comment of the Working Group on Enforced or Involuntary Disappearances on the definition of enforced disappearances, A/HRC/7/2, para. 26.

36 *Ibidem*, paras. 8–9.

ney – should have access to information concerning the whereabouts of the detainee, and when the detainee is transported to another place of detention, the place and the authority responsible for the transfer should be specified.

It should be mentioned that Mr. Yrusta was transported under the pretext that his request was being taken into consideration, namely the change his place of imprisonment so that he could be closer to his family – from Córdoba to the province of Santiago del Estero. Information on the actual state of affairs was not provided by any representative of the authorities, to either the prisoner or the members of his family. Not only did the family not know where Mr. Yrusta was, they were not even told that he had been taken to another prison. Article 20 (1) of the Convention allows that the right of family members to be informed can be restricted, subject to certain preconditions, which however the Committee judged to be inapplicable in this case. The State Party did not provide any explanation as to relevant legislation in force in this area. The Committee held that depriving the prisoner and his family of information for seven days, including the family members who submitted the communication, violated Articles 17 (1), 18 (1) and 20 (1) of the Convention. The Committee also found the State Party to be in violation of Article 20 (2) of the Convention, because the family did not have effective access to a court as a means of obtaining information without delay, within the meaning of Article 18 (1).

As regards the authors' claim that they were prevented from taking an active part in the investigation of their brother's case, including his enforced disappearance, as they were denied the status of private criminal plaintiffs, the Committee recalled that, according to Article 24 of the Convention, apart from the disappeared person, a 'victim' is also defined as a person who has suffered directly as a result of enforced disappearance. The State Party did not provide any evidence that the sisters of the disappeared did not fall under this category of persons. In the Committee's view, the anxiety and suffering experienced by the authors of the communication, due to the lack of information explaining what had happened to their brother, was intensified by the *de facto* refusal to recognize their status as victims, which in turn led to their re-victimization – which is also in conflict with the principles of the Convention.

The Committee noted that the proceedings initiated with Mr. Yrusta's case dealt with the causes and circumstances of his death, and possible criminal liability associated with them. However, none of the files attached to the communication referred to the issue of enforced disappearance. The fact that the competent national authority took a year to make a decision concerning the participation of the Yrusta family in the case of Mr. Yrusta was in itself a violation of Articles 12 (1) and 24 (1), (2) and (3) of the Convention. After such a long period of time, the possibility of active and effective participation in the proceedings is reduced to such an extent that the damages resulting from the lack of enforcement of the relevant law becomes irreparable, and thus violates the victim's right to know the truth.

The Committee held that there had been violations of articles 1, 2, 12 (1), 17, 18, 20 and 24 (1), (2) and (3) of the Convention in relation to Mr. Yrusta, and 12 (1), 18, 20 and 24 (1), (2) and (3) of the Convention with respect to the authors of the communication.

Acting on the basis of article 31 (5) of the Convention, the Committee recommended that the State Party recognize the victim status of the authors of the communication, which would enable them to participate effectively in proceedings aimed at clarifying the death and enforced disappearance of their brother. The investigation into the circumstances of Mr. Yrusta's death should also include a comprehensive and detailed investigation into his enforced disappearance during his transport from Córdoba to Santa Fe. The perpetrators of the violations should be prosecuted, judged and punished. According to Article 24 (4) and (5) of the Convention, the authors of the communication should be vindicated and provided with prompt, fair and adequate compensation. Pursuant to Articles 24 (5) (d) and 17 and 18 of the Convention, the State Party must ensure that in the future similar violations do not occur, that prison registers are compiled and maintained, and that all persons with a legitimate interest will have access to all relevant information.

The Argentine authorities were obliged to publish and disseminate the Committee's views to the fullest extent possible, above all among members of the security forces and prisoner personnel, but not only in these circles.

The Committee requested that, within six months from receiving its views, the State Party should provide information on the measures taken to implement its recommendations. However, by the time of the 12th session of the Committee, Argentina had not provided such information.[37] Furthermore, the information available to the Committee shows that the State Party had not taken any steps to implement the recommendations contained in the views. Emphasizing that such nonfeasance continued and thus aggravated the violations of the rights of the authors of the communications, the Committee requested that the Argentine authorities submit the requested information within 2 months of receiving a verbal warning on this issue, and decided to consider it at its thirteenth session, which took place from 4–15 September 2017.[38] In 2018, the Committee examined the follow-up information submitted by the State Party. As Argentina had not fully implemented its recommendations, the Committee decided to maintain the follow-up procedure and to send a note verbale to the permanent mission of the State Party and a letter to the authors informing them accordingly, which took place in 2019[39].

37 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/SessionDetails1.aspx?SessionID=1102&Lang=en>.

38 Report of the CED, General Assembly Official Records, 72 Session, Supplement no. 56, A/72/76, para. 89.

39 Report of the CED, General Assembly Official Records, 74 Session, Supplement no. 56, A/73/56, para. 59 and Report of the CED, General Assembly Official Records, 74 Session, Supplement no. 56, A/74/56, para. 9 (p).

Comments

The Convention belongs to the human rights treaties of narrow scope. It protects the individual from enforced disappearance, and from acts or nonfeasance inspired by enforced disappearance which can accompany or be the consequence of this crime being committed by the state or by public or private law entities authorized by the state. It is clear from Article 2 of the Convention that anyone can participate in the crime of enforced disappearance, albeit in different forms. However, not all the actions of the person who is involved in the crime of enforced disappearance constitute a crime under the Convention. Yet, the refusal to admit that a person has been abducted, or obfuscating the location at which a person has been detained, do both fall under the definition of enforced disappearance expressed in Article 2 of the Convention, and thus constitute a basis for initiating the complaint procedure under Article 31.

In many cases, or even the majority of them, enforced disappearance rarely occurs out of nowhere, in an isolated manner, without being related to other crimes. Usually enforced disappearance is another method for attempting to exert pressure on a person deprived of liberty, and on the members of his or her family, or persons from the same political circle, or on persons in any other way connected with him or her. This type of offense takes place after acts classified by international law as ill-treatment, rather than as a pretext for such acts, as the intent is to cover up, especially when the aim is to prevent a missing person from being found. The kinds of treatment applied to those deprived of liberty, including enforced disappearance, is symptomatic of an unhealthy social fabric in the state, and is evident in broader political and economic spheres, not just in the prison service. It could even be argued that enforced disappearance in such situations is usually the final manifestation of ill-treatment, although it is impossible to exclude an alternative sequence of events.

Therefore, enforced disappearance is a very sensitive issue, making its regulation even more difficult and complex than that typically involved in the legislative process of international law. Legislators, including international ones, determine the principles and objectives of acts to be adopted *a priori*, in the interests of the majority taking part in the voting. For these reasons, in the Convention enforced disappearance became an illegal act separate from the notion of ill-treatment in international law. The Convention does not in practice rule out the convergence and multiple configurations of enforced disappearance and ill-treatment.[40] Nevertheless, for the implementation of the Convention,

40 It should be recalled that in the report prepared for the UN General Assembly by the Commission on Human Rights Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, indicated the admissibility of enforced disappearances as a kind of torture. United Nations General Assembly, Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, Question of torture and other cruel, inhuman or degrading treatment or punishment, A/56/156, 3 July 2001, paras. 9–16.

enforced disappearance was limited to the definition in Article 2, binding it strongly with another normative construct, namely the protection of freedom and personal security. The issue of ill-treatment falls outside the scope of the Convention provisions. Accordingly, any allegations of any form of ill-treatment, for example the use of the 'dry submarine' technique – although such treatment can be correlated with enforced disappearance, as it was in the *Yrusta* case – fall outside the scope of the Convention and, as expected, these allegations had to be rejected.

The Yrusta family could have submitted claims for alleged ill-treatment under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984 (CAT)[41], the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment of 2002 (CAT-OP)[42], or the American Convention on Human Rights of 1969 (ACHR).[43] Argentina is a party to these treaties and has recognized the competence of their supervisory bodies to deal with individual complaints against it[44]. Nevertheless, from the perspective of the Yrusta family or others, to submit simultaneous claims concerning alleged enforced disappearance and ill-treatment would seem to be an unacceptable solution, due to the time, cost and personal commitment, especially the emotional dimension. Allocating justice according to thematic categories, which is in principle permissible and justifiable, can – in the case of some complainants – turn out to be a choice that is unsatisfactory and therefore unreasonable, as in the *Yrusta* case. The interesting aspect of the Convention is that, in this context, it provides protection from ill-treatment, intimidation or punishment when persons with a legitimate interest search for information concerning a person deprived of liberty.[45] The relatives of Roberto Agustín Yrusta could therefore have demanded such protection as the required conditions were fulfilled, but solely with regard to them.

In its decision on the *Yrusta* case, the Committee treated enforced disappearance as was intended by the legislator, namely as an serious offense, unrelated to any other violation of fundamental human rights and freedoms, or to any unlawful act as defined by criminal law, whether international or national. At the same time, the Committee reaffirmed its jurisprudence in the area under discussion, according to which only the criminalization of enforced disappearance as an autonomous offense would enable the State

41 General Assembly Resolution of 10 December 1984, UNTS, vol. 1465, p. 85, A/RES39/46.

42 General Assembly Resolution of 9 January 2003, UNTS, vol. 2375, p. 237,

43 American Convention on Human Rights adopted on November 22 1969, UNTS, vol.1144, p. 123, hereinafter: ACHR.

44 Individual complaint procedure under CAT <http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=7&Lang=en> Individual complaint procedure under AHCR <http://www.cidh.oas.org/basicos/english/Basic4.Amer.Conv.Ratif.htm>.

45 Article 18 (2) of the ACHR.

Party to meet its obligations under Articles 2, 4, 6, 7 and 8 of the Convention.[46] It would be inappropriate to establish criminal liability for enforced disappearance by subsuming it under the various provisions of criminal law, because it constitutes one offense. Enforced disappearance is complex, not because it consists of elements of different crimes committed in secrecy, but rather because it has implications for the whole situation of the imprisoned and his or her rights. It does not suffice to show that the domestic law penalizes certain acts which are directed against the freedom of persons (for example, unlawful detention or arrest, alleged deprivation of liberty or abduction) and that the provisions contain some of the elements that constitute enforced disappearance as defined Article 2 of the Convention.[47] The situation of Argentina is, in this context, particularly interesting, as in its comments on the only government report submitted so far, the Committee welcomed an amendment to the penal code which introduced a new, separate type of offense of enforced disappearance, but at the same time the Committee indicated the difficulties in implementing the newly introduced provisions.[48] The position adopted by the Committee then confirmed its views on the *Yrusta* case.

According to Article 2 of the Convention, and as exemplified by the Committee in its case-law, enforced disappearance is carried out by representatives of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State.[49] This constitutive element of the definition was realised somewhat atypically in the *Yrusta* case. Mr. Yrusta disappeared during his imprisonment. Apparently, the deceased was under the care of the State Party's authority, which had authorised the prison services to be responsible for his life, health and safety. Nevertheless, the question arises of whether he was subject to enforced disappearance in a manner covered by the Convention, namely arrested, detained, abducted or otherwise deprived of his liberty – when Mr. Yrusta had already been deprived of his liberty, following a lawful judgment, and while actually being imprisoned. The Committee, in holding that Mr. Yrusta had been subjected to enforced disappearance, considering the circumstances of the case, allowed that Article 2 of the Convention applies to situations when liberty is deprived in openly functioning state prison systems. Given that the deprivation of liberty is only one of

46 CED, Concluding observations on the report submitted by Serbia under article 29, paragraph 1, of the International Convention for the Protection of all Persons from Enforced Disappearances, CED/C/SRB/CO/1, 16 March 2015, para. 10.

47 CED, Concluding observations on the report submitted by Armenia under article 29, paragraph 1, of the International Convention for the Protection of all Persons from Enforced Disappearances, CED/C/ARM/CO/1, 13 March 2015, para. 11.

48 CED, Concluding observations on the report submitted by Argentina under article 29, paragraph 1, of the International Convention for the Protection of all Persons from Enforced Disappearances, CED/C/ARG/CO/1, 12 December 2013, para. 12.

49 CED, Concluding observations on the report submitted by Germany under article 29, paragraph 1, of the International Convention for the Protection of all Persons from Enforced Disappearances, CED/C/GER/CO/1, 10 April 2014, para. 7.

the conditions required for enforced disappearance, and regarding that this deprivation can take many forms, other factors must play a role, such as when the prison authorities refuse to provide any information about the prisoner, most crucially concerning his or her location, as in the case in question, and consequently it becomes impossible to provide the protection provided for by law. Only after all the criteria required to establish enforced disappearance have been met can it be stated that there has been a violation of the prohibition of Article 1 of the Convention.[50] There is no doubt that the enforced disappearance of Mr. Yrusta was caused by acts contrary to the responsibilities of the State Party towards a person deprived of liberty, and that the violation took place by further deprivation of liberty, entailing that he found himself in a vicious circle, which he was unable to escape from himself. Help from family members was also precluded due to their not being provided with the necessary information.

Another important issue which may have an impact on the understanding of enforced disappearance in the Convention is the issue of time. Article 2 is silent on this subject. The legislator did not specify a temporal boundary, after the crossing of which arrest, detention, abduction or deprivation of liberty in another form are considered to constitute enforced disappearance, and thus the issue was left to the discretion of the supervisory body. Consideration of the literal wording of the definition of enforced disappearance in the Convention suggests that the element of time, if it is at all meaningful to a decision, is merely subordinate. Teleological interpretation, applied to the facts of a particular case, may prescribe caution in their subsumption, even if the conditions considered necessary to establish enforced disappearance have been fulfilled. In this case, the period of 7 days during which Mr. Yrusta could not personally determine where he was and why, and in which the Yrusta family were in no way able to obtain information on the whereabouts or fate of their relative, was precisely and repeatedly indicated at each stage of the proceedings before the Committee, starting from the submission of the communication through to the finding of violation of Articles 1 and 2. However, when deciding on the substance of the matter, the Committee did not refer more broadly to the effect of temporality on the legal classification. It may seem that, in the light of the Yrusta views, although the Committee did not ignore the element of time, given the potential strength of its interaction with elements of the definition of enforced disappearance in the Convention, it was not a decisive factor.

The prohibition on enforced disappearances was developed and strengthened by: prohibiting the detention of persons in secret places[51], formulating the obligation to establish

50 CED, Concluding observations on the report submitted by Netherlands under article 29, paragraph 1, of the International Convention for the Protection of all Persons from Enforced Disappearances, CED/C/NLD /CO/1, 10 April 2014, para. 14.

51 Article 17 (1) A/RES/61/177.

a guarantee of freedom and personal security in the national legal system[52], and obliging the States Parties to organize and maintain registers or files of persons deprived of liberty.[53] In order to implement the provisions of Article 17 of the Convention, it is necessary to close secret institutions for depriving people of liberty, irrespective of their form and purpose, if such exist in the territory of the country, or they should be converted into clearly identified detention centres within the meaning of the Convention, taking into account relevant legislative acts. Those who violate the prohibition on Article 17 (1) must be punished in proportion to the degree of their culpability and the victims should be properly compensated and rehabilitated.[54] The State should take the necessary legislative measures, and any other required measures, to ensure that any person, irrespective of his or her status[55], and regardless of the type of offense he or she is alleged to have committed[56], is guaranteed the material and procedural protection provided for in the Convention, particularly in Article 17, and other relevant instruments that protect human rights.[57]

It is preferable that the guarantees of *habeas corpus* be enshrined in basic state law, and that they be developed through ordinary legislation. Deprivation of liberty may only take place on the basis of a decision issued in accordance with the law by a competent state authority.[58] Such a decision must be implemented in official centres for the deprivation of liberty, which are subject to constant supervision. Any person deprived of liberty should be able to maintain prompt and regular contact with their family, counsel or any other designated person, and in the case of foreigners, with the consular office.[59] Without exception, all cases of deprivation of liberty must be subject to a single registration system, containing – as a minimum – the information required under Article 17 (3), and must be regularly updated and checked.[60] It is unacceptable for the right to liberty and personal security within the meaning of the

52 Article 17 (2) A/RES/61/177.

53 Article 17 (3) A/RES/61/177.

54 CED, Concluding observations on the report submitted by Iraq under article 29, paragraph 1, of the International Convention for the Protection of all Persons from Enforced Disappearances, CED/C/IRQ/CO/1, 10 April 2014, para. 30.

55 E.g. immigrants.

56 E.g. a coup.

57 CED, Concluding observations on the report submitted by Iraq under article 29, paragraph 1, of the International Convention for the Protection of all Persons from Enforced Disappearances, CED/C/IRQ/CO/1, 10 April 2014,, para. 28.

58 CED, Concluding observations on the report submitted by Burkina Faso under article 29, paragraph 1, of the International Convention for the Protection of all Persons from Enforced Disappearances, CED/C/BFA /CO/1, 24 May 2016, paras. 31–2.

59 CED, Concluding observations the report submitted by Kazakhstan under article 29, paragraph 1, of the International Convention for the Protection of all Persons from Enforced Disappearances, CED/C/KAZ/CO/1, 26 May 2016, para. 20.

60 CED, Concluding observations on the report submitted by Tunisia under article 29, paragraph 1, of the International Convention for the Protection of all Persons from Enforced Disappearances, CED/C/TUN/CO/1, 25 May 2016, para. 30.

Convention to be suspended, even if a state of emergency or war arises.[61] In addition, with regard to the States Parties to the CAT-OP, the Committee welcomes the correct implementation of the national preventive mechanism[62], even though it does not have jurisdiction over this area. In all likelihood this is because at least some forms of deprivation of liberty that violate Article 17 may also be simultaneously classed as torture or other cruel, inhuman or degrading treatment or punishment. Another reason may be the need for all the bodies that deal with human rights to cooperate, at least within the UN, in the fight against torture and associated practices.

Application of the above principles for the interpretation of Article 17 of the Convention regarding the case in question first requires consideration of whether Roberto Agustín Yrusta was indeed held in a secret place. It must be pointed out that he was imprisoned in a place which was certainly an identifiable state penitentiary centre in Argentina. During his imprisonment, Mr. Yrusta was supposed to be transported to another, similar institution, but for seven days it was impossible to determine where he was and what was happening to him. Argentina, one of the few states to report to the Committee, stated that it had fully implemented the prohibition on people being held in secret places.[63] This would entail that Mr. Yrusta was not being held in a secret place of detention, since no such place exists in the territory of the country of which he was a citizen. It is possible accept a twofold understanding of secrecy, but not of places where people are detained. The secret detention of persons defined in the Convention is essentially deprivation of liberty in places that are not listed on any official list of state penitentiary institutions. However, it is possible that a place of detention can be found on such a list, but that the information concerning a person imprisoned in it is kept secret. It is hard to say which these possibilities describes the state of affairs in the *Yrusta* case, as until now the information presented to the Committee has been inadequate. In any case, it was acknowledged admissible that there had been a violation of the prohibition on

61 The introduction of an *incommunicado* detention regime, which allows discretionary determination of the duration of deprived liberty, although within the limits established by national law, in connection with an increased threat to the security of the state as a result of terrorist attacks, makes it possible to deny a person the ability to appoint counsel, to only allow the person to talk with their counsel with an officer's assistance, and to not inform a selected person about the fact of deprivation of liberty or location, all of which is contrary to Article 17 of the Convention. CED, Concluding observations on the report submitted by Montenegro under article 29, paragraph 1, of the International Convention for the Protection of all Persons from Enforced Disappearances, CED/C/MNE/CO/1, 16 October 2015, paras. 24–5.

62 Articles 17–23 A/RES/61/177. In Armenia, such a mechanism is the Human Rights Defender. CED, Concluding observations on the report submitted by Armenia under article 29, paragraph 1, of the International Convention for the Protection of all Persons from Enforced Disappearances, CED/C/ARM/CO/1, 13 March 2015, paras. 20–1.

63 CED, Concluding observations on the report submitted by Argentina under article 29, paragraph 1, of the International Convention for the Protection of all Persons from Enforced Disappearances, CED/C/ARG/CO/1, 12 December 2013, para. 24.

people being held in secret places. For similar reasons, it is impossible to determine with complete certainty who made the decision to secretly detain the prisoner. Nevertheless, taking into account the available facts of the case regarding Mr. Yrusta's transport from one prison to another, the obstacles encountered by the family during the investigation of his disappearance, and the prolonged silence of the Argentine Government in the proceedings before the Committee, suggests that the issue will remain secret, as an adequate decision was not taken by an authorized state body, under the law and within the boundaries and procedure laid down, but it was the result of the discretionary treatment of the prisoner by unidentified prison officials.[64] Preventing contact with the family and incorrectly entering data into the register of persons deprived of their liberty, and possibly the falsification of this data[65], led to there being no possibility of determining the fate of Mr. Yrusta or providing him with legal protection[66].

While a person deprived of liberty has the right to know where he or she is detained, and for what reasons and on what basis, Article 18 of the Convention stipulates the right of every person generally defined as having a legitimate interest to obtain the same information. The Convention expressly refers to the people legitimately entitled to search for and demand information concerning the detainee – namely their relatives, representatives or counsel. Since one of the safeguards against people's being kept in secret places is the right of someone who has been deprived of their liberty to communicate with the people indicated[67], any of these people may be expected to demand access to information about him or her. Furthermore, the purpose of the provision is to guarantee protection to those who seek such information – and seek to participate in proceedings which aim to investigate the circumstances of enforced disappearance – from intimidation and mistreatment aimed at forcing them to resign from the action taken.[68]

Information that should be made available is that which is of fundamental importance for identifying the place of detention, including data for updating the state of affairs; determining the health condition of the detainee; identifying the causes of possible death; the circumstances of the release; and establishing the authorities that issued the decisions shaping the legal and factual situation of the detainee during the whole period when he or she was deprived of liberty. According to the Convention, the basic

64 It often happens when the prison authorities want to hide the fact of applying extra-judicial punishment to prisoners. *Ibidem*, para. 26.

65 In the report on Argentina, the Committee pointed out the lack of standard computerised procedures for registering persons deprived of liberty in that country and recommended their urgent implementation. *Ibidem*, para. 29.

66 Admittedly, as part of implementing the CAT-OP, Argentina introduced the Prison System Ombudsman, but it is still not fully effective because it is not possible to monitor all penitentiary centres, due to lack of access. *Ibid*., para. 30.

67 Article 17 (2) (d) A/RES/61/177.

68 Article 18 (2) A/RES/61/177.

source of information an authorized person may demand to see is the registers or files of persons deprived of their liberty, which links the right provided in Article 18 (1) and the obligation of the State Party stipulated in Article 17 (3). Considering the importance of the information sought, the Convention requires that sanctions be imposed for conduct that refuses to provide information or providing inaccurate information.[69]

The extent of the information that those entitled may demand under Article 18 (1) is qualified by the term as 'at least', which entails that a State Party is always able to provide claimants with a more extended version, but may not limit it, except in cases permitted by the Convention. Personal data, especially medical information, including genetic information, cannot be used for other purposes than the search for the disappeared person. The collection, processing, use and storage of this data will infringe the human dignity of such a person and constitute a violation his or her human rights.[70] In the *Yrusta* case, this problem did not occur and was therefore not considered by the Committee.

The right to information can be limited when the following conditions are met. Deprivation of liberty is subject to judicial control. A person who is deprived of his or her liberty is protected by law. If the release of data indicated in Article 18 (1) would have an adverse effect on the security or privacy of the person deprived of liberty, or if it would impede the judiciary or otherwise be prejudicial within the meaning of national and international law, then the information may be restricted. A decision to restrict this information must have a legal basis in legislation and can only be taken in case of absolute necessity. The restriction of this information cannot result in any person's being secretly detained or subjected to enforced disappearance.[71]

The fulfilment of such conditions for restricting the right to information is not a simple matter, and does not often occur in practice, under democratic rule of law. The example of the Yrusta family trying to find basic information about the fate of their relative shows that is simpler for the public authorities to not provide any information or make it difficult for the relatives to obtain it by falsifying prisoner registers. Anticipation of such situations resulted in legitimate claimants being granted the right to an effective remedy, namely a means of obtaining the information sought without delay – a remedy which is separate from the question of the lawfulness of the deprivation of liberty. The law cannot be suspended or restricted regardless of the circumstances.[72] Given the case file, it is evident that the right of Roberto Agustín Yrusta's relatives to an effective remedy was

69 Article 22 A/RES/61/177. CED, Concluding observations on the report submitted by Burkina Faso under article 29, paragraph 1, of the International Convention for the Protection of all Persons from Enforced Disappearances, CED/C/BFA /CO/1, 24 May 2016, para. 34.

70 Article 19 A/RES/61/177.

71 Article 20 (1) A/RES/61/177.

72 CED, Concluding observations on the report submitted by Senegal under article 29, paragraph 1, of the International Convention for the Protection of all Persons from Enforced Disappearances, CED/C/SEN/CO/1, 18 April 2017, para. 34 (d).

adversely affected by the refusal to allow them to participate in the investigation into his death, and by the protraction of their appeals in individual instances. Given that the authors of the communication were unable to enforce their right to information, the Committee ruled that this right had been violated with regard to the relatives of the disappeared and Mr. Yrusta himself. The literal wording of Article 18, however, suggests that the right established therein pertains not to persons deprived of liberty, but rather to those who seek information on them. Thus, for the Committee to express such an opinion about Mr. Yrusta's right, it could only have been on the assumption denying the right of Mr. Yrusta's relatives to information entailed that Mr. Yrusta received inadequate legal protection.

In the case in question there was found to have been a violation of the right to report the facts concerning enforced disappearance in the system of national law, as expressed in the first sentence of Article 12 (1) of the Convention.[73] Since the State Party had accepted the provision, it should have created in its domestic law a means of reporting the alleged enforced disappearance of persons, a means for competent authorities to verify these reports, and a means for prosecuting and punishing the perpetrators. Anyone with real knowledge of enforced disappearance is authorized by the Convention to participate in the State's criminal procedure. Such a statement entails that the State has a corresponding obligation to take the reported information into account and treat it with seriousness, due to the gravity of the offense, which may lead to the investigation of a crime, as well as the obligation to provide appropriate support to those intending to present known facts to the investigator. The Committee did not interpret Article 12 (1) of the Convention as an independent editorial body, but by quoting the first sentence, *in extenso*, it made it the starting point for citing the first three paragraphs of Article 24, indicating their relationship and relevance to the *Yrusta* case. In this way, it became possible to demonstrate that the authors of the communication had the status of victim under the Convention[74], that the family of the disappeared person had reason to report the disappearance of Mr. Yrusta[75], that they were entitled to demand the truth about the circumstances of the enforced disappearance, about the progress and results of the investigation, and about his actual fate.[76] The finding that the State had not taken measures to uphold those rights[77] by refusing the status of parties to the prosecution, and delaying the proceedings that were to establish such status, subsequently led to the finding of the State Party to be in violation of Articles 12 (1) and 24 (1), (2) and (3) of the Convention.

73 In this regard, so far the Committee has not commented on the reports of the States.

74 Article 24 (1). CED, Concluding observations on the report submitted by France under article 29, paragraph 1, of the International Convention for the Protection of all Persons from Enforced Disappearances, CED/C/FRA /CO/1, 8 May 2013, para. 34.

75 Article 12 (1) A/RES/61/177.

76 Article 24 (2) A/RES/61/177.

77 Article 24 (2) and (3) A/RES/61/177.

It is curious why – in the scope stated in the conclusions, somewhat in contrast to the main part – the Committee's views cover not only the family of the disappeared, but also Roberto Agustín Yrusta himself. This seems to be a misunderstanding, or it must be accepted that Article 12 (1) applies to the disappeared, which is possible, but not entirely correct. In contrast, the application of Article 24 (1), (2) and (3) to Mr. Yrusta for the same purposes as his family was not legitimate. The facts of the case indicated that he was undoubtedly a victim, as the Committee confirmed by statement that there was violation of Articles 1 and 2 with regard to Mr. Yrusta. The decision that there had been a violation of Article 24 (1) only reinforces this conclusion. The Committee could, however, have considered such a measure necessary to express its opinion on the violation of sections 2 and 3 of the same Article of the Convention. In this context, it should be noted that Mr. Yrusta's case file does not contain any mention of his disappearance. The deceased was not able to defend himself; especially considering his mistreatment after the disappearance seems to have intensified, and this discouraged efforts aimed at clarifying the situation. For obvious reasons, the prison authorities were not inclined to discover – or rather reveal – the truth. As a result, the State failed to take measures to ascertain the circumstances of Mr. Yrusta's disappearance and to determine his whereabouts and f cilitate his release. In this respect, it was correct to decide that there had been a violation of Article 24 (2) and (3) of the Convention in relation to the disappeared.

In conclusion, it should be emphasized that the procedure for individual complaints specified in the Convention has begun to function in practice. A communication was filed, the case was recognized, and a decision was issued which stated that there had been numerous irregularities in the implementation of the ban on enforced disappearance by the Argentine authorities. It is of key importance that a problem was identified, and the Committee proposed the implementation of specific corrective measures. However, this positive side of the issue is diminished by the fact that in the proceedings before the Committee there has been almost no cooperation from the State Party, which ignored the views after it had been delivered. It is not possible to establish what has happened with the *Yrusta* case on the national level: whether the circumstances of Mr. Yrusta's disappearance were explained, and whether his family received adequate compensation. The failure of the Argentine Government to cooperate with the Committee to full extent, along with the advisory nature of the procedure and the non-binding character of the final decision may send a bad signal to other Parties to the Convention, perhaps making them liable to disregard its potential, both in substance and in the form of individual complaints. With regard to countries such as Argentina and the phenomenon of enforced disappearance, on which the international community has so far had little impact, this would be a great shame.

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CED, Concluding observations the report submitted by Kazakhstan under article 29, paragraph 1, of the International Convention for the Protection of all Persons from Enforced Disappearances, CED/C/KAZ/CO/1, 26 May 2016.

CED, Concluding observations on the report submitted by Tunisia under article 29, paragraph 1, of the International Convention for the Protection of all Persons from Enforced Disappearances, CED/C/TUN/CO/1, 25 May 2016.

CED, Concluding observations on the report submitted by Montenegro under article 29, paragraph 1, of the International Convention for the Protection of all Persons from Enforced Disappearances, CED/C/MNE/CO/1, 16 October 2015.

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SUMMARY

The Use of the "Dry Submarine" Technique and Other Allegations in Proceedings Before the United Nations Committee on Enforced Disappearances. Remarks on the *Yrusta v. Argentina* Case no. 1/2013

The prohibition on enforced disappearances is one of the fundamental norms of contemporary international law which is intended to protect the individual from state repression. Under certain circumstances, a violation of the prohibition is recognized as a crime of international law. There are no exceptions to the implementation of the norm. Since the prohibition is a treaty, States must expressly agree to be bound by it. Not all States have done this, but some have, including Argentina. Despite this, Roberto Agustín Yrusta disappeared. His enforced disappearance was preceded by numerous and elaborate forms of evil, cruel and humiliating treatment. This paper seeks to answer the question of how international law can ensure effective enforcement of the prohibition on enforced disappearance.

Keywords: human rights law, United Nations Committee on Enforced Disappearances, *Yrusta v. Argentina* Case no. 1/2013.

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Autonomous Vehicles – a New Challenge to Human Rights?

Introduction

Undoubtedly, modern technology has been disrupting many aspects of human life, also in the context of transportation and road vehicles. The transformation taking place in the driving market aims at improving safety, mobility and efficiency of vehicles. From the very beginning, car manufacturers have been developing systems that improve vehicle safety and comfort, in addition to communicate with and assist the driver; such comprehensive systems make the variety of electronic control units remarkable[1]. Advancements have led to cars that can operate without human intervention (hitherto: autonomous vehicles, driverless, self-driving or robotic cars). Nevertheless, in Arizona on March 18th, 2018 a woman got hit by an Uber autonomous vehicle, because she stepped into the road and fell under the car. The key nuance of this accident was that the car system never took action to prevent the fatality[2]. Consequently, the accident ignited a debate over the legality of driverless cars.

This paper consists of three parts, each of them examining: 1) the definition and components of autonomous vehicles, 2) the benefits of autonomous driving, 3) human rights influenced by introducing driverless cars onto public roads. These considerations lead to the question whether robotic cars are indeed a new challenge to human rights. The question of a driver and his/her liability remains open, but some valuable remarks have already been developed, for example within the European Union framework.[3]

1 E.g.: Electronic Stability Program, advanced driver assistance systems, units ameliorating passengers' comfort, communication systems (vehicle to vehicle, vehicle to infrastructure, vehicle to pedestrian communication systems).

2 S. Levin, J. C. Wong, *Self-driving Uber kills Arizona Woman in first Fatal Crash Involving Pedestrian*, 19.03.2018, <https://www.theguardian.com/technology/2018/mar/19/uber-self-driving-car-kills-woman-arizona-tempe>.

3 European Parliamentary Research Service, *A common EU Approach to Liability Rules and Insurance for Connected and Autonomous Vehicles. European Added Value Assessment Accompanying the*

Terminology

Nowadays, more and more electronic control units are put into vehicles. All drivers are used to such conveniences as Electronic Stability Program or Advanced Driver Assistance Systems[4]. Artificial intelligence has also been used in vehicle technology, however as drivers give more and more driving tasks to automated systems, the levels of autonomy depend on the balance among the dynamic driving tasks between human and artificial intelligence, from zero to full automation. An autonomous vehicle is defined as a road vehicle able of sensing the environment and control movements without a human driver. It replaces the human driver with artificial intelligence[5], after hardware sensor data (collected from: cameras, radar and lidar) are sent to the artificial intelligence, which then determines how the vehicle should behave. Obviously, there is no one autonomy of vehicle in question, but levels of autonomy depend on tasks given to the computer algorithm to decide.

In literature, there are five levels of autonomous driving distinguished, based on three factors: 1) steering, acceleration and deceleration, 2) monitoring driving environment, and 3) fall-back performance of dynamic driving tasks[6]. The highest levels - three to five - have already been considered as autonomous, while the fifth level is fully autonomous, since the car performs all these tasks without any human intervention. One of the examples of the legal regulation of the employment of a vehicle's autonomous functions is the European Union Regulation 2015/758 of the European Parliament and of the Council concerning type-approval requirements for the deployment of the eCall in-vehicle system based on the 112 service and amending Directive 2007/46/EC[7]. Starting from the 1st of April 2018, there is a compulsory calling emergency aid system (working independently) in case of a car crash in all newly produced cars imported to each European Union Member State[8].

European Parliament's Legislative Own-Initiative Report. Rapporteur: Mady Delvaux), "European Added Value Unit", PE 615/635, February 2018.

4 <https://www.euroncap.com/en/press-media/press-releases/testingautomation/>.

5 T. Tettamanti, I. Varga, Z. Szalay, *Impacts of Autonomous Cars from a Traffic Engineering Perspective,* "Periodica Polytechnica Transportation Engineering" 2016, p. 244–250.

6 <http://www.europarl.europa.eu/news/en/headlines/economy/20190110STO23102/self-driving-cars-in-the-eu-from-science-fiction-to-reality>; *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions: On the road to automated mobility: An EU strategy for mobility of the future*, 17.05.2018, Brussels, COM 2018, 283, p. 3.

7 Regulation EU 2015/758 of the European Parliament and of the Council of 29 April 2015 concerning type-approval requirements for the deployment of the eCall in-vehicle system based on the 112 service and amending Directive 2007/46/EC, 19.05.2015, Official Journal of the European Union L 123/77.

8 Similar solution – ERA-GLONASS – has been developed in Russia based on the European standard eCall system.

The immanent component of a robotic car is artificial intelligence. This is an area of computer science responsible for the creation of machines which work and react like humans (so called: intelligent machines)[9]. Artificial intelligence is a highly technical and specialized branch of computer science, within which computers are programmed for certain features, such as: recognition, reasoning, problem solving, perception, learning, planning as well as the ability to manipulate and move objects[10]. Two types of this computer science are distinguished: weak and strong artificial intelligence[11]. The weak one (also known as narrow artificial intelligence) can be responsible for facial recognition or driving a car, while the strong artificial intelligence (also called: general) is a long-term goal of research aiming at performing nearly all cognitive tasks that humans can perform[12]. In this paper, only the narrow artificial intelligence is concerned. Still, the strong artificial intelligence impacts the progress of the weak one.

The main problem resulting from artificial intelligence is the unpredictability of its developments, since computer science and robotics are an ongoing research, but no specific limits are put on this research so far[13]. Nevertheless, while creating machines, one should bear in mind the basic laws of robotics (proposed by American writer and professor of biochemistry – Isaac Asimov): it is primary that a robot may not injure a human being and that a robot must obey human orders[14]. Nonetheless, Asimov's Laws have already been criticised by some scientists, as being too restrictive and contextual[15]. Instead, there are suggestions that 'robots should be empowered to maximise the possible ways they can act'[16] in order to find the best solution for a human[17]. Notwithstanding, more attention should be paid to the ethics of artificial intelligence research in order to ensure that not only the result is important, but also the way artificial intelligence achieves its goals[18]. Very interesting developments in this field have been achieved in the European Union system. The European Commission has appointed a new High-Level Expert Group on Artificial Intelligence to support the implementation of European Union Strategy

9 <https://www.techopedia.com/definition/190/artificial-intelligence-ai>.

10 *Ibidem.*

11 <https://futureoflife.org/background/benefits-risks-of-artificial-intelligence/>.

12 *Ibidem.*

13 The only limit seems to be human imagination. Artificial intelligence is even used in creating autonomous weapon systems, it is weapon systems that can act without human intervention.

14 I. Asimov, *I Robot: Runaround,* New York, 1942.

15 Ch. Salge, *Asimov's Laws Won't Stop Robots Harming Humans so We've Developed a Better Solution,* "The Conversation", 14.02.2017. <http://theconversation.com/asimovs-laws-wont-stop-robots-harming-humans-so-weve-developed-a-better-solution-80569>.

16 *Ibidem.*

17 Ch. Salge, D. Polani, *Empowerment As Replacement for the Three Laws of Robotics*, "Frontiers" 29 June 2017.

18 N. Bostrom, E. Yudkowsky, *The Ethics of Artificial Intelligence*, in: *Cambridge Handbook of Artificial Intelligence*, eds. W. Ramsey, K. Frankish, Cambridge 2011.

on artificial intelligence[19]. The High-Level Expert Group on Artificial Intelligence has prepared a Draft Ethics Guidelines for Trustworthy AI[20], in which it considered the issues of: fairness, safety, the future of work, democracy and transparency, but also the impact of technological developments in artificial intelligence for fundamental rights (as prescribed in the Charter of Fundamental Rights of the European Union[21]). The following fundamental rights have been taken into consideration: non-discrimination, privacy, personal data protection and consumer protection, which will be discussed below.

Another term inextricably linked to autonomous vehicles is the driver. According to the Oxford Dictionary the definition seems very simple, as a driver is 'a person who drives a vehicle'[22]. However, when it comes to autonomous vehicles, may a driver be a person who finds themselves in a car (also a child or person with disabilities) or the artificial intelligence itself, thus deciding on driving tasks of a car? This is to be explained in the forthcoming years when autonomous car research develops and attracts States to the level of introducing them onto public roads.

The Benefits of Autonomous Driving

There are plenty of advantages of introducing autonomous vehicles onto public roads. As they rely less on humans, human-related errors in transportation, such as inattentiveness or intoxication, can be eliminated[23]. Robots are always focused on driving tasks and never get drunk, drowsy or distracted by external factors[24]. Robotic vehicles also provide a great economic, ecological and social benefit[25]. A lot of organizational problems caused by strict regulation for driving and rest hours can be eliminated. Furthermore, driverless cars can ensure optimal headway control and minimize the number of accidents. Due to

19 *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: Artificial Intelligence for Europe*, 25.04.2018, Brussels, COM, 2018, 237 final.

20 European Commission, *High-Level Expert Group on Artificial Intelligence: Draft Ethics Guidelines for Trustworthy AI*, 18.12.2018.

21 *Charter of Fundamental Rights of the European Union*, "Official Journal of the European Union", 2012/C 326/02.

22 <https://en.oxforddictionaries.com/definition/driver>.

23 R. Sykora, *The Future of Autonomous Vehicle Technology as a Public Safety Tool,* "Minnesota Journal of Law, Science and Technology" 2015, vol. 16, no. 811; P. Koopman, *Autonomous Vehicles Safety: In Interdisciplinary Challenge*, "IEEE Intelligent Transportation Systems Magazine" 2017, vol. 9, no. 1, pp. 90–96. See also: European Commission, *Report from the Commission to the European Parliament and the Council: Saving Lives: Boosting Car Safety in the EU*, 12.12.2016, Brussels, COM, 2016, 787 final.

24 K. Naughton, *Just How Safe Is Driverless Car Technology, Really?*, "Bloomberg", 27 March 2018.

25 L. Determann, B. Perens, *Open Cars*, "Berkeley Technology Law Journal" 2017, vol. 32, no. 915, pp. 915–933.

optimal work regulation, they can also reduce environmental impact and improve road traffic parameters (i.e. travel time, traffic flow capacity).

Driverless cars can touch upon the increasing demand of mobility for these people who are not able to drive themselves, since such technology offers a very wide mobility opportunity[26] (for such persons as the elderly or with disabilities). Such developments can address the issue of disability or age discrimination. Following the European Commission's Communication on the road to automated mobility[27], mobility of people and goods is considered as a priority and an increasing demand for people. In the aftermath of such remarks, European Parliament's Committee for Transport and Tourism proposed a Draft Report on autonomous driving in European transport[28]. The Committee takes it for granted that autonomy in widely perceived transport will appear by 2030[29]. Therefore, according to the Draft Report, it is crucial to consider data protection and data access, as well as cyber security in the context of autonomous driving. The Draft Report stresses fundamental blocks of autonomous driving: the vehicle and route data. The massive increase of data produced, gathered, and transmitted from the vehicle will result in the need to use non-personal anonymised data[30]. This is the reason why the international, European Union and national approach to autonomous driving should be based on the principle of an openness and neutrality of technology. The Committee also points out the need to develop key autonomous technologies (namely simulations of the human brain when driving) and employment disturbance awareness resulting from introducing daily autonomous driving[31]. All these issues are analysed in detail below.

Legal Disturbances

Safety

Autonomous driving poses a great challenge to public safety requirements, because some sufficient level of safety has to have actually been achieved before deploying such vehicles into the public roads. "Safe" means at least correctly handling vehicle-level be-

26 *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions: On the road to automated mobility: An EU strategy for mobility of the future*, 17.05.2018, Brussels, COM, 2018, 283 final.

27 *Ibidem.*

28 *Draft Report of the Committee on Transport and Tourism of the European Parliament on autonomous driving in European transport*, 20.07.2018, 2018/2089 INI.

29 Not only autonomous cars, but also autonomous rail or air transport.

30 *Draft Report of the Committee on Transport and Tourism of the European Parliament on autonomous driving in European transport*, 20.07.2018, 2018/2089 INI.

31 *Ibidem.*

haviours, including obeying traffic laws[32], which can differ depending upon location. The sufficient safety level shall also require dealing with non-routine road accidents, to which artificial intelligence actually responses. Driverless vehicles will be programmed to act in a certain way, but the question arises in the situation when, all of the sudden, the circumstances are being changed. Then, for example, the problem with an unexpected situation or extreme weather conditions would let car sensors transmit wrong data to artificial intelligence, thus making it unable to decide correctly upon the car's behaviour. It is therefore mainly not the problem of unpredictable decision of the computer algorithm itself, but the improvements in sensors that collect data and then transfer it to the algorithm. Hence, it is argued that for the time being fully autonomous vehicles cannot be introduced onto public roads, because the requirement of notification of not being able to drive in such conditions is necessary and the control over the vehicle should fall back to the driver. Decisions made by artificial intelligence can be unpredictable while artificial intelligence is programmed to perform tasks beneficially for humans, however, through developing a destructive method for achieving its goals. An autonomous vehicle can be programmed in a way to obey human orders, for example by taking a person to the chosen place as quickly as possible, however it may not only violate driving rules, but also cause an accident.

Nevertheless, the European Commission has already proposed the intelligent speed adaption system[33] in order to achieve the goals from the Directive of the European Parliament and of the Council on the framework for the deployment of Intelligent Transport Systems in the field of transport of 2010[34]. Intelligent Speed Adaption (ISA) is a collective term for various systems that support a driver's compliance with the speed limit, thus preventing a violation of speed limits while driving[35]. One of the examples of the intelligent speed adaption system is the warning that the speed limit is being exceeded (but the decision remains with the driver)[36]. Other categories interfere with car infrastructure by increasing the pressure on the accelerator pedal or – the most interruptive – by limiting the speed automatically (called 'closed ISA')[37]. Such systems have

32 P. Koopman, *Autonomous Vehicles Safety…*, p. 91.

33 <https://ec.europa.eu/transport/road_safety/specialist/knowledge/speed/new_technologies_new_opportunities/intelligent_speed_adaptation_isa_en>.

34 *Directive 92/6/EEC of the Council on the installation and use of speed limitation devices for certain categories of motor vehicles in the Community,* 10.02.1992, "Official Journal of the European Communities", L 57/27; *Directive 2010/40/EU of the European Parliament and of the Council, on the framework for the deployment of Intelligent Transport Systems in the field of transport and for interfaces with other modes of transport,* 07.07.2010, "Official Journal of the European Union", L 207.

35 A. M. Rook, J. H. Hogema, A. R. A. van der Horst, *Intelligent Speed Adaption: Acceptance and Driver Behaviour on Rural Roads*, "Proceedings ICTCT Workshop Tartu", Soesterberg, 2004.

36 J. P. Cauzard ed., *SARTRE Report: European drivers and road risks*, "Arcueil Cedex" 2004, p. 179.

37 *Ibidem.*

already been adapted into certain categories of vehicles within the European Union framework[38]. The experiments held *inter alia* in Sweden and Great Britain showed that individual incorporation of Intelligent Speed Adaption can result in lesser attentiveness of drivers on the road conditions or frustration caused primarily by the closed ISA[39]. However, the primary benefits resulting from ISA's acceptance are tremendous in the context of safety.

Cybersecurity

The security system of an autonomous vehicle and its stored data might be vulnerable to hacking and cyber manipulation, as autonomous vehicles are connected to other vehicles or an infrastructure to share or receive data. They are also morally and ethically questionable, when it comes to the absence of a human driver who makes moral decisions in extreme and difficult situations (e.g. the decision to hit a certain object or person). Questions of cybersecurity focus on two main problems: remote taking control over the vehicle and data protection. The first issue relates to specific control upon transmitted data and the process of making decisions by artificial intelligence. This is to be specified in the coming years by researchers responsible for the development of this industry sector as driverless vehicles beyond doubt shall be hacking resistant[40]. In the Draft Recommendation on Cyber Security of the Task Force on Cyber Security and Over-the-air Issues prepared by United Nations Economic Commission for Europe (UNECE), over thirty categories of cyber-threats and corresponding mitigations have been distinguished, among them threats regarding back-end servers, as well as threats to vehicles regarding: their communication channels, update procedures, unintended human actions, and external connectivity[41]. Nonetheless, it lists only the examples of cyber-threats.

Privacy

Subsequently, autonomous vehicles correspond with the right to private life as expressed *inter alia* in the Art. 8 of the European Convention on Human Rights and Fundamental Freedoms of 1950[42], due to which everyone has the right to respect his private and family

38 *Directive 2002/85/EC of the European Parliament and of the Council amending Council Directive 92/6/EEC on the installation and use of speed limitation devices for certain categories of motor vehicles in the Community,* 05.11.2002, "Official Journal of the European Communities", L 327.

39 V. Beyst, *Project for Research on Speed Adaption Policies on European Roads Final report on Stakeholders Analysis*, 2006, <https://ec.europa.eu/transport/road_safety/sites/roadsafety/files/pdf/projects_sources/prosper_d2–4.pdf>.

40 *United Nations Task Force on Cyber Security and Ober-the-Air issues*, *Draft Recommendation on Cyber Security of the Task Force on Cyber Security and Over-the-air issues of UNECE WP.29 GRVA.*

41 *Ibidem,* pp. 25–39.

42 *European Convention on Human Rights and Fundamental Freedoms*, European Treaty Series 5.

life. According to Dorothy J. Glancy, privacy can be affected by autonomous vehicles in at least three ways, all of which are rooted in the dignity of a person[43]: personal privacy, information privacy, and surveillance.

Firstly, autonomous vehicles would take control over the way people move from place to place and over the data shared[44]. Personal autonomy therefore refers to the decision whether to choose a driverless vehicle or not. It is interconnected with people's self-determination and the ability to make independent decisions about themselves[45]. But more importantly, the use of autonomous vehicles will make it harder to control the information on a person's real and forthcoming location, time of departure, the way the person moves from place to place. The question arises as to whether the autonomy of a vehicle makes the autonomy of a person less important, as one has to bear in mind that relationship between a car and a person is not of a binary character. Autonomy refers to independence of decisions, therefore driverless cars are only an example of the delegation of some choices to the vehicle, not precluding personal autonomy. A vehicle can only control its speed or the way it moves from place to place, but most vital decisions remain with in a human's hands. There are two aspects of autonomy, namely the right to make a decision and the freedom from external interferences[46], whereas the negative aspect of autonomy –freedom from external interferences – is referred to as 'the right to be let alone', which means that the law shall secure each individual's determination of the scope of data communicated to and shared with others[47]. There is little to say as for the example to location-oriented data whether this information shall be shared on commercial basis (to propose adverts). Information privacy, as the second aspect of privacy, collects a person's habits and the most frequent behaviours, thus, anonymity is crucial for the right to be let alone. Last but not least, surveillance privacy which puts limits to the possibility of being monitored by others, will result in some benefits, especially in the case of an accident (the data on speed, location, passengers and driver behaviour would be helpful in determining the potential responsibility and the insurance claim amount). However, such activities shall also be legally restricted and constantly verified. Such safeguards have already been developed within the European Union by adopting the General Data Protection Regulation of 2016, which entered into force in April 2018[48].

43 D. J. Glancy, *Privacy in Autonomous Vehicles*, "Santa Clara Law Review" 2012, vol. 52, no. 1171, p. 1187.

44 *Ibidem,* p. 1188.

45 *Ibidem.*

46 S. D. Warren, L. D. Brandeis, *The Right to Privacy*, "Harvard Law Review", 1890, vol. 4, no. 5, pp. 193–220.

47 *Ibidem*, pp. 198.

48 *Regulation 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, 27.04.2016*, "Official Journal of the European Union", L 119.

Conclusion

To sum up, the benefits from introducing autonomous driving into public roads cannot be overestimated, since driverless vehicles support non-discrimination and the mobility of a person. This can also help in reducing global climate change, as the driving industry constitutes one of the main factors worsening environmental protection. Nowadays the right to environment and human rights are becoming more and more interlinked. Even so, while stepping forward to autonomous driving, one shall bear in mind the necessity of being prepared for the unexpected; meaning that cars can, in certain circumstances, be intelligent enough to decide instead of a human driver. Legislators and the automotive industry must not lose sight of the wider challenges which autonomous cars entail.

Legal issues, including, firstly, human rights, then ethics secondly, must be handled as problem to be solved rather than an obstacle to get around. It is commonly known that laws usually do not respond quickly to technological developments, however, once the legal aspect remains ambiguous, it imposes a great challenge for lawmakers and manufacturers to not only develop technology to acceptable levels, but to gain the market's acceptance of using such technology. New technologies disrupt with human existence and the existence of the general society and, accordingly, the whole research devoted to robotic cars shall put the human and their rights in the centre of all new developments.

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SUMMARY

Autonomous Vehicles – a New Challenge to Human Rights?

New technologies, as autonomous vehicles are, disrupt the way people exist, and consequently with human rights. Research devoted to artificial intelligence and robotics moves freely and the destination, for the time being, is unknown. This is the reason why special attention should be paid to the ethics of these branches of computer science in order to prevent the creation of a crisis point, when human beings are no longer necessary.. The aim of this paper is to examine whether such development is a new challenge to human rights law and what happens when an autonomous vehicle drives an autonomous human being. The paper also mentions the desirable level of human control over the machine so that human dignity, from which human rights originate, is preserved.

Keywords: autonomous vehicles, artificial intelligence, human rights, privacy, cybersecurity

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Criminal Liability for Crimes Against Humanity as a Problem of International Law

Introduction

Our prehistoric approach now leads us to consider in detail the successive definitions of the concept of crimes against humanity in international law, as well as the other basic texts of international law which directly contribute to its understanding. The process of legal conceptualization of crimes against humanity, as it is presented to the contemporary observer, spans less than a century. Begun as such during the Second World War, it first gave rise to a relatively short paragraph leading to the consequent text of the Rome Statute of the 1998. The definition of 'crimes against humanity' is codified in Article 7 of the Rome Statute of the International Criminal Court (ICC). "The notion encompasses crimes such as murder, extermination, rape, persecution and all other inhumane acts of a similar character (willfully causing great suffering, or serious injury to body or to mental or physical health), committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack." Crimes against humanity have both a colloquial and a legal existence.[1] Usually, the term is employed to condemn any number of atrocities that violate international human rights. As a legal construct, crimes against humanity encompass a constellation of acts made criminal under international law when they are committed within the context of a widespread and systematic attack against a civilian population.[2] In the domain of international criminal law, crimes against humanity are an increasingly useful component of any international

1 *V*. C. Bassiouni, *Crimes Against Humanity in International Criminal Law*, The Hague-London-Boston 1999; A. Cassese, *Crimes Against Humanity: Comments on some Problematical Aspects* in: *The International Legal System in Quest of Equity and Universality. Liber Amicorum Georges Abi-Saab*, eds. L. Boisson De Chazournes, V. Gowland-Debbas, The Hague-London-Boston 2001, pp. 429–447.

2 The concept of crimes against humanity is closely linked to the evolution of international criminal justice. The road traveled since the beginning of the twentieth century in this area with different Courts and legal decisions to formalize and clarify certain terms such as crime against

prosecutor's toolbox, because they can be charged in connection with acts of violence that do not implicate other international criminal prohibitions, such as the prohibitions against war crimes (which require a nexus to an armed conflict) and genocide (which protects only certain human groups and requires proof of a specific intent to destroy such a group).[3] Although the concept of crimes against humanity has deep roots, crimes against humanity were first adjudicated—albeit with some controversy—in the criminal proceedings following the World War II period.[4] The central challenge to defining crimes against humanity under international criminal law since then has been to come up with a formulation of the offense that reconciles the principle of sovereignty—which envisions an exclusive territorial domain in which states are free from outside scrutiny—with the idea that international law can, and indeed should, regulate certain acts committed entirely within the borders of a single state. Because many enumerated crimes against humanity are also crimes under domestic law (e.g., murder, assault, and rape), it was necessary to define crimes against humanity in a way that did not elevate every domestic crime to the status of an international crime, subject to international jurisdiction. Over the years, legal drafters have experimented with various elements in an effort to arrive at a workable penal definition. The definitional confusion plaguing the crime over its life span generated a considerable amount of legal scholarship. It was not until the UN Security Council promulgated the statutes of the two ad hoc international criminal tribunals—the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda—that a modern definition of the crime

humanity or genocide is important; *v.* M. Guzman, *The road from Rome: the Developing Law of Crimes Against Humanity*, "Human Rights Quarterly" 2000, vol. 22, p. 335.

3 *V.* V. Dadrian, *The Historical and Legal Interconnections Between the Armenian Genocide and the Jewish Holocaust: From Impunity to Retributive Justice*, „Yale Journal of International Law" 1998, no. 23, pp. 503–559; S. Garibian, *Crimes against humanity and international legality in legal theory after Nuremberg*, "Journal of Genocide Research" 2007, no. 1: pp. 93–111; *V.* S. C. Res. 1674, 8, U.N. Doc. S/RES/1674 (Apr. 28, 2006). *V.* also S.C. Res. 1820, U.N. Doc. S/RES/1820 (June 19, 2008) (reaffirming "the resolve expressed in the 2005 World Summit Outcome Document to eliminate all forms of violence against women and girls, including by ending impunity); noting *that rape and other forms of sexual violence can constitute a war crime, a crime against humanity, or a constitutive act with respect to genocide, calling upon "Member States to comply with their obligations for prosecuting persons responsible for such acts, and stressing the importance of ending impunity for such acts;* S.C. Res. 1261,4, U.N. Doc. S/RES/1261 (Aug. 25, 1999) (*The responsibility of all States [is] to bring an end to impunity and their obligation to prosecute those responsible for grave breaches of the Geneva Conventions...).*

4 The concept is transposed into national law only after its original adoption in international law. We can count three contexts of reception of the concept by the national legislations: after the Second War following the adoption of one of the specialized international conventions (the Convention on the Prevention and Punishment of the Crime of Genocide and the International Convention on the Suppression and Punishment of the Crime of Apartheid) or following the creation of the International Criminal Court, *V.* E. Fronza, *Le crime contre l'humanité*, Paris 2009, p. 51.

emerged.[5] These definitions were further refined by the case law of the two tribunals and their progeny, such as the Special Court for Sierra Leone. All these doctrinal developments were codified, with some additional modifications, in a consensus definition in Article 7 of the Statute of the International Criminal Court (ICC). It is now clear that the offense constitutes three essential elements: 1. the existence of a widespread or systematic attack against a civilian population and 2. the intentional commission of an enumerated act (such as an act of murder or torture) 3. by an individual with knowledge that his or her act would contribute to the larger attack. A renewed effort is now afoot- to promulgate a multilateral treaty devoted to crimes against humanity based on the ICC definition and these central elements. Through this dynamic process of codification and interpretation, many—but not all—definitional issues left open in the postwar period have finally been resolved. Although their origins were somewhat shaky, crimes against humanity now have a firm place in the canon of international criminal law.

The Issue of Crime Against Humanity in International Criminal Law

The use of the term "crimes against humanity" can be traced back to late eighteenth and early nineteenth century.[6] The term was used in the context of slavery and the slave trade, and to describe atrocities associated with European colonialism in Africa and elsewhere such as, for example, the atrocities committed by Leopold II of Belgium in the Congo Free State. The term appears to have been applied for the first time formally at the international level in 1915 by the Allied governments when issuing a declaration

5 The creation of two new ad hoc International Criminal Tribunals, respectively for the former Yugoslavia (ICTY: May 25, 1993) and Rwanda (ICTR: November 8, 1994) was the occasion for the United Nations Security Council to redefine the notion of crime against humanity.

6 This formulation stems from the work of the first International Peace Conference, held in The Hague from 18 May to 29 July 1899. However, the authors cite the Martens clause more often in reference to the preamble to the Convention concerning the laws and the customs of war on earth adopted on October 18, 1907, during the Second International Peace Conference, held at The Hague from June 15 to October 18, 1907. In general, it is found expressed - more or less partially - in several texts relating to international humanitarian law. Here are some notable occurrences: in the four Geneva Conventions of 12August 1949, in Resolution XXIII on the respect of human rights in armed conflict adopted by the International Human Rights Conference of Tehran on 12 May 1968, in the Protocols to the Geneva Conventions of 1949 adopted on 8 June 1977 (V. Article 1, clause 2 of Protocol I and Preamble to Protocol II) or in the Convention on the Prohibition or Restriction of the Use of Certain Conventional Weapons which may be considered as producing excessive traumatic or indiscriminate effects adopted on 10 October 1980 in the context of the UN Conference of the same name.

condemning the mass killing of Armenians in the Ottoman Empire.[7] At the beginning of the renaissance of international criminal law in the 1990s, the law on crimes against humanity was in a fragile state. The International Criminal Tribunal for the former Yugoslavia (ICTY) decisively contributed to the consolidation of customary international law on crimes against humanity and paved the way for its first comprehensive codification in Article 7 of the Statute of the International Criminal Court (ICC). At the same time, the ICTY in its early decisions already showed a certain inclination to broaden the scope of the application of the crime by downgrading its contextual requirement. More recently, this tendency culminated in the complete abandonment of the policy requirement. While this 'progressive' facet of the ICTY's jurisprudence largely took the form of *obiter dicta*, the situation in the Republic of Kenya confronted the ICC with the need to 'get serious' about the present state of the law.[8] This has led to a controversy in Pre-Trial Chamber II about the concept of organization in Article 7(2)(a) of the Statute.[9] While the majority essentially follows the path of the more recent case law of the ICTY, the ICTR, and the Special Tribunal for Sierra Leone and supports a liberal interpretation, Judge Kaul prefers to confine the term to state-like organizations and generally calls for caution against too hasty an expansion of the realm of international criminal law *stricto sensu*. This comment agrees with the main thrust of the Dissenting Opinion and hopes that it will provoke a thorough debate.

This does not exclude a development of the law. Such a development would, however, constitute a very important step. The jurisdiction of the International Military Tribunal at Nuremberg was limited to aggression, war crimes committed in international armed conflicts, and, if committed inexecution or connection with one of the preceding crimes, crimes against humanity.[10] By clearly linking all these crimes with a breach of international peace in the strict meaning of the term, the first generation of international

7 *V*. S. Garibian, *Génocide arménien et conceptualisation du crime contre l'humanité. De l'intervention pour cause d'humanité à l'intervention pour violation des lois de l'humanité*, "Revue d'histoire de la Shoah" 2003, pp. 177–178: pp. 274–294; *v*. also V. Dadrian, *The Historical and Legal Interconnections Between the Armenian Genocide and the Jewish Holocaust: From Impunity to Retributive Justice*, "Yale Journal of International Law", 23: 1998, pp. 503–559.

8 G. Mettraux, *Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, "Harvard International Law Journal", 2002, pp. 237–316.

9 The judicial debate which has been the subject of the foregoing reflections is not only a textbook example of the challenges involved in the interpretation of the Statute. Its outcome is of paramount importance for the future development of the law on crimes against humanity. *V*. C. BassiouniI, *Crimes Against Humanity: The Need for a Specialized Convention*, "Columbia Journal of Transnational Law" 1994, pp. 457–494, A. Cassese, *Crimes against Humanity*, in: *The Rome Statute of the International Criminal Court: A Commentary*, eds. A. Cassese, P. Gaeta, J. R. W. D. Jones, Oxford 2002, pp. 353–378.

10 D. Kastrup, *From Nuremberg to Rome and Beyond: the Fight Against Genocide, War Crimes and Crimes Against Humanity (Dedicated to the United Nations High Commission for Human Rights:*

criminal law reflected, despite its revolutionary recognition of criminality directly under international law, the traditional, almost entirely state-centred, configuration of the international legal order. In the by-now historic decision of the ICTY's Appeals Chamber in Tadic case, a decisive step towards a second generation of international criminal law was taken. The Chamber reached the conclusion that criminality directly under international law had extended to armed conflicts not of an international character. This legal determination was complemented by a second and equally significant finding that crimes against humanity under customary international law may be committed in peacetime. The crystallization of customary war crimes committed in conflicts not of an international character, and the emergence of crimes against humanity by making them an autonomous crime, moved the protective scope of international criminal law beyond interstate incidents to also cover certain forms of intrastate strife. It now encompasses situations where a government and/or state-like organization (typically in the form of armed opposition forces) spread terror among the people under its power. The situation in most African states raises the question whether international criminal law is to make a third generational step and would move into the area of national and transnational conflicts between states and destructive private organizations of all kinds. This would mean that the law's protective thrust, which was hitherto confined to situations of war and internal strife, would extend to protect states and their populations from internal or external threats emanating from private persons. Such an important move should not be initiated by the international judiciary but should rather be supported by a solid amount of state practice.

To a large extent, uncertainty abounds, to start with the precise contours of the concept "international law crimes" itself. Even if one day one were to reach a consensus on conceptually clear legal definitions and obligations, the major obstacle might well turn out to be the States' being often politically unwilling to implement in practice their duty to prosecute international law crimes. In order to overcome this, attention needs to be turned to assess the factors which induce States to prosecute international law crimes. Even more fundamentally, no effort should be spared to look for appropriate fora in which to challenge a State's decision not to prosecute despite an international obligation to do so. As previously indicated, it remains to be seen in the coming years what influence the Rome Statute will exercise upon this practice.

While, as previously mentioned, the ICC has been given jurisdiction over both genocide and crimes against humanity, this leaves unanswered the question whether States are under an international legal obligation to prosecute genocide and crimes against humanity, committed in or outside their territory and by their or by foreign nationals respectively. In respect of genocide, the answer to the question raised is less controversial than in respect of crimes against humanity. Indeed, the 1948 Convention on the

Genocide, War Crimes and Crimes against Humanity), "Fordham International Law Journal" 1999, vol. 23, pp. 404- 414.

Prevention and Punishment of the Crime of Genocide confirms, in its Article I, that "genocide, whether committed in time of peace or in time of war, is a crime under international law which they (the Contracting Parties) undertake to prevent and to punish". This undertaking to punish individuals having committed genocide is repeated in Article IV. Pursuant to Article V, all Contracting Parties have the obligation to enact, inter alia, criminal legislation applicable to perpetrators of genocide.

The existence of a duty to prosecute crimes against humanity is a different case: indeed, apart from their definition in the International Law Commission's "Principles of International Law recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal" (1950), no international treaty defined the concept until recently. Even though a substantial amount of authors seem to agree there exists a duty to prosecute crimes against humanity for the State on whose territory the crimes were committed, it is uncertain to what extent actual State practice confirms the doctrinal point of view that, as international crimes, they should be sanctioned with universal jurisdiction. Indeed, many States which did provide for domestic legislation over crimes against humanity committed abroad included requirements in terms of links with the State prosecuting the crimes, thus remaining below true universal jurisdiction. In this respect too, it is to be hoped that the coming years, benefiting from a definition agreed upon in the Rome Statute, will provide further guidance of the extent to which States consider they are bound by a customary international law duty to prosecute crimes against humanity committed abroad.

Conclusion

In the light of this analysis, crime against humanity is a concept transcending both the international legal order and the national legal order. As much to say that this notion upsets legal thought of common law. Its definition is precise but leaves many questions as to the extent of its content, and as to the very identity of the concept or its specificity. Its magnitude is universal but has many restrictions. This paradox reveals the idea of transcendence of the notion of crime against humanity. The prohibition of crimes against humanity is based on a much broader concept of justice than our current legal system can offer. Moreover, as a norm of jus cogens, the prohibition of crimes against humanity stands out as an imperative, as a supreme rule at the top of the hierarchy of norms. The municipal law of States is only a legal fact for international law, Article 33 of the Statute of the International Criminal Court perfectly illustrates this indifference to municipal law since the mere order of the law does not exempt commission of crimes against humanity. This universal and transcendental aspect of the prohibition of crimes against humanity over the classical legal systems, however, knows the limits of its application. Indeed, if the universal vocation is widely accepted in the standard-setting, the repressive justice system is much less inclined

to such an enlargement. The rule against the commission of crimes against humanity is dualistic and opposes its vocation to its use. The current trend in the written evolution of the notion is towards enlargement. We can ask to what point the notion of crime against humanity can be extended or if this notion really aims to expand. Crime against humanity is not an autonomous concept, it depends on the legal system that surrounds it. Its content is not intended to be universal since it would encroach on the object of other national or international criminal standards.

Delimitating crime against humanity seems easier since the creation of the Rome status. However, this delimitation only concerns the extent of its commission but not the extent of its existence. The delimitation given in the definition of a crime against humanity of the Statute of the International Criminal Court is not a stable and unambiguous delimitation, since the essence of the concept does not lie in a conventional definition but in custom and there is no real definition of crime against humanity. The perimeter of the crime against humanity cannot be drawn from the conception that crime against humanity is a norm of natural law. Because on the basis of this conception, the crime against humanity will always be the object of a quest for truth which will not allow it to take a particular status within the international legal order. Setting up the perimeter of the crime against humanity therefore requires a positivist and realistic conception of law. However, today, the place of crime against humanity in the international legal order is still subject to too many questions that do not allow the limits to be established.

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SUMMARY

Criminal Liability for Crimes Against Humanity as a Problem of International Law

The article sets out the nature, the history and the general structure of the crime against humanity and provides a comprehensive analytical commentary of the elements of such crimes as a problem of international law. The contextual element determines that crimes against humanity involve either large-scale violence in relation to the number of victims or its extension over a broad geographic area (widespread), or a methodical type of violence (systematic). This excludes random, accidental or isolated acts of violence. In addition, Article 7(2) (a) of the Rome Statute determines that crimes against humanity must be committed in furtherance of a State or organizational policy to commit an attack. The plan or policy does not need to be explicitly stipulated or formally adopted and can, therefore, be inferred from the totality of the circumstances. In contrast with genocide, crimes against humanity do not need to target a specific group. Instead, the victim of the attack can be any civilian population, regardless of its affiliation or identity.

Keywords: International law, crimes, humanity, liability, genocide, war crimes.

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Crimea and Liability of Russia and Ukraine under the European Convention on the Protection of Human Rights

Introduction

Five years after the events in Crimea is the question "does Crimea now constitute a part of Russia or Ukraine" still valid? Most of the countries and international organizations qualify the Russian actions undertaken in Ukraine as a violation of the norms of international law.[1] In particular, the Ukrainian side treated Russian actions in Crimea as annexation.[2] Russia, of course, does not agree with such a view of the issue, and explained the situation as the asserting and exercising of the people's rights to self-determination.[3] However, as of today, no international courts have decided whether Crimea is Russian or Ukrainian territory under international law. Regardless of how this situation is treated by international law, we are faced with a *fait accompli*. Russia has complete control over Crimea.

This situation has a direct impact on the residents of the Crimean Peninsula. Since Russia took control over the territory, Crimea's human rights situation has been drastically deteriorating.[4] The full range of political and civil rights for Crimea's residents are limited by Russian law. Paradoxically, Ukraine also contributes to the violation of individual human rights of the Crimean residents. The international community has little

1 P. Grzebyk, *Aneksja Krymu przez Rosję w świetle prawa międzynarodowego*, "Sprawy Międzynarodowe" 2014, no. 1, pp. 19–37; J. Kranz, *Kilka uwag na tle aneksji Krymu przez Rosję*, "Państwo i Prawo" 2014, no. 8, pp. 23–40; T. D. Grant, *Aggression Against Ukraine. Territory, Responsibility, and International Law*, Palgrave Macmillan 2015; N. Cwicinskaja, *Problem legalności secesji Krymu w 2014 r. w świetle prawa międzynarodowego,* w *Rewolucja w imię godności. Ukraiński Euromajdan 2013–2014,* eds. G. Skrukwa, M. Studenna-Skrukwa, Wydawnictwo Adam Marszałek 2015, pp. 179–203.

2 N. Cwicinskaja, *The Legality and Certain Legal Consequences of the „Accession" of Crimea to the Russian Federation,* „Polish Yearbook of International Law, 2014, XXXIV, p. 6668.

3 *Ibidem*.

4 *Report of the Human Rights Assessment Mission on Crimea 6–18 July 2015,* OSCE Office for Democratic Institutions and Human Rights & High Commisioner on National Minorities. <https://www.osce.org/odihr/report-of-the-human-rights-assessment-mission-on-crimea?download=true>.

access to Crimea, as the authorities have denied or limited travel for representatives of international organisations. It has led to numerous individual applications to the European Court of Human Rights (ECtHR) from Crimea's residents. Applications have been lodged against Ukraine, or Russia, or both. Ukraine is also has brought cases against Russia's actions on its territory in the ECtHR under art. 33 of the European Convention of Human Rights and Fundamental Freedoms (ECHR).

As of the end of 2018, there were over 4,000 individual applications before the Court which are related to the events in Crimea or to the hostilities in Eastern Ukraine and five inter-state applications brought by Ukraine against Russia. One of the inter-state cases related directly to events in Crimea (no. 20958/14).[5]

The ECtHR exercises jurisdiction over a dispute between individual and state or between two states concerning the breach of the provisions of the Convention or its Protocol. The Court's future judgments in cases related to Crimea will point out the responsible state for human rights violations of residents of Crimea. Although the ECtHR has no jurisdiction to determine the legality of Russia's acquisition of Crimea, it is highly likely that during the consideration of the cases it will assess Russia's actions from the point of view of international law.

This article starts with an overview of pending and possible prospective cases originating from the conflict around Crimea between Ukraine and Russia. Individual as well as inter-state applications are presented. The analysing of prospects for complaints filed with the ECtHR and prospective cases is based on the cases already settled by the ECtHR and on ongoing cases of human rights violation of the residents of Crimea. Due to the inconsistency in case law of the ECtHR it is difficult to clearly determine what state will be considered responsible for the violation of the rights of residents of Crimea resulting from the Convention. The possible outcome of applications is proposed based on analysing the ECtHR's law-cases in the next part of the article. The last part provides a summary and offers some conclusions.

Cases Related to the Situation in Crimea Before the ECtHR: Individual Applications

Lodged Applications

According to a ECtHR press release from the 17th of December 2018, there are more than 4000 individual cases before the Court with a nexus to the conflict in Eastern Ukraine and Crimea. The Court does not maintain a separate list of complaints related

5 *ECHR to adjourn some individual applications on Eastern Ukraine pending Grand Chamber judgment in related inter-State case*, Press Release issued by the Registrar of the Court, ECHR 432 2018, 17.12.2018.

to Crimea and a separate list related to events in Eastern Ukraine. It is difficult to accurately indicate how many complaints specifically concern events in Crimea as of today, e.g., in November 2014 it was more than 20.[6] In 2016 more than 1170 cases were rejected as the Court found the allegations had not been substantiated[7].

Up to and as of April 2019 there has been no judgement of the ECtHR related to the situation in Crimea since February 2014. However, some of those cases had been considered by the Court and were communicated. These are: the case of Sentsov against Russia lodged on 7 July 2014 (Application No. 48881/14)[8] and the case of Sentsov and Kolchenko against Russia lodged on 27 April 2016 (Application No. 29627/16).[9]

In the first case the applicant complains that his arrest and the decision on his detention were arbitrary and violated Article 5 § 1 (c) of the ECHR. Further, the applicant complains that he was not brought before a judge established in accordance with the national law and that the decision on his detention was not substantiated. In this case the ECtHR decided on the interim measure, calling the Russian government to provide the applicant with appropriate treatment in an institutionalized medical setting on 25 July 2018.[10] Measures were decided without prejudging any subsequent decisions on the admissibility or merits of the case. However, the case was communicated to the Russian government less than two months later, on 20 September 2018. Previously, the priority had been given to this application. On the same date the President of the First Section to which the case had been allocated decided to adjourn the Court's proceeding in the case pending the outcome of the proceedings in the inter-state case Ukraine v. Russia (re Crimea) no. 20958/14.[11] The Russian government was requested to submit observations by 16 January 2019. There were following questions among others: did the applicant come with the jurisdiction of the Russian Federation with the meaning of Article 1 of the Convention interpreted by the Court in some previous cases on the account of the circumstances of the present case? Are the acts of which the applicant complains in the present case imputable to the Russian Federation, within the meaning of Article 34 in conjunction with Article 1 of the Convention? Was the judge who, on 11 May 2014, ordered the applicant's pre-trial detention, a "judge or other officer duly authorised by law to exercise judicial power", within the meaning of Article 5 § 3 of the Convention?

Initially, on 16 January 2019, the Russian authorities sent to the ECtHR proposition to postpone the exchange of documents on this application until the outcome of the proceedings in the inter-state case Ukraine v. Russia (re Crimea). The Agency "Intefax" received the

6 *Information Note on the Court's Case - Law*, No. 179, November 2014, Council of Europe, p. 18.
7 *ECHR to adjourn …*, *op.cit*.
8 Sentsov v Russia, No. 48881/14.
9 Sentsov and Kolchenko v. Russia, No. 29627/16.
10 *Court decides on medical care interim measure for Oleg Sentsov, calls on him to end hunger strike*, Press Release issued by the Registrar of the Court, ECHR 271 2018, 25.07.2018.
11 First Section, ECHR-LE4.1cR OBS CHB, 26/09/2018.

official position of the Russian Ministry of Justice: "In connection with the notification of the European Court of Human Rights about the adjournment of the proceedings in the 'Sentsov v. Russia' complaint before the outcome of the proceedings in the case of 'Ukraine v. Russia (re Crimea)', the Russian authorities sent a position on the inexpediency of the exchange of procedural documents on admissibility and merits before making decisions on the admissibility of the abovementioned intergovernmental complaint, given that the findings of the ECtHR in this decision can significantly affect the content of the legal positions of the parties on the individual complaint".[12] However, on 13 March 2019, some news agencies published information that the Russian authorities had sent their observations to the ECtHR. Russia has provided the affirmative answer to the questions posed by the Court. The memorandum of Mikhail Galperin, Russian Federation's Representative at the ECtHR, states that since March 18, Russia exercises jurisdiction in the territory of the Republic of Crimea and is responsible for all actions of state bodies. Sentsov was arrested in connection with suspicion of committing a crime, and these suspicions proved to be reasonable. As for the judge of the district court of Simferopol Denis Didenko, at the time of the decision he was the acting judge of the Russian court on the basis of the Law "On the acceptance into Russian Federation of the Republic of Crimea", adopted on 21 March 2014.[13]

The second case refers the conviction of Ukrainian citizens by Russian courts for terrorism committed in Crimea after its annexation. Applicants complain that under Article 6 § 1 they were not brought before a tribunal established by law. In their opinion since the annexation of Crimea was unlawful and since they were Ukrainian citizens and the alleged crimes were committed on Ukrainian territory (in Crimea) they could not have been tried by a Russian court. Further they complain that their trial was unfair as they were convicted on the basis of evidence obtained by torture and coercion and their conviction was not based on relevant and sufficient evidence. The case was communicated to the Russian government on 19 November 2018. There are five questions to the parties. Most of them concerned the evidence and inhuman or degrading treatment of one of the applicants. But one of the questions concerned the court before which the case of applicants was conducted. The ECtHR asked the Russian government a detailed question – was the court, which dealt with the applicant's case, a tribunal established by law, as required by Article 6 §1 of the Convention? Until 9 April 2019 there is no information about the responses provided by the Russian government. However, considering the observation given by the Russian Federation in the Sentsov v. Russia case, one should also expect an affirmative answer to this question.

However, there is no further consideration of both cases by the ECtHR to expect in the near future. According to the Information Agency UNN, it received the notifica-

12 *Rossija ne napravila v ESPC dokumenty po delu Sentsova-SMI*, 17 January 2019. <https://ru.krymr.com/a/news-oleg-sencov-evropeyskiy-sud-po-pravam-cheloveka/29715614.html>.

13 A. Kornia, *Rossija otvetila na voprosy ESPC po jalobe ukrainskogo rejisera Sentsova*, Vedomosti <https://www.vedomosti.ru/politics/articles/2019/03/13/796360-rossiya-otvetila-na-voprosi-espch>.

tion from the ECtHR Press Service, that "[…] this case is still adjourned until the outcome of the proceedings in the case Ukraine v. Russia (in relation to the Crimea) no. 20958/14".[14]

Prospective Complaints

According to numerous human rights protection organisations, Russia is perpetrating grave human rights violations against residents of Crimea.[15] The scale of human rights violations allows to consider that the number of applications brought to this moment to the ECtHR does not exhaust all possible complaints and may gradually increase. The indefinite, controversial status of Crimea additionally has a negative impact on the ability of citizens to exercise their rights. Formally Ukraine bears responsibility for the observance of human rights in Crimea, however, de facto, Crimea is a part of Russia now. Obviously, under the international law, the Russian Federation, as the occupying state, bears the main responsibility for the human rights violations in Crimea. At the same time, there are areas, where Ukraine could be responsible under the ECHR. Numerous situations described in the media or in reports of non-governmental and international organisations could be used to draw up a complaint to the ECtHR. The framework of the article does not allow analysing violations of all human rights guaranteed by the ECHR. Only one of them, regarding the violation of the freedom of movement, will be presented to describe the possibility of drawing up complaints to the ECtHR.

Freedom of Movement (Art. 2 of Protocol No. 4)

Pursuant to the Federal Constitutional Law of 21.03.2014 No. 6 -FKZ "On acceptance of the Republic of Crimea into the Russian Federation and the creation of new constituent entities of the Russian Federation – the Republic of Crimea and the Federal City of Sevastopol", the border of the Republic of Crimea on land, interfaced with the territory of Ukraine, is the state border of the Russian Federation[16]. The Federal Migration Service of the Russian Federation announced the establishment of the state border between the

14 S. Karter, *Delo Sentsova i Kolchenko v ESPCH vsio esio otlojeno*, Informacionnoe Agentstvo UNN, 30.01.2019 <https://www.unn.com.ua/ru/exclusive/1776841-spravu-sentsova-i-kolchenka-v-yespl-vse-sche-vidkladeno>.

15 See widely, *Ukraine. Events of 2018*, Human Rights Watch <https://www.hrw.org/world-report/2019/country-chapters/ukraine>; *Situation of human rights in the temporarily occupied Autonomous Republic of Crimea and the City of Sevastopol (Ukraine),* Office of the United Nations High Commisioner for Human Rights <https://reliefweb.int/sites/reliefweb.int/files/resources/Crimea2014_2017_EN-1.pdf>.

16 Federalnyi konstitutsionnyi zakon ot 21.03.2014, no. 6-FKZ, O prinyatii v Rossiiskuyu Federatsiyu Respubliki Krym i obrazovanii v sostave Rossiiskoi Federatsii novykh sub'ektov – Respubliki Krym i goroda federalnogo znacheniya Sevastopolya. <http://base.garant.ru/184002/>.

Crimea and Ukraine only on 25 April 2014.[17] Ukraine established their crossing point at the administrative boundary line between Crimea and Kherson region already in March 2014.[18] The establishment of this border has adversely affected the freedom of movement between mainland Ukraine and Crimea.[19] Besides that, citizens of Ukraine have been deported from Crimea for violating Russian Federation immigration rules. In accordance with the provisions of Article 5 of the Federal Law of July 25, 2002 No. 115-FZ "On the Legal Status of Foreign Citizens in the Russian Federation", if the stay does not require a visa, a foreigner may stay in Russia without registration for 90 days during every 180 days.[20] These provisions now are applied also in regard to non-Russian citizens, who prior to the occupation, resided in Crimea. This especially applies to individuals who criticize the human rights situation in Crimea. Courts operating in the peninsula found these individuals to be foreigners who violated immigration rules by exceeding the authorized 90-day period in Crimea and ordered their administrative expulsion. However, the application of a given law to such persons is doubtful: this law provides restriction to foreigners who enter Russia, but it doesn't contain a provision which could be applied to persons who became foreigners as a result of occupation. In addition, deportation of those individuals contravenes the provisions of Art. 49 of the Geneva Convention (IV) applying to protected persons in situations of occupation.[21] Naturally, the Russian Federation does not treat the Crimean status as occupation and will prove that those persons were foreigners under the Russian law. When constructing a complaint to the ECtHR, it is necessary to exhaust effective remedies available at the national level. The decision on expulsion must be appealed and after the court decision of last resort will be rendered, a complaint to the ECtHR could be brought. A similar situation also occurs when the Russian authorities issue a ban on entering the territory of the Russian Federation to persons living in the Crimea before March 2014 who have not acquired Russian citizenship.[22] Such individuals had temporarily left Crimea and then attempted to come back. The decision on ban on entry has to be also appealed in order to file complaint to the ECtHR.

The freedom of movement can also be violated by the Ukrainian Government. Ukraine has imposed restrictions on entry into and exit from Crimea of foreigners and citizens of Ukraine who have not reached 16 years. According to the art. 3 of the Decree of Cabinet of Ministers of

17 *FMS objavila ob ustanovlenii gosgranicy mejdu Krymom i Ukrainoj*, 25.04.2014. <https://lenta.ru/news/2014/04/25/granica/>.

18 About border between Crimea and mainland Ukraine v. *Freedom of movement across the administrative bundary line with the Crimea*, "Thematic Report", 19.06.2015, OSCE, p. 4–5 <https://www.osce.org/ukraine-smm/165691?download=true>.

19 V. *Freedom of movement*…, *op. cit*.

20 Federalnyj zakon ot 25.07.2002, no. 115-FZ, O pravovom polojenii inostrannyh grajdan v Rossiiskoi Federatsii. <https://www.consultant.ru/document/cons_doc_LAW_37868/>.

21 Geneva Convention relative to the protection of civilian persons in time of war of 12 August 1949.

22 E. Andreyuk, P. Gliesche, *Crimea: Deportations and forced transfer of the civil population*, "The Foreign Policy", 4.12.2017.

Ukraine „Order of entry into and exit from the temporarily occupied territory of Ukraine" from 4 June 2015, children below 16 years of age, if travelling only with one parent, must have notarized written consent of the other parent.[23] Crimean residents, which have documents authorised by a state notary officer of the Republic of Crimea, are not permitted to enter mainland Ukraine, as documents issued in Crimea are not recognised in Ukraine. These requirements are contrary to Art. 10 of the Law of Ukraine on ensuring the rights and freedoms of citizens and the legal regime in the temporarily occupied territory of Ukraine, which establishes the free entry and exit from Crimea of all citizens of Ukraine.[24] According to the Ukrainian Helsinki Human Rights Union, a lawsuit was filed that this Resolution violates the Constitution of Ukraine and other laws, and also contradicts the international obligations of Ukraine.[25] In case the Ukrainian court will not find the abovementioned provisions unlawful and after exhaustion of effective remedies available in Ukraine, a complaint to the ECtHR could be prepared.

Inter-State Applications

There are currently five Ukraine v. Russia inter-state applications. Four of them are pending before the Grand Chamber and one of them is pending before a Chamber.

They are:

- Ukraine v. Russia (re Crimea) (application no. 20958/14).
- Ukraine v. Russia (II) (application no. 43800/14) on the alleged abduction of three groups of children in Eastern Ukraine and their temporary transfer to Russia on three occasions between June and August 2014.
- Ukraine v. Russia (re Eastern Ukraine) (no. 8019/16).
- Ukraine v. Russia (VIII) (application no. no. 55855/18) concerning events on the Kerch Strait in November 2018.
- Ukraine v. Russia (VII) (application no. 38334/18) alleging the politically motivated detention and prosecution of Ukrainian nationals on various criminal charges.

The first case Ukraine v. Russia (20958/14) was lodged by Ukraine as inter-state application under Article 33 on March 13, 2014. In this case Ukraine stated that, from February 27, 2014 The Russian Federation had started to exercise effective control over territory of the Autonomous Republic of Crimea and to exercise control over armed separatist groups operating in Eastern Ukraine. Thus, this State began to exercise jurisdiction over the situation which resulted in numerous violations of the European

23 *Pro zatverdjennia Poriadku vjezdu na timchasovo okupovanu teritiruju Ukraini ta viezdu z nei*, Oficijnyj visnik Ukraini ot 19.06.2015–2015 g., no 46, p. 130, statja 1485, kod akta 77309/2015.

24 Zakon Ukraini *Pro zabezpechennia praw i svobod gromadian ta pravovii rejim na timchasovo okupovanii teritorii Ukraini*, Oficijnyj visnik Ukraini oficialnoe izdanie ot, 08.05.2014–2014 g., no. 36, p. 35, statja 957, kod akta 72341/2014.

25 *Monitorongovyj obzor sutiacii s pravami cheloveka v Krymu. Iuli-Avgust 2015,* Krymskaja pravozashitnaja gruppa, p. 18.

Convention on Human Rights in those territories. Ukraine accused Russia of violating the following articles of the Convention: 2 (right to life), 3 (prohibition of torture and inhuman or degrading treatment), 5 (right to liberty and security), 6 (right to a fair trial), 8 (right to respect for private life), 9 (freedom of religion), 10 (freedom of expression), 11 (freedom of assembly and association), 13 (right to an effective remedy) and 14 (prohibition of discrimination) of the Convention and Article 1 of Protocol No. 1 (protection of property) and Article 2 of Protocol No. 4 (freedom of movement) to the Convention.

The Ukrainian government stated that between March and September 2014, killings of Ukrainians as a result of the illegal annexation of Crimea amounted to a widespread and systematic practice. They are also alleged cases of ill-treatment Crimean population on account of their ethnic origin. The Ukrainian government stated that Ukrainian nationals living in Crimea were automatically recognized as Russian nationals and that pressure was exerted on those who express the wish to remain Ukrainian nationals. It is alleged that property belonging to Ukrainian legal entities were taken by the self-proclaimed authorities of the Crimean Republic, which acts were later approved by Russian legislation. Finally, the applicant government stated that the border between Crimea and Ukraine has led to Ukrainian nationals' entry into Crimea being unlawfully restricted.

Following the introduction of the application on 13 March 2014, the Court decided to apply Rule 39 of the Rules of Court (interim measures), calling upon both Russia and Ukraine to refrain from taking any measures, in particular military action, which might bring about violations of the Convention rights of the civilian population, notably the right to life and prohibition of torture and inhuman or degrading treatment.[26]

On 25 November 2014 the ECtHR invited the Russian Federation within 16 weeks to submit its observations on admissibility and to answer a number of questions, including the question of whether the alleged violations of the Convention fall within the jurisdiction of the Russian Federation within the meaning of Article 2 of the ECHR.[27] The allotted time was extended twice at the request of the Russian Federation – initially to 25 September 2015[28] and later to 31 December 2015.[29] As of today, both governments have already submitted their observations on the merits of the cases.[30]

26 *Interim measure granted in inter-State case brought by Ukraine against Russia*, ECHR 073, 2014, 13.03.2014.

27 *European Court of Human Rights deals with cases concerning Crimea and Eastern Ukraine*, ECHR 345, 2014, 26.11.2014.

28 *European Court of Human Rights extends time allowed for Russia's observations on admissibility of cases concerning Crimea and Eastern Ukraine*, Press Release issued by the Registrar of the Court, ECHR 122 (2015), 13.04.2015.

29 *European Court of Human Rights communicates to Russia new inter-State case concerning events in Crimea and Eastern Ukraine*, Press Release issued by the Registrar of the Court, ECHR 296 (2015), 01.10.2015

30 *Grand Chamber to examine four Compaints by Ukraine Against Russia over Crimea and Eastern* Ukraine, ECHR 173, 2018, 09.05.2018.

The next application regarding Crimea was lodged by the government of Ukraine on 27 August 2015 (application no. Ukraine v. Russia 42410/15). It concerns the events in Crimea and eastern Ukraine after September 2014.[31] Ukraine stated that Russia had exercised and continues to exercise effective control over Crimea and de facto control over Eastern Ukraine. Therefore, Russia is responsible for violations of the ECHR in those regions. Just as in the case 20958/14, Ukraine accused Russia of violating Articles 2 (right to life), 3 (prohibition of torture and inhuman or degrading treatment), 5 (right to liberty and security), 6 (right to a fair trial), 8 (right to respect for private life), 9 (freedom of religion), 10 (freedom of expression), 11 (freedom of assembly and association), 13 (right to an effective remedy) and 14 (prohibition of discrimination) of the Convention and Article 1 of Protocol No. 1 (protection of property) to the Convention. Furthermore, the Ukrainian government relies on Articles 18 (limitation on use of restrictions on rights) of the ECHR and Article 2 of Protocol No. 1 (right to education) and Article 3 of Protocol No. 1 (right to free elections) to the Convention. When it comes to Crimea, Ukraine accused Russia of, among others, the disappearances of members of the Crimean Tatar community and pro-Ukrainian activists in Crimea and their arbitrary arrests, as well as torture and the ill-treatment of civilian and military personnel. On 29 September 2015 the ECtHR invited Russia to submit its observations on the admissibility of that application within 16 weeks. The ECtHR already received Russian's submissions on this application.

On 6 February 2016, the ECtHR decided to divide the first case 20958/14 geographically in order to increase the effectiveness of case processing. All the complaints related to Crimea remained as case no. 20958/14, while complaints related to Eastern Ukraine were put under the application Ukraine v. Russia (V) no. 8019/16. The same rule was applied to the second discussed application no. 42410/15. Since 25 November 2016 all events in Crimea have remained as case no. 42410/15, while those related to Eastern Ukraine were registered as Ukraine v. Russia (VI) no. 70856/16.

In May 2018 the Chamber dealing with the applications decided to relinquish jurisdiction over the case in favour of the Grand Chamber under Article 30 of the ECHR, which decided to join two cases into one – Ukraine v. Russia (application no. 20958/14). Initially the Grand Chamber hearing was scheduled for 27 February 2019. However, it was postponed for an indefinite period. According to leading Russian news agencies, the ECtHR Press Service stated the postponing had been due to organizational reasons.[32] In opinions of the Russian legal experts, political aspects have a strong influence on this

31 *European Court of Human Rights communicates to Russia…*, op.cit.

32 V. *ESPC otlojil spor Ukrainy s Rossiej na neopredellennyj srok,* 7.02.2019 <https://pravo.ru/news/208867/>; Kornia, *ESPC perenes slushanija po delu «Ukraina protiv Rossii» po Krymu na neopredellennyj srok*, 6.02.2019 <https://www.vedomosti.ru/politics/articles/2019/02/06/793466-ukraina-protiv-rossii>.

case.[33] However, Ukrainian new agencies stated that the reasons of the postponement had not been specified.[34] In turn, the ECtHR did not specify a new date of hearings nor provided the reasons for its postponement.

There was one more inter-state application of Ukraine against Russia, no. 49537/14 regarding events in Crimea. However, it was struck out by the ECtHR in September 2015 after the government of Ukraine informed that it no longer wants to pursue this application as it concerns the same subject matter as the individual application Dzhemilov v. Ukraine and Russia no. 49522/14.[35] The Russian government also did not object to the application being struck out of the ECtHR's list. Therefore, the ECtHR considered that it is no longer justified to continue the examination of the application.

Other cases are not related to the events in Crimea and hence go beyond the topic of this article.

The inter-state case procedure in ECtHR is a rarity. As of 31 January 2019, only 26 inter-state cases have been filed.[36] In 10 most recent cases brought by Georgia and Ukraine during the last 12 years, the Russian Federation is the respondent. As it was pointed out above, Ukraine's application concerns Russia's activities in the territory of Ukraine. Georgia's applications against the Russian Federation relate, among others, to the 2008 armed conflict between Georgia and Russia and its aftermath, including the deterioration of the human rights situation along the administrative boundary lines between Georgian-controlled territory and Abkhazia and South Ossetia.[37]

Possible Outcome of the Applications

As of April 2019, there has been no judgment of the ECtHR related to the situation in Crimea since February 2014. In order to understand what issues are likely to arise in adjudicating and what a possible outcome of the applications lodged, it is necessary to analyse case law of the ECtHR.

The issues of jurisdiction and the imputability of the alleged violation to the actions or omissions of the State concerned will be crucial. A State's jurisdiction within the meaning of Article 1 is essentially territorial. It is presumed to be exercised throughout the State territory.[38] However, according to the ECtHR, the presumption of territorial jurisdiction may be limited by several exceptional circumstances. Those circumstances are the following: acts of diplomatic or consular agents of the State abroad and on board aircraft and ships registered in that State in accordance with the international law; exercise of

33 *Ibidem*.

34 *ESPC perenes na neopredellenyj srok razbiratelstvo dela „Ukraina protiv Rossii"*, 6.02.2019 <https://interfax.com.ua/news/general/564220.html>.

35 Ukraine against Russia, No. 49537/14 24.

36 <https://www.echr.coe.int/Documents/InterStates_applications_ENG.pdf>.

37 *New Inter-State application brought by Georgia against Russia*, ECHR 287, 2018, 31.08.2018.

38 Assanidze v. Georgia, No. 71503/01, Judgment of 8 April 2004, §137.

another State's sovereign authority with its agreement; use of force by a State's agents operating outside its territory; exercising State's authority outside its own territory by complete or military occupation of another State, by support for an insurrection or a civil war in another State, by installation or support with installation on the territory of another State of a separatist regime or unrecognised entity; delegation of State powers or its joint exercise with other States[39].

Judgments in previous cases of the ECtHR related to the Turkish Republic of the Northern Cyprus, Transnistria or Nagorno-Karabakh (de facto regime in ECtHR's terminology) could be relevant to some extent to cases related to Crimea.[40] The ECtHR developed the following rules:

- the mother State remains the sole legitimate government of the parts of territory which are separate as a result of the third state's unlawful military operations on those territories[41];
- responsibility of a State arises when as a consequence of military action – whether lawful or unlawful – it exercises effective control directly, through its armed forces, or through a subordinate local administration, on the area of another state;[42]
- responsibility of a State arises when as a consequence of the military, economic, financial and political support which it had to provide to the separatist regime established on the territory of another state;[43]
- the State in whose territory a separatist regime has been established may be liable under the Convention, as it has positive obligations to take appropriate steps to ensure that the rights under the Convention are respected within its territory.[44]

However, one should remember that the situation in Crimea is rather different than the situation in the European entities which declared independence and are supported by a third State and are not recognized by the international society (e.g. Northern Cyprus, Transnistria or Nagorno-Karabakh). Crimea now is declaring to be a part of the

39 V. *Guide on Article 1 of the European Convention on Human Rights. Obligation to Respect Human Rights – Concepts of „Jurisdiction" and Imputability* <https://www.echr.coe.int/Documents/Guide_Art_1_ENG.pdf>.

40 One could also mention in this place the cases relating to Ossetia, hovewer as for today, only decision of admissibility on 13 December 2011 was adopted without prejudging the merits of the case. The case is still pending. V. *Grand Chamber Hearingin case brought by Georgia against Russia over 2008 conflict*, ECHR 183, 2018, 23.05.2018.

41 Cyprus v. Turkey, No. 25781/94, Judgment of 10 May 2001, Para. 61; Ilascu and others v. Moldova and Russia, No 48787/99, Judgment of 8 July 2004, § 330

42 Loisidou v. Turkey, No 15318/89, Judgment of 23 March 1995, Para. 62

43 Ilascu and others v. Moldova and Russia, No 48787/99, Judgment of 8 July 2004, § 392.

44 *Ibidem*, § 313.

Russian Federation and is recognised as such by the Russian Federation. In previous cases, the supporting States, such as Turkey, Russia and Armenia, claimed that the actions of the secessionist entities cannot be attributed to them as the entities are independent or are territories which belonged to the mother States.[45] In the case of Crimea the position of the Russian Federation is quite different. Russia claimed that Crimea belongs to Russia, so actions in Crimea could be attributed to it. Moreover, the Russian Federation also confirmed such a position in its observations in the case Ukraine v. Russia (re Crimea) no. 20958/14[46]. So, the issue of jurisdiction and the imputability of the alleged violation seems to be relatively clear. However, it seems unlikely that the ECtHR will support the position of the Russian Federation. There is widespread opinion expressed by international organisations that Russian activities in Crimea in March 2014 violated international law and had no legal effect[47]. According to the case law of the ECtHR, there is a probability that the Court will recognise Ukraine as the sole legitimate government of Crimea, like it was done regarding the Republic of Cyprus and the Republic of Moldova in cases Cyprus v. Turkey and Ilascu and Others v. Moldova and Russia.

The question whether Russia is occupying the Ukrainian territory could also arise in adjudicating on Crimean cases. The ECtHR stated in the case of Al-Skeini v United Kingdom that if the territory of State is occupied by the armed forces of another State, the occupying state should in principle be held accountable under the Convention for breaches of human rights within the occupied territory[48]. At the same time in previous cases regarding the Turkish Republic of Northern Cyprus, Transnistria and Nagorno-Karabakh, the ECtHR seemed to avoid the discussion of problems related to the occupation of Cyprus, Moldova and Azerbaijan[49]. The ECtHR determined only whether the respondent State is responsible for the alleged violation of the rights under the ECHR due to exercised effective control over the concerned territories. There is a probability that in Crimea's case the ECtHR also will limit itself to determining whether Russia

45 Loisidou v. Turkey, No 15318/89, Judgment of 23 March 1995, Para. 54; Ilascu and others v. Moldova and Russia, No 48787/99, Judgment of 8 July 2004, § 354; Chirakov and Others v. Armenia, No. 13216/05, Judgment of 16 June 2015, § 163.

46 Sentsov v Russia, App. No. 48881/14.

47 Resolution 1988 of the Parliamentary Assembly of the Council of Europe, 2014, para 16; Resolution 68/262 of General Assembly of the United Nations adopted on 27 March 2014, A/RES/68/262; Conclusions on Ukraine approved by the European Council 20 March 2014, § 5.

48 Al-Skeini and Others v. United Kingdom, No. 55721/07, Judgment of 7 July 2011, Para 142

49 Cyprus v. Turkey, No. 25781/94, Judgment of 10 May 2001, Ilascu and others v. Moldova and Russia, No 48787/99, Judgment of 8 July 2004, Chirakov and Others v. Armenia, No. 13216/05, Judgment of 16 June 2015. V. H-J. Heintze, *On the Relationship Between Human Rights Law Protection and International Humanitarian Law*, IRRC, December, 2004, vol. 86, no. 856, pp.805–809; M. Milanovic, *European Court Decides that Israel is Not Occupying Gasa*, EJIL <https://www.ejiltalk.org/european-court-decides-that-israel-is-not-occupying-gaza/#more-13413>.

is exercising effective control over Crimea. This could be sufficient for the ECtHR to indicate Russia's responsibility under the Convention.

In case the ECtHR considers that the Russian Federation exercised effective control over the territory of Crimea, it will examine if acts and the court's decision of Crimean authorities are lawful and valid for the purposes of the ECHR. Such examinations take place at the admissibility stages when the ECtHR decides on the exhaustion of domestic remedies. In previous cases regarding de facto regimes, the ECtHR developed the position according to which legal and judicial systems operating in de facto regimes were not unlawful only because they were established by an unlawful regime[50]. It is significant whether the judicial system in general can be considered compatible with the principles of the Convention.[51] As it seems that, due to the fact that the Russian law and judicial system operating in reality in Crimea, the law of Crimea will be valid for the purposes of the Convention. The Russian Federation is a member of the ECHR, as well as a member of the Council of Europe, so there should be no doubt about the Crimean legal system.

Does it mean that the Russian Federation would be the only respondent State before the ECtHR? This is not a foregone conclusion. On the one hand, similarly to the case Cyprus v. Turkey, the State (Ukraine) is unable to exercise effective control over a part of territory (Crimea), due to the de facto control of the third State (Russia). On the other side, Ukraine could be obliged to uphold some of its Convention obligations in Crimea, which, in principle, corresponds to the recent ECtHR's jurisprudence regarding separatists' entities and control over them. Such an approach has been applied by the court in the commonly quoted case of Ilascu and Others v. Moldova and Russia.[52] In addition, in a recent case regarding Karabakh, Sargsyan v. Azerbaijan, the Court found that Azerbaijan had violated rights established in the ECHR, due to the fact that "the Government have failed to discharge the burden of proving the availability to the applicant of a remedy capable of providing redress in respect of his Convention complaints and offering reasonable prospects of success".[53] Obviously, in the case Sargsyan v Azerbaijan it was disputed that Azerbaijan exercises control over the territory in question, in distinction from the situation that Russia exercises de facto control over Crimea.

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50 Cyprus v. Turkey, No. 25781/94, Judgment of 10 May 2001, § 88–90, Demopoulos and Others v. Turkey, No. 46113/99, Decision as to the admissibility, § 94.

51 Ilascu and others v. Moldova and Russia, No 48787/99, Judgment of 8 July 2004, § 436.

52 "Moldova […] has a positive obligation under Article 1 of the ECHR to take the diplomatic, economic, judicial or other measures that it is in its power to take and are in accordance with international law to secure to the applicants the rights guaranteed by the ECHR", *Ibidem*, §331. Regarding ECtHR's positive obligations case law v. L. Lavrysen, *Human Rights in a Positive State. Rethinking the Relationship Between Positive and Negative Obligations under the European Convention on Human Rights,* Cambridge – Antwerp – Portland 2016

53 Sargsyan v. Azerbaijan, No. 40167/06, Judgment of 16 June 2015, § 119.

However, this case may also affect the resolution of cases regarding Ukraine's responsibility for human rights violations in Crimea. So, if an individual brings the case against Ukraine, the ECtHR could apply the concept of positive obligations, which could mean that if Ukraine has to fulfil its obligations under the ECHR concerning residents of Crimea, it has to take measures and efforts to protect rights and freedoms of the residents of Crimea even if it does not control it de facto. The scope of those obligations remains, however, not fully defined and it is difficult to determine what steps Ukraine has to take to fulfil those obligations.[54]

Conclusions

It could be stated that the issue of the liability of Ukraine and Russia under the ECHR over Crimean residents is not quite clear. Both Russia and Ukraine take actions that violate basic human rights. The ECtHR could determine that the Russian Federation may be held responsible, as it was with Turkey regarding the Northern Cyprus. Also, Ukraine may be considered responsible for human rights violations with respect to Crimean residents. However, as it seems, the liability of Ukraine will be limited to the positive obligations under the ECHR.

Although one should agree with the claim that "the uncertainty surrounding each State's obligations with respect to Crimea is obviously deeply unsatisfactory for both the State and potential victims of human rights abuses"[55], it is very important, that the ECHR continues to be applied in force on the territory of Crimea. It is reasonable for Crimean residents to lodge complains against both Russia and Ukraine. In previous judgments the ECtHR always has regard to the special character of the Convention as an instrument of the European public order and defined the State which is responsible for violating human rights in order to avoid "a regrettable vacuum in the system of human rights protection" in the specific territory.

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55 *Ibidem*, p. 42

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SUMMARY

Crimea and Liability of Russia and Ukraine under the European Convention on the Protection of Human Rights

The aim of this article is to present the liability of Russia and Ukraine regarding Crimea under the European Convention on the Protection of Human Rights. The author analyzes pending and possible prospective cases originating from the conflict around Crimea between Ukraine and Russia. Due to the inconsistency in case law of the ECtHR it is difficult to clearly determine what state will be considered responsible for the violation of the rights of residents of Crimea resulting from the Convention. In author's opinion the ECtHR could determine that the Russian Federation may be held responsible, as well as Ukraine. However, as it seems, the liability of Ukraine will be limited to the positive obligations under the ECHR.

Keywords: Crimea, Ukraine, the Russian Federation, European Convention on the Protection of Human Rights, European Court of Human Rights.

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Global Space Security and Counter-space Capabilities: the Legal and Political Challenges

Introduction

The growing use and reliance on space for national security has also led more states to examine and develop their own counter-space capabilities. Counter-space, also known as space control, is the set of capabilities or techniques that are used to gain space superiority. Space superiority is the ability to use space for one`s own purposes while denying it to an adversary. Accordingly, counter-space capabilities have both offensive and defensive elements that are supported by Space Situational Awareness (information about the space environment). Defensive counter-space helps protect one`s space assets from attack, while offensive counter-space tries to prevent the adversary from using their space asset. Anti-satellite weapons (ASAT) are a subset of offensive counter-space capabilities, although the satellite itself is only one part of the system that can be attacked. Offensive capabilities can be used to deceive, disrupt, deny, degrade, or destroy any of the three elements of a space system: the satellite, the ground system, or the communication links between them.

There are several different categories of offensive counter-space capabilities: a) direct ascent (weapons that use ground-, air-, or sea-launched missiles with interceptors that are used kinetically to destroy satellites through force of impact, but are not placed into orbit themselves; b) co-orbital (weapons that are placed into orbit and then maneuver to approach the target; c) directed energy (weapons that use focused energy, such as laser, particle, or microwave beams to interfere or destroy a space system; d) electronic warfare (weapons that use radiofrequency energy to interfere with or jam the communication to or from satellites; e) cyber (weapons that use software and network techniques, to compromise, control, interfere with, or destroy computer systems).[2]

1 Publication financed under the project implemented in the RESEARCH GRANT Program of the Ministry of National Defense Republic of Poland.

2 B. Weeden, V. Samson ed., *Global Counterspace Capabilities: An Open Source Assessment*, 2019, p. XV. T. Harrison, K. Johnson, T. G. Roberts, M. Bergethon, A. Coultrup, *Space Threat Assess-*

International Regulations on Space Security

Space security legislation is very important for the international community, but also challenging. In 2008, Russia and China proposed a discussion on the project of the Treaty on the Prevention of the Placement of Weapons in Outer Space, the Threat of Use of Force against Outer Objects (PPWT)[3] in the Conference of Disarmament in 2008. In 2014 a new Chinese-Russian treaty proposal would ban the placement of weapons in outer space but does not address weapons based on the ground that could destroy satellites. This is the first redraft of the PPWT presented for review since the original was presented. That document was rejected by many states (including the US) for a variety of reasons, including the grounds that it was unverifiable.

When they introduced the 2014 draft treaty, China and Russia offered an explanatory note. "We consider a legally binding ban on placement of weapons in outer space as one of the most important instruments of strengthening global stability and equal and indivisible security for all," it stated. However, there are several gaps that the PPWT does not address even in its latest draft[4]. Long discussion and criticism on the project have been presented in this matter by the US. For example, the PPWT had not succeeded in receiving large-scale endorsement principally on the fact that the draft treaty did not address direct-ascent Anti-Satellite (ASAT) systems nor did it address soft-kill weapons such as lasers that could be employed to permanently or temporarily disable a satellite. [5] Moreover, the draft failed to address so-called "breakout" weapons, which could take the form of direct-ascent or co-orbital weapons that could be manufactured and launched in the event of hostilities. All these are inherently destabilizing and bear consideration yet remain unmentioned. Rather, the draft treaty emphasized a great deal on the placement of weapons in outer space, which would likely come in the form of co-orbital ASAT's, but overlooks the more dangerous aspect of ground-based assets targeting outer space assets as demonstrated with the Chinese ASAT test in 2007 that targeted the defunct FY-1C weather satellite. Even though that test brought down one of China's old weather satellites, the potential for intentional or unintentional incidents in the future is still

ment, 2019, pp. 3–5.

3 <www.unog.ch>.

4 Note verbal dated 2 August 2018 from the Delegation of the United States of America to the Conference on Disarmament addressed to the Secretary-General of the Conference transmitting the United States response to CD/2042 14 September 2015 titled "Letter dated 11 September 2015 from the Permanent Representative of the People's Republic of China to the Conference on Disarmament and the Chargé d'affaires a.i. of the Russian Federation regarding the United States of America analysis of the 2014 updated Russian and Chinese texts of the draft treaty on prevention of the placement of weapons in outer space and of the threat or use of force against outer space objects (PPWT)"

5 The draft treaty emphasizes a great deal on the placement of weapons in outer space, which would likely come in the form of co-orbital ASATs, but overlooks the more dangerous aspect of ground-based assets targeting outer space assets as demonstrated with the Chinese ASAT test in 2007.

high and such capabilities raise the potential for dangerous consequences. Moreover, after recent revelations by the US Defense and State Departments that China has performed several disguised ASAT tests, it is clear that China has no intention of placing these weapon systems into the coverage of the PPWT[6].

The draft treaty did not address the major issue presented by space debris, which confronts the long-term sustainability of outer space, especially in low Earth orbit. The issue of space debris is not mentioned anywhere in the proposed draft treaty, even though the issue poses a far bigger challenge than the placement of weapons in outer space. The potential for any state placing weapons, including weapons of mass destruction (WMDs), is highly remote, but the growth of the space debris population has already affected the functioning of outer space assets. This issue is important by the continued threat posed by the destructive capacity of hard-kill, direct-ascent ASATs. The PPWT should acknowledge the importance surrounding the creation of space debris by direct-ascent ASATs, but the current draft conveniently neglects to mention it. [7]

Ancillary to the issue of space debris creation is space debris removal. Technology designed to remediate space debris could also be used to interfere with functioning satellites belonging to another state. This so-called 'dual-use technology' is already a political issue that needs to be overcome in order for effective remediation to begin. However, the PPWT would complicate the issue because it gives additional legal leverage to a State Party that seeks to protest activities of another to remediate space debris by claiming that they can be "space weapon." Whether such a claim is a legitimate concern or a geopolitical maneuver on the part of the complaining State Party, it will surely complicate the issue of space debris remediation. That the PPWT does not mention this concern is troubling and further degrades its legitimacy.

Some of the definitional attempts in the current draft of the PPWT pose challenges. For example, the way which "use of force" or "threat of force" is defined raises questions about the intentions of states that might become signatories of PPWT in the future. There is also an issue about the differentiation that the draft treaty makes between States Parties and non-States Parties. Article II of the proposed treaty states, that States Parties to this Treaty shall "not resort to the threat or use of force against outer space objects of States Parties." However, it makes no prohibition against the outer space objects belonging to non-State

6 J. Foust, *U.S. Dismisses Space Weapons Treaty Proposal As "Fundamentally Flawed"*, "Space News" September 11, 2014.

7 CD/2129 Conference on Disarmament, 16 August 2018 GE.18–13568(E); Remarks of Richard H. Buenneke Senior Advisor, National Security Space Policy Office of Emerging Security Challenges Bureau of Arms Control, Verification and Compliance U.S. Department of State Panel on "Balancing national security and economic security in a contested and congested space domain"; "Greater Security Through International Space Collaboration" Seminar George Washington University Space Policy Institute The Aerospace Corporation's Center for Space Policy & Strategy, July 19, 2018

parties. This suggests that if the PPWT becomes binding international law, it will override customary norms of non-interference and leave the space objects of non-parties open to interference, unless they become a party to the treaty.

Additionally, the definition of "outer space object" used by the PPWT is considered by the US as not necessary and confusing, given that the Liability Convention 1972[8] and the Rescue Agreement 1975[9] have a working definition of "space object." That definition is already internationally accepted and even used in some domestic space law and would serve to integrate the PPWT into the current body of international space law. Having this new term defeats the purpose of trying to harmonize the PPWT with the existing international legal framework, which China and Russia are parties to, and suggests that the two countries seek to differentiate the PPWT from the existing body of international space law instead of integrating it.

Another inconsistency deals with the PPWT's reference to the self-defense provision in Article 51 of the UN Charter. China has objected in strong terms to the reference of Article 51 of the UN Charter—the right to individual or collective self-defense—in the International Code of Conduct (ICoC). However, this element is even further clarified in the text of the current draft treaty. The text of the 2008 draft states, "nothing in this Treaty may be interpreted as impeding the exercise by the States Parties of their right of self-defense in accordance with Article 51 of the Charter of the United Nations." The text in the current draft treaty takes a step further and adds a reference to collective self-defense in that "this Treaty shall by no means affect the States Parties' inherent right to individual or collective self-defense, as recognized by Article 51 of the UN Charter[10]." This inconsistency between railing against the "self-defense" principle of Article 51 [11]mentioned in ICoC and promoting it within the PPWT brings into question the legitimacy for bringing the current draft forward to coincide with negotiations for the ICoC.[12]

8 Convention on International Liability for Damage Caused by Space Objects of 1972.

9 The Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space of 1975.

10 Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security. <http://legal.un.org/repertory/art51.shtml>.

11 G. Wang, *What "Flaws" In the PPWT? The way forward for arms control in outer space*, Vienna 2017.

12 The United States reiterates its view that existing international legal obligations, as reflected in Article 2(4) of the United Nations Charter, prohibit the use of force or the threat CD/2129; Remarks of Richard H. Buenneke Senior Advisor, National Security Space Policy Office of Emerging Security Challenges Bureau of Arms Control, Verification and Compli-

A further aspect of the current draft treaty is the so-called "Executive Committee" outlined in Article VI. This concept was mentioned in the 2008 draft, but the current draft treaty fleshes out some of the responsibilities of this committee to include operation and implementation of the treaty, addressing alleged violations of the treaty, developing procedures for sharing data and information analysis, and distribution of information collected pursuant to transparency and confidence-building measures. The responsibilities outlined for the Executive Committee fail to spell out the structure, responsibilities and financial obligations with specific detail if at all.

With regards to dispute resolution, the current draft treaty outlines a graduated methodology in Article VII. However, an important exclusion from the dispute resolution mechanism in Article VII is the Permanent Court of Arbitration's new Optional Rules for Arbitration of Disputes Relating to Outer Space Activities (the Rules). Any dispute involving an enacted PPWT would involve state parties with competing geopolitical interests and would likely revolve around the use of dual-use technology. The availability of the Rules to impartially arbitrate a dispute arising out of an enacted PPWT would be an obvious option as part of any dispute resolution mechanism in order to obtain an impartial resolution.

Aside from the specific concerns outlined, the current draft, not unlike the original, is unclear. China and Russia responded to concerns by other states about the vagueness of the original draft by stating that further detail could be fleshed out once states became a party to the treaty. This means that in order to flesh out the detail, a state will have to legally bind itself to the PPWT in its current form before it can read the fine print. The US observed that this might give Russia and China significant legal influence to back a state into a legal and political corner, all the while enhancing its soft-power base in the UN and, specifically, in the Conference of Disarmament (CD). [13]

The United States has clearly articulated the many flaws (errors) of this draft treaty, understanding unusual, even potentially threatening behavior, where a satellite is observed doing something that is contrary to what its owners claim it is intended to do, is of great concern to us. This is important because not only do these actions create uncertainty for other satellite operations, but they also create uncertainty concerning the intentions of the satellite's owners or operators. The US State Department has rejected the draft treaty. This was not a surprise to anyone in the international community and certainly was expected by both the PPWT's sponsors.[14] Absent a drastic shift in US space policy, the future legitimacy of the PPWT is more than questionable, if not terminal.

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ance U.S. Department of State Advanced Maui Optical and Space Surveillance Technologies AMOS Conference Wailea, Hawaii, September 14, 2018

13 <https://www.state.gov/t/avc/rls/285128.htm>.

14 J. Foust, *U.S. Dismisses Space Weapons Treaty Proposal As "Fundamentally Flawed"*, "Space News", September 11, 2014.

Space Security

There are three definitions of "security in Outer Space": the protection of the space infrastructure against natural and man-made threats or risks; ensuring the sustainability of space activities; and "Outer Space for Security" -the use of space systems for security and defense purposes. "Security from Outer Space" means the protection of human life and the Earth environment against natural threats and risks coming from space.

The space infrastructure can be described as a network of space-based and ground-based systems interconnected by communication channels and enabled by access to space capabilities. It includes: a space segment (all systems of the infrastructure located in orbit, namely satellites required for the conduct of operations and delivery of intended service), a ground segment (all systems of the infrastructure located on the surface of the Earth and necessary for the conduct of operations in space and delivery of data and signals), a user segment (sub-part of the ground segment and composed of complementary ground-based systems required for the delivery of full-fledged space services accessible by end-users) and a down-link and up-link interface between the space and ground segments (i.e. including users' equipment) and to operate the space system and receive its data. The uplink refers to signals transmitted from the ground to space and the downlink refers to signals received on the ground from space.[15]

In the 21st Century, while mentioning space, we should put attention on the three "c's"- congested, contested and competitive as a scene for space law regulation implementation.

Congested Space

From the beginning of the Space Age and the first satellite launch, i.e. Sputnik-1 on the 4th of October 1957, the number of space debris exceeds the number of operational satellites. As such, space debris poses a threat to the Near-Earth environment on a Global scale[16]. The first awareness of the problem came out in 1960s, based on the research activities undertaken in the US.

Currently, the total number of objects larger than 10 cm has exceeded more than 17 000 objects and objecst between 1cm and 10 cm, approximately 500 000 among which only about 1400 are active satellites. Those remnants of human activity around space encompass all the inactive, manmade objects, including the fragments that are orbiting Earth or re-entering the atmosphere. Most catalogued objects however originated from more

15 *European Space Policy Institute Report*, Vienna 2018; *Security in Outer Space: Rising Stakes for Europe*, Report 64

16 J. Robinson, M.P Schaefer, K. U. Schrögl, F. von der Dunk ed., *The status and future evolution of Transparency and Confidence Building Measures*, in: *The prospects for Transparency and Confidence-Building Measures in Space*, ESPI Report 27, Vienna 2010.

than 290 break-ups in orbit, mainly caused by the explosion, and from about 10 suspected collisions (of which four are confirmed between the catalogued objects). That debris creates a significant risk to Space infrastructure as the collision with debris larger than 1 cm could disable an operational satellite or could cause the break-up of a satellite or a rocket body. Moreover, the impact by the debris larger than about 10 cm can lead to a catastrophic break-up as complete destruction of a spacecraft and the generation of a debris cloud.

The two major contributions to the population of the fragments came from a Chinese Anti-Satellite test targeting the Feng Yun-1C Weather Satellite on 11 January 2007, which created more than 3400 tracked fragments, and the approximately 2300 tracked fragments created from the first-ever accidental collision between two satellites, Iridium-33 and Cosmos-2251 on 10 February 2009.

Many years of technical discussion and various exchanges are reflected in the leading body in the field of space debris, i.e. Inter-Agency Space Debris Coordination Committee (IADC), founded in 1993 by ESA, NASA, Japan Space Agency (JAXA) and Russian Space Agency (ROSCOSMOS) (complemented by the other space agencies later on). The significance of those issues has been recognized globally and some measures where applied as the nearly universal adoption of the Liability Convention[17] IADC's Space Debris Mitigation Guidelines[18] or some work being performed at the level of the Technical Subcommittee of the United Nations' Committee on the Peaceful Uses of Outer Space (UN COPUOS) since 1994. However, the standardization measures are required in order to achieve a common understanding of the required task leading to the transparent and comparable processes as works performed with ISOWD 24113 Space Debris Mitigation.[19] Additionally in order to address the issues posed by the Space debris on spacecraft activities, UN COPUOS has taken the initiative to create a set of internationally agreed Guidelines for the long-term sustainability of outer space activities[20].

The growing number of spacecraft deployed around the globe and the growing trend of their miniaturization significantly multiplies the risk of in-orbit collision. Due to that fact, the systematically growth caused the necessity to gather more precise information on the location of the Earth-orbiting objects. Moreover, all expert analyses highlight the risk collision which will increase significantly with the appearance of so-called 'mega-constellations' (hundreds to thousands of satellites). [21]

17 Convention on International Liability for Damage Caused by Space Objects of 1972.

18 Inter-Agency Space Debris Coordination Committee, Space Debris Mitigation Guidelines, 2002.

19 International Standard Organization, Space Systems - Space Debris Mitigation, ISO TC 20/SC 14, 2011.

20 United Nations, Guidelines for the long-term sustainability of outer space activities, A/AC.105/L.315, 2018.

21 J. Radtke, C. Kebschull, E. Stoll, *Interactions of the space debris environment with mega constellations using the example of the One Web constellation*, "Acta Astronautica" 2017, vol. 131, pp. 55–58.

This trend has been noticed worldwide and as such reflected as a global concern within the international fora.

Contested Space

Beside the space debris, there are other challenges contemporary space must face. Today's world is more and more dependent on space assets and in parallel there are more and more states able to perform hostile actions against space-related infrastructure (ground-based and space-based). [22] These issues are both related to civil security and defense, of course. In the civil world, the fast-growing dependence on the usage of assets as Global Navigation Satellite Systems (GNSS such as GPS and Galileo) is easy visible. A lack of access to space-based systems or a disruption in the continuity of those services may significantly shake the economy of the states and their internal security. This is even more visible in the military domain where the recent wars in Afghanistan and earlier in Iraq revealed the universality of space assets in contemporary wars. Those wars were the first real space wars with a wide scope of space assets utilized. Modern space systems, like information gathering satellites, were vastly used on missions that contributed to the preparation, execution of assessing operations. A similar situation concerns other assets like the GNSS Guidance Munition and Satellite Communications.

However, other states like Russia and China recognize the dependence of NATO and the US on space assets[23]. Because of this dependence, they pursue developing counter-space capabilities like anti-satellite weapons, electronic warfare, cyber and jamming capabilities, laser disabling or rendezvous and proximity operations (RPO).

NATO and the national answer to the developing of counter-space activities by hostile states has imposed an urgent need to improve SSA capabilities[24]. In particular, the US signed the so-called 'SSA Data Sharing Agreement's and cooperated in military SSA exercises as the global sentinel.

22 A. A. Faiyetole, *Potentialities of Space-based Systems for Monitoring Climate, Policies and Mitigation at Climate Policies and Mitigations of Climate Process Drivers*, "The International Journal of Space Politics and Policy" 2018, vol. 14, no. 8, pp. 28–48, *Global Counter space Capabilities: An Open Source Assessment*, April 2018.

23 S. Paracha, *Military dimensions of the Indian Space Programs*, "The International Journal of Space Politics and Policy" 2013, vol. 11, no. 3, pp. 156–186.

24 J. J. Klein, *The influence of Technology on Space Strategy*, "The International Journal of Space Politics and Policy" 2012, vol. 10, no. 1, pp. 8–26.

Competitive Space

At the beginning of the 21st century, the international community is witnessed the confluence of several powerful economic and policy forces in the global space sector[25]. Due to the financial constraints at the governmental level, the emergence of the emergence of new space markets and involvement of venture capital in the commercialization of space market are increasing rapidly. In the same time, technology dissemination and lowering of the barriers to entry are bringing new opportunities to the public space programs. Thus, introducing some new space actors to the fold.

Moreover, this change to commercial space is being performed within the world. These changes which are rapidly and vastly reshaping the global context, making the commercial space more complex and challenging. The five major global trends dominant to Horizon 2030 are:

a) globalization will continue moving towards more interdependence, but also fragmented governance and insecurity (specifically cyber- insecurity);
b) The revolution in technologies and their application will continue to transform societies in almost every aspect;
c) The nexus of climate change, energy and resources (including food security and water supply) will intensify;
d) The shift in the world economy towards Asia will continue;
e) Ageing will be global; Europe will be the "oldest" region; inequalities (in different forms, e.g. income, age, gender, digital divide) will persist; and migration may well further increase. [26]

In this environment the key driver of the Space change today is the enabling of major change in the commercial launch and satellite manufacturing industries. While relatively small markets today, rapidly falling costs are lowering the barrier to participate in the Space economy, making new industries like space tourism, asteroid mining, and on-orbit manufacturing viable, and growing existing flagship communications satellite services business while taking exploration deeper into space. Space is also becoming a military focal point as government pivot off Earth. [27]

25 C. Al-Ekabi, S. Feretti, Yearbook on Space Policy 2016 - Space for sustainable development, ESPI, Vienna, 2018, p. 1 and next

26 *European Strategy and Policy Analysis System ESPAS, Global Trends to 2030: Can the EU meet the Challenges Ahead?* 2015; *World Economic Forum Global Risks Report*, Geneva 2017.

27 *Profiles in Innovation: Space: Next Investment Frontier*, April 2017.

Doctrine and Policy of Counter-space in Selected States

United States

The U.S. SSA system is the most advanced in the world and relies on a national infrastructure called the U.S. Space Network (SSN), a network of 30 surveillance sensors including radars and optical telescopes, operated by military and civilian entities. Partial access to American SSA data is granted to select partners through a worldwide cooperation scheme. Today, the U.S. has more than 70 unclassified SSA Sharing Agreements with commercial and institutional organizations. These SSA Sharing Agreements aim to support transparency on operation in outer space, promote cooperation for security, enhance the availability of information among the partners, and improve the quality of U.S. SSA information. In practice, SSA Sharing Agreements provide selected organizations, which are not affiliated to the federal government, including foreign institution and private operators, with free access to authorized data stemming from SSN (U.S. Space Surveillance Network) sensors.[28]

Most recent U.S. presidential administrations have directed or authorized research and the development of counter-space capabilities, and in some cases green light testing or operational deployment of counter-space systems. These capabilities have typically been limited in scope, and designed to counter a specific military threat, rather than be used as a broad coercive or deterrent threat (for example, the most recent national space policy issued by the Obama Administration in 2010).

The link between these policy statements and offensive counter-space capabilities can be found in the official U. S. military doctrines on space operation. Two different doctrines exist on space operation: an Air Force doctrine developed by United States Air Force Space Command, and a joint doctrine developed by United States Strategic Command. The most recent publicly available versions of this doctrine are August 2018 and April 2018, respectively. Under current doctrine, the U.S. military considers counter-space operations to be a separate mission area of space operation. Counter-space operations consist of defensive space control (DSC) and Offensive Space Control (OSC), both of which are supported by SSA. DSC consists of active and passive actions to protect friendly space-related capabilities from enemy attack or interference by protecting, preserving, recovering, and reconstruction friendly-related capabilities before, during, and after an attack by an adversary. OSC consists of offensive operations to prevent an adversary`s hostile use of U.S/ third- party space capabilities or temporary or permanently negate an adversary`s space capabilities. Prevention can occur through diplomatic, informational, military, and economic measures, and negation can occur through active offensive and defense measures for deception, disruption, denial, degradation, or destruction. Ground- and space-based SSA capabilities are used to find, fix,

28 *Security in Outer Space: Rising Stakes for Europe*, *Report 64*, Vienna, August 2018, pp. 20–21.

track, and target adversary space systems, and assess the effects of OSC operations. OSC actions may target space nodes, terrestrial nodes, and/or communications links.

It is still unclear whether the recent aggressive rhetoric from the Trump administration in the second half of 2018 and early 2019 is reflected in actual U.S. policy. In various speeches and statements promoting the Space Force, President Trump called for the U.S. to "dominate" space. Vice President Mike Pence reiterated this language in a speech at the Johnson Space Center, stating that the Trump Administration was taking steps to "ensure American national security is a dominance in space as it is here on Earth". In his remarks during the signing ceremony for establishing the Space Force, President Trump said the United States was developing, "a lot of new defensive weapons and offensive weapons" that they were now "going to the advantage of" the Space Force. Yet official U.S. policy statements on space security issues, or at least the public ones, continue to reflect a more moderate tone and do not explicitly outline the development of new offensive space weapons.[29] President Trump provided peace through strength, stating that space is a warfighting domain and there is a need to "prioritize investments in resilience, reconstitution, and operations to assure [U.S.] space capabilities".[30] There is a "whole-of-government approach to U.S. leadership in space", in close partnership with the private sector and allies. 2018 Space Strategy included four essential pillars, all related to security & defense: 1) Mission Assurance, 2) Deterrence and Warfighting, 3) Organizational Support, 4) Conducive domestic and international environment. In the US strategy, there is a need to assure military superiority in space and on the ground and strengthen deterrence in space and on the ground. Space infrastructure is a critical component of warfare. That is why there is a need for a reemergence of a space warfare doctrine and a need for tactical response options in space. There is a priority in safeguarding national security against space vulnerability and in the protection of critical space assets against threats (e.g. ASAT, cybersecurity, jamming & spoofing). The US Strategy is fostering a commercial space, by giving way to a potentially promising commercial market and reinforcing global leadership in space. [31]

Civil space cooperation between the National Aeronautics and Space Administration (NASA)[32] and Chinese organizations is restricted by the legislation in 2011. Despite the rhetoric of a space race between the United States and China, experts say there are opportunities for the US and China to expand cooperation in space that could have broader benefits. Brian Weeden, Director of Program Planning at the Secure World

29 *Global Counterspace Capabilities: An Open Source Assessment*, April 2019, pp.3.1–19. D. Werner, *Controlling Space*, "Aerospace", April 2019, pp. 22–28.

30 <https://www.federalregister.gov/documents/2018/06/21/2018–13521/national-space-traffic-management-policy>.

31 <https://www.federalregister.gov/documents/2018/06/21/2018–13521/national-space-traffic-management-policy>.

32 Hereinafter: NASA.

Foundation said: "I absolutely agree that Wolf Admende does not prohibit cooperation, but the effect of it has been to prohibit it". There has been recent, if limited, cooperation between NASA and China on China`s lunar exploration program.[33]

People`s Republic of China

Official Chinese public statements on space warfare have remained consistent: "China always adheres to the principle of the use of outer space for peace and opposes the weaponization of or arms race in outer space". However, since 2015, other official writing suggests China`s position on space warfare and space weapons has become more nuanced. China`s 2015 defense White Paper, China`s Military Strategy, for the first-time designated outer space as a military domain and linked developments in the international security situation to defending China`s interests in space. The defense White Paper states that "outer space has become a commanding height in international strategic competition. States concerned are developing their space forces and instruments, and the first signs of weaponization of outer space, deal with security threats and challenges in that domain, and secure if space assets to serve its national economic and social development, and maintain outer space security." In particular, the White Paper states that "threats from such new security domains as outer space, and cyberspace will be dealt to maintain the common security of the world Community." In 2016, defense of China`s interests in space was made legally binding in China`s National Security Law.

The Chinese military does not appear to have an official doctrine governing space in military operations This may change in the coming years. On December 31st 2015, the Chinese military (the Strategic Support Force) intended, in part, to help to unify the command and control of Chinese forces and to make them more operationally responsive. More recently, U.S. intelligence officials state that the People`s Liberation Army (PLA) has "formed military units and begun initial operational training with counter-space capabilities that it has been developing, such as ground-launched ASAT missiles" toward the end of better integrating counter-space capabilities with other domains.

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33 J. Foust, *New opportunities emerging for U. S. - China space cooperation*, in: 35th *Space Symposium, Space News Show Daily, Sierra Nevada Corporation*, 2019, p.14. J. Logsdon, *There is no space race*, "Aerospace" April 2019, pp. 46, 47. The U.S. Department of Defense has applied for $304 million in funding to allow further research into space-based laser weapons, particle beams and other new forms of missile defense.

In 2023, U.S. Department of Defense employees want to test laser cannon in orbit to test different types of space-based weapons. A request has already been made for an additional $304 million in the 2020 budget to develop stronger lasers and other next-generation missile defense tools. In 1967, the United States of America signed the Outer Space Treaty, which prohibits the placing of nuclear weapons in space. However, a member of the Department of Defense explained that the treaty does not constitute any obstacle to the deployment of lasers or particle beams in orbit, as the document only mentions 'weapons of mass destruction'. Pentagon wants to undertake the tests of space weapons.

Nevertheless, Chinese thinking on space has remained consistent for at least the past two decades. According to the 2015 defense White Paper, the PLA will "endeavor to seize the strategic initiative in military struggle" and "proactively plan for military struggle in all directions and domains."

Chinese analysts argue that China must develop counter-space weapons to balance U.S. military superiority and protect China`s own interests. As one researcher writes, China`s development of ASAT weapons is to protect its own national security and adds that "only be prepared for war can you avoid war". The authors of the 2013 Science of Military Strategy write that given the wide range of rapid strike methods "especially space and cyber-attack and defense methods," China must prepare for an enemy to attack from all domains, including space. Chinese analysts write that having the ability to destroy or disable an opponent`s satellites may deter an adversary from conducting counter-space operations against Chinese satellites. Space power can also improve the overall capabilities of the military and serve as a deterrent force not just against the use of specific types of weapons, but also as a general capability that can deter a state from even becoming involved in a conflict.

Chinese military writings state that the goal of space warfare and space operations is to achieve space superiority. Space superiority is defined as "ensuring one`s ability to fully use space while at the same time limiting, weakening, and destroying an adversary`s space forces. It not only includes offensive and defensive operations in space against an adversary`s space forces, but also air, ground, and naval operations against space assets.

In recent years China has undertaken a significant reorganization of its military space and counter-space forces. Part of this reorganization included the creation of the Strategic Support Force (SSF) as the fifth military service by merging existing space, cyber and electronic warfare units under a new unified command that report directly to the Central Military Commission. The intent is to shift the PLA`s most strategic, informative mission from a discipline-centric to domain-centric force structure and enable full-spectrum war fighting. [34]

The Russian Federation

Before the collapse of the Soviet Union in 1991, marking the end of the first global space age, Russia was first in reaching several key space technology milestones. Although the Russian Federation achieved the greatest number of successful orbital launches of any state in 2014, Russia fell behind China and the United States in 2018 with only 19 launches to China`s 38 and the United States' 34. There is strong evidence that Russia has embarked on a set of programs over the last decade to regain some of its Cold War–era counter-space capability. Russia has a strong technical legacy to use. Under

34 *Global Counterspace Capabilities: An Open Source Assessment*, April 2019, pp.1, 1–22; *China Space Threat Assessment*, 2019, pp. 8–16.

Putin, Russia also has a renewed political will to obtain counter-space capabilities for much the same reasons as China: to advance its regional power and limit the ability of the United States to impede Russia`s freedom of action. Unlike China, there is also significant evidence that Russia is actively employing counter-space capabilities in current military conflicts. There are multiple, credible reports of Russia's using jamming and other electronic warfare measures in the conflict in eastern Ukraine, and indications that these capabilities are tightly integrated into their military operations.

The Russian military sees the U.S. reliance on space–based assets as a vulnerability to be exploited. Russian thinking about conflict in space and space in conflict is much more a reflection of the evolution of modern warfare and the struggle to achieve information dominance during military operation. The Russian military is aggressively pursuing capabilities to degrade or destroy adversary space-based assets as well as to negate the advantage of space-based capabilities in theaters of conflict. Russian strategists see the trajectory of modern warfare being dominated by the struggle to achieve information dominance as a prerequisite to military victory. Space-based, information-driven military capabilities make non-contact warfare possible, through such enabling actions as queuing and guidance of long-range strike assets. Russian security strategists believe the struggle of information dominance begins before conflict and, once a conflict has ensued, is used to dominate an opponent`s decision making by either denying the adversary`s ability to utilize space-enabled information or by corrupting that information to mislead an adversary into making decisions contrary to military objectives.

Russian objectives in space, however, face significant challengers over the near term primarily from industry shortcomings. The Ukrainian conflict and the subsequent sanction placed on the Russian Federation brought to light several Russian industrial and technological deficiencies in its space program such as the hardening and miniaturization of electronics, despite these challenges Russian President Putin recently announced a number of initiatives suggesting that Russia intends to aggressively address its shortfalls in space.[35]

The Islamic Republic of Iran

Iran`s pursuit of space capabilities is a relatively recent development, and its efforts in space are often viewed as a thinly-veiled cover for its developing ballistic missile program. Iran has a relatively weak space industrial base, especially given the Iranian Space Agency`s close ties to the nation`s Ministry of Defense, and evidence suggests that a portion of Iran`s space technologies were adapted from Russia and North Korea counterparts. Iran has a nascent space program, building and launching small satellites that have limited capability. Technologically, it is unlikely Iran has the capacity or motivation

35 *Global Counterspace Capabilities: An Open Source Assessment*, April 2019, pp. 2–1, 2–22, 2–24; *Space Threat Assessment…*, pp. 17–24.

to build on-orbit or direct-ascent anti-satellite capabilities at this point. Iran has not demonstrated any ability to build homing kinetic kill vehicles, and its ability to build nuclear weapons is currently constrained by the Joint Comprehensive Plan of Action. Iran has demonstrated the ability to persistently interfere with the broadcast of commercial satellite signals, although its capabilities to interfere with military signals are difficult to ascertain.

Iran is also developing space launch capabilities. It already possesses a proven space launch, the *Safir* rocket which has been used to place four small satellites into orbit. Iran is developing a more capable SLV known as the *Simorgh*, but it has experienced significant delays. *Simorgh* shares some design similarities with the North Korean *Unha SLV* and was meant to have been launched in 2010. In April 2016, the first known test of the *Simorgh* was reported by American Intelligence agencies as a "partial success".[36]

The Democratic People`s Republic of Korea (North Korea)

Like many spacefaring Nations, North Korea`s space capabilities are closely tied to ballistic missile development. The *Unha 3* – the space launch vehicle used for North Korea`s only two successful orbital launches – likely used components from other missiles within the state's arsenal, including the medium-range *Nodong* and Scud-class ballistic missiles. There is little indication that North Korea is making substantial efforts to build or sustain a space industrial base, but its missile program is growing, and many believe that it is aided by technology from China, Iran and Pakistan.

In its official statements, North Korea has never mentioned the intention of anti-satellite operations, suggesting that there is no clear doctrine guiding Pyongyang`s thinking at this point. North Korea does not appear motivated to develop dedicated counter-space assets, though certain capabilities in their ballistic missile program might be eventually evolved for such a purpose. There are multiple ballistic missiles systems, including those in the intermediate range ballistic missile and ICBM (Intercontinental Ballistic Missile) class, which could possibly be used as the basis for future DA-ASAT capabilities. North Korea, has demonstrated the capability to jam civilian GPS signals within a limited geographical area. Their capability against U.S. military GPS signals is not known. There has been no demonstrated ability to interfere with satellite communications, although their technical capability remains unknown.

North Korea currently possess a basic satellite development and command and control capability, but they have not demonstrated any of the rendezvous and proximity operations and active guidance capabilities necessary for a co-orbital satellite capability. There are currently six objects in orbit as a result of two North Korean space launches. Two of these objects are satellites.[37]

36 *Global…*, pp. 4–1,4–2; 25–29.

37 *Global…*, pp, 5–1, 5–3; *Space Threat Assessment…*, pp. 30–34.

Situational Awareness (SSA) and Space Traffic

All above trends in Space (i.e. increased number of space objects, militarization and commercialization)[38] make space a much busier place that must be appropriately reflected in effective SSA and its evolution to Space Traffic Management (STM). Additional supplementing of operational aspects as the Space Weather (SWE) and NEO (Near Earth Orbit) both enhance maturity and effectiveness of the SSA system and protection and security in space and on the ground.

Many states have increased spending devoted to data collection and processing; it is evident that for many of these states, SSA is a priority. For example, in 2017 Japan invested 1.7 billion USD ($16M) and requested 1.8 billion USD ($17M) in 2018 for SSA activities. Australia intends to spend $1B to $2B USD on SSA activities from 2018 until 2035. The EU SST (European Union Space Surveillance and Tracking) has committed €70M ($87M) between 2015 and 2020 and is expected to invest more money after 2020. Some states have ground-based sensors that could be used for SSA but currently are not. Others do not currently have data collection capabilities but are interested in building sensors for part-time or dedicated SSA use. Similarly, some states may be thinking about repurposing existing sensors for part-time or dedicated SSA use. States and consortia with data collection capabilities are either keeping the data to use domestically or within their consortium or are actively sharing their data in some form with one or more states. On the commercial side, some vendors are either not participating in any data colection or are not operating sensors but pulling data from other sources. Other companies are planning or building sensors to operate, while others already operate sensor networks. States would prefer to mature and engage their own private organizations rather than international ones.

Some states are in the nascent phases of developing software. Others are developing their own software but rely heavily on the use of outside tools or services; others who are developing their own software capabilities are mostly autonomous but still use some outside tools and services. A couple of states in the matrix have been identified as having fully autonomous software capabilities. Commercial vendors fall in similar categories.

Some states have basic product abilities such as calculating launch and reentry trajectories. States and vendors able to deliver products beyond launch and reentry are considered as more mature. These states did not necessarily need to have a "comprehensive" list of SSA products to be considered mature. Instead, the groupings were based on the ability to develop products autonomously, similar to the groupings for SSA software. Private sector capabilities are increasing; based on their location in the space traffic system (collection, processing, and products). There is an assessment of what role the private

38 R.G. Harrison, *Unpacking the Three C's: Congested, Competitive and Contested Space*, "The International Journal of Space Politics and Policy", vol. 11, no. 3, pp. 121–131.

sector is playing in changing the structure of the SSA system. It important to note first, that the private sector has always been a significant part of the SSA enterprise.

What has changed however in recent years is that the SSA sector is beginning to undergo a functional modularization. The integrated "end-to-end" SSA process—data collection, processing, generation of SSA products and value added services—that was previously controlled by a large government military organization (e.g. the US Department of Defense) is being broken up into segments. This breakup is allowing more players, especially in the private sector that can sell piecemeal information, to enter the system, and there is a growing number of companies offering SSA data, software, and services.

A growing number of these companies are privately funded (though most likely serve government customers, at least for now). For example, spin-off LeoLabs in the United States is funded by several venture capital firms including Horizons Ventures, based in Hong Kong, and Airbus Ventures (Airbus's early-stage investment group). There is not much information on sources of funding for other firms, as most of them are either privately held (examples include companies such as AGI, Exo Analytics, Express SAR) or parts of larger conglomerates (such as Airbus). Private companies serve both private satellite owner/operators as well as governments globally. There are many organizations involved in data collection. Together, AGI and Exo-Analytic have well over 200 telescopes around the globe. France's Ariane Group similarly has global coverage of GEO. Some private organizations involved in SSA data processing have developed fully commercial catalogs using purely commercial, scientific, and international data. By some accounts, these databases provide better information than the DoD. Some companies (e.g., Airbus/Europe, SDA/multinational, and Space Nav/US) also provide additional data processing services to augment the DoD's conjunction warnings to satellite operators. As the preceding sections have indicated, the private sector, which includes not just commercial firms but also non-profits and academic institutions, is on track to match and exceed USG capabilities, at least what the U.S. releases publicly. Not only are many of these companies' capabilities comparable or better than the U.S. Government, they are cheaper as well.

The private sector is finding willing international customers leveraging commercial capabilities to grow indigenous capabilities. U.S.-based firms have both direct customers and resellers in a growing list of international customers. And the list of providers is growing. Some companies work under the umbrella of their governments (e.g. IHI in Japan). More "commercial-like" foreign companies (e.g., GMV) are, however, starting to develop.

As a result of the increasing number and improved performance of all SSA sensor types and software, the quality of SSA tracking for decision making will continue to improve. While optical sensors have become cheaper and more ubiquitous, radar technology remains expensive and mostly limited to governments. Other technologies such

as ground-based and space-based radio frequency and laser ranging are rapidly improving and adapting for SSA applications. The expected increase of space-based sensors, optical and Radio Frequency will also have an impact on the overall quality of SSA tracking. Software is rapidly improving with respect to falling cost, growing timeliness, and increasing performance. In this section we discuss the implications of these trends.

Globally, states are increasing their investments in SSA capabilities. In a couple of instances, notably with Russia and China, investments in-house, reflect a desire to develop and maintain an SSA system independent of the U.S. SSA system. Their ability to process these data and use in-house software to develop SSA products, however, is not clear and is not likely as mature as that of the United States. China and Russia's interest to develop independent systems is likely strategic, and any improvements to the U.S. system, even increased transparency, is unlikely to dissuade states such as China and Russia from continuing to develop their own capabilities.

However, in other instances, such as in Europe, Japan, and elsewhere, the desire to develop in-house SSA capabilities reflects the desire to increase autonomy and be improved stakeholders. Thus, it is likely that states will continue developing their own independent capabilities regardless of whether the United States improves SSA products shared internationally. An analogy to this is GPS. After the United States developed GPS, and despite sharing its capabilities with the rest of the world, other GPS alternatives independently emerged: Galileo (EU), BeiDou (China), GLONASS (Russia), QZSS (Japan), IRNSS (India).[39]

Final Remarks

The types of space-to-space threats described above have distinctly different characteristics that make them suitable for different situations. A counter-space weapon that has been reversible, difficult to attribute and has limited social awareness is ideally suited to situations where the opponent may wish to signal or cause uncertainty in the opponent's mind without causing escalation. For example, without a credible assessment of combat damage, an opponent cannot act with confidence that his actions in space have been successful. In addition, weapons that cause additional damage in space, such as large quantities of space debris, risk escalating the conflict unintentionally and turning other nations against the attacker, , or may damage the attacker's own space systems. The described situation above is not covered by existing international space law which

39 B. Lal, A. Balakrishnan, B. M. Caldwell, R. S. Buenconseja, S. A. Carioscia, *Global Trends in Space Situational Awareness (SSA) and Space Traffic and Management (STM)*, Virginia 2018, pp. 38–57; T. Masson-Zwaan, *The international Framework for Space Activities*, in: *Handbook for New Actors in Space*, ed. C.D. Johnson, Denver-Colorado 2017, pp.40,41. G. Gasparini, V. Miranda, *Space situational awareness*, in: The Fair and Responsible Use of Space: An International Perspective, ed. W. Rathgeber, K. U. Schrögl, R. A. Wiliamson, Wien-New York , 2010 , pp. 73–84

is lacking in this regard. That is why it seems that the cooperation of states under the SSA system and sharing information among as many participants as possible is crucial in case to be aware of all situations which may happen in space not only to those states which are space powers, but also to others that are not. The SSA challenge may be to implement such a system on the national level. The system should be a part of strategy and should be properly implemented into national system of law.

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SUMMARY

Global Space Security and Counterspace Capabilities. Legal and Political Challenges

This article undertakes a very sensitive issue: space security and counterspace capabilities and arms control. Those issues come under the sovereignty of each state and are strictly connected to national defense and policy. Counterspace, also known as space control, is the set of capabilities or techniques that are used to gain space superiority. Space superiority is the ability to use space for one`s own purposes while denying it to an adversary. These issues are so important now in the era of fast-growing state activities in space and under such a big dependence on space. Anti-satellite weapons (ASAT) are a subset of offensive counterspace capabilities, although the satellite itself is only one part of the system that can be attacked. That is the reason why protecting space infrastructure, in the absence of stabilized international space control cooperation and difficulties in reaching an agreement on PPWT treaty and lack of progress of international space law in this matter, is crucial by building the Space Situational Awareness system. Collaboration of states in this matter seems to be a priority.

Keywords: Space security, counterspace, space weapon, Space Situational Awareness.

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The Norms of National Law Forming the Basis for the Shaping and Implementing of State Policy in the Field of Energy Security. Discussion Based on the Polish Legal Order[1]

Introduction: The Concepts of State Policy and Energy Policy

The term "public policy" ("state policy"), in a legal and political sense can be understood as a series of coordinated, purposeful and targeted actions of public authority bodies aimed at achieving certain states, conditions or objectives, and at materialising certain values associated with the realisation of the common good. State policy comprises a certain group of spheres and fields which determine the internal division of all the state actions aimed at the accomplishment of its goals and tasks.[2] Irrespective of the general division of state policy into the internal (domestic) and external (foreign) policy sphere, of key importance is the division of the public policy into specific sectors associated with the basic fields of socio-political, economic, technical, scientific and cultural activity of the state.

One of the types of sectoral state policies is the energy policy. The abovementioned state policy sector mainly involves the process of formulating state assumptions, conditions and goals associated with ensuring energy security, proper management of fuels and energy (including its production and distribution) and protection of the interests of energy consumers. The state energy policy also involves implementation processes of the above conditions, assumptions and goals as well as an evaluation of the effectiveness in the accomplishment of general and specific goals of such policy. This approach is consistent with the concept of public policy structure. In the theory of administration and management, the process of public policy implementation is first and foremost sub-

1 The paper was developed as a part of the research project financed by the National Science Center on the basis of the decision no. DEC-2013/09/B/HS5/01060.

2 Cf. e.g. O.E. Hughes, *Public Management and Administration. An Introduction*, New York 2003, p. 113 et seq.; R.K. Sapru, *Public Policy. Formulation, Implementation and Evaluation*, New Delhi 2009, p. 4 et seq.

ject to conceptualisation by means of a policy cycle model, within which a few basic stages have been differentiated.[3] These stages do not form a linear or sequential order, but take the form of a circular structure, a specific continuous cycle, a non-final and repeatable public policy planning, formulation and implementation mechanism.[4] The cycle, understood in this manner, includes the following stages: political agenda-setting, policy formulation, policy decision-making, policy implementation and policy evaluation. A reference to the above approach is provided by these definitions of energy policy which demonstrate the complexity as well as the legal and factual character of actions taken by the state authority in order to accomplish the socio-economic goals set in the political process regarding the energy sector of the national economy.[5]

Energy Security Concept in the Polish Legal Order

The concept of energy security is deemed by the lawmaker, as the central and basic element that defines the state energy policy. One can be said that in the Polish legal order the concept of energy policy is concentrated around the premise of energy security. Pursuant to Article 13 of the Energy Law Act of 10 April 1997 (the ELA)[6], the purpose of the state energy policy is to ensure the country's energy security, improved competitiveness of the economy and its energy efficiency, as well as environmental protection.

The term 'energy security' is defined by law[7] as "the condition of economy which makes it possible to fully satisfy the consumers' current and prospective demand for fuels and energy, in a technically and economically justified manner, and meeting the environmental protection requirements". In the interpretation of the Polish legislator, the general state of energy security has been linked to at least several elements of the energy management system. It is possible, on the one hand, to distinguish the concept of security of electricity supply to mean the ability of the electrical power system's ensuring secure operation of the electrical power network and balancing the electricity supply

3 *V.* W. Jann, K. Wegrich, *Theories of Policy Cycle* in: *Handbook of Public Policy Analysis: Theory, Politics, and Methods*, eds. F. Fischer, G.J. Miller, M.S. Sidney, Boca Raton – London – New York 2007, p. 43 et seq.

4 M. Kamiński, *Procedury administracyjne trzeciej generacji a transformacje struktur administracji publicznej i metod regulacji administracyjnoprawnej* in: *Struktury administracji publicznej: Metody, Ogniwa, Więzi.* Vol. 1, ed. A. Mezglewski, Rzeszów 2016, p. 293 et seq.

5 *V.* A. Walaszek-Pyzioł, *Energia i prawo*, Warszawa 2002, p. 13. According to the Author, energy policy is a "complex of functionally related legal and factual actions taken by the state (and more precisely by state authorities) aimed at such formation of the energy sector of the economy (its organisation and rules of operation) that ensures optimum achievement of specific socio-economic goals)".

6 Journal of Laws of 2018, item 755 as amended.

7 See article 3 point 16 of the ELA.

with demand (Article 3 point 16a of the ELA). Having a wide range of meanings, the term involves not only ensuring a stable, continuous and proper operation of the electrical power network as well as energy production and distribution within the network, but also ensuring continuous energy supply to all consumers, in compliance with the current level of energy demand. On the other hand, the lawmaker defines secure operation of the electrical power network as its uninterrupted operation, as well as meeting the requirements for quality parameters of the electricity and customer service quality standards, including the permitted interruptions in electricity supply to end users, under foreseeable conditions of operation of the network (Article 3 point 16b of the ELA). This is a narrow (technological) approach to energy security that refers to the technical and quality requirements of the electrical power supply network and the electricity itself.

Normative Basis of the Energy Security Policy in the Polish Legal Order

In connection with the above remarks, it can be assumed that the basic element and purpose of Poland's energy policy is to ensure energy security at the national level. It is correctly pointed out in the literature that, by type, energy security is a separate category of state security[8] – both in the external and internal dimension – which combines the components of the political, social, economic and ecological security of the state. Energy security can be also regarded as one of the normative values that is subject to constitutional protection.[9]

Assuming that energy security is *de lege lata* the main goal and element of the national energy policy of the Republic of Poland, the need arises to consider the normative basis for the determination, implementation and verification of political actions taken by the public authorities in the field of energy security.

In this respect, it should be noted that not all the stages of the energy policy cycle are subject to strict and direct legal determination. It is a consequence of an inability to create rigid and content-full normative foundations of state policy.[10] Due to the existence in the legal system of the so-called "static relations" between norms and an absence of

8 Cf. M. Pawełczyk, *Publicznoprawne obowiązki przedsiębiorstw energetycznych jako instrument zapewnienia bezpieczeństwa energetycznego w Polsce*, Toruń 2013, pp. 44–45; I.M. Jankowska, *Bezpieczeństwo energetyczne w polityce bezpieczeństwa państwa,* „Studia Lubuskie" 2015, Vol. XI, p. 149 et seq.

9 Cf. M. Domagała, *Bezpieczeństwo energetyczne. Aspekty administracyjno-prawne*, Lublin 2008, p. 25; F. Elżanowski, *Polityka energetyczna. Prawne instrumenty realizacji*, Warszawa 2008, p. 182.

10 *V.* M. Kamiński, *Mechanizm i granice weryfikacji sądowoadministracyjnej a normy prawa administracyjnego i ich konkretyzacja*, Warszawa 2016, p. 107.

a comprehensive and closed source of the contents of statutory norms at the level of the main substantive norms of the legal system, constitutional regulations that set the directions and goals of the state policy are not only of a general and essentially open character, but additionally require for their concretisation continuous and situationally conditioned political decisions, which refer to non-legal norms and values in the content layer. The constitution itself, granting a largely blanket authorisation to substantive concretisation through legislation, is thus subjected to 'politicisation', and the norms resulting therefrom have the character of 'political law".[11]

Categories of the Norms Shaping and Implementing of the Energy Security Policy in the Polish Legal Order

Creating the legal basis for the determination, concretisation and implementation of a specific type of public policy requires the use of specific normative structures, which on the one hand, are to set binding goals, directions and conditions for the actions of state authorities, and on the other hand, ensure the necessary degree of freedom of concretisation, in particular in the field of shaping the contents of the acts which realize the state policy (including acts of planning or programming character). In the sphere of administration and legal regulations, such normative structures are referred to as 'goal-oriented norms *sensu largo*'.[12] Norms of this kind mainly include program-, task- and direction-oriented norms, goal-oriented norms in the strict sense, planning norms as well as norms-principles in the strict sense. In the theory of administrative law, the view that the goal-oriented norms are strictly related to the norm-principles has been expressed.[13]

In vertical terms, of fundamental importance are constitutional and statutory norms-principles as well as goal-oriented norms which set the normative basis for the state policy in general or in specific fields.

Regarding the constitutional basis of the state energy policy and state security policy, the need arises to point out in this respect, above all, the main substantive norms of the legal system, including the norm-principle of the common good as the uppermost goal of the state (Article 1 of the Constitution of the Republic of Poland[14]), and the main

11 Cf. e.g. Ch. Gusy, *Staatsrecht und Politik*, „Österreichische Zeitschrift für öffentliches Recht und Völkerrecht" 1984, Nr. 35, pp.84–85.

12 M. Kamiński, *Mechanizm i granice weryfikacji sądowoadministracyjnej…*, p. 105 et seq.

13 Cf. M. Kamiński, *Normy-zasady prawa administracyjnego i ich konkretyzacja*, in: *Zasady w prawie administracyjnym. Teoria, praktyka, orzecznictwo*, eds. Z. Duniewska, M. Stahl, A. Krakała, Warszawa 2018, p. 62 et seq.

14 The Constitution of the Republic of Poland of 2 April 1997, Journal of Laws no.78, item 483 as amended.

program norms, including the norm-principle of ensuring the security of the citizens (Article 5 of the Constitution of the Republic of Poland).

At the statutory level, however, of key importance are the goal-oriented norms which form a certain sequence according to the increasing degree of specificity or types of the related legal instruments of implementation.[15] These norms set the general framework basis for the determination, concretisation, shaping and implementation of the state energy policy.[16]

First, it is possible to differentiate statutory goal-oriented norms of the state energy policy. Norms in this category define or determine the assumptions, conditions and general goals of the state as regards to the energy policy. A statutory obligation to establish such norms results from the constitutional program - or goal - and task-oriented norms, which by exposing specific values and legal goods, make certain state goals and tasks the objects of the necessary and intensive statutory concretisation. Concretisation of framework constitutional norms consists in specifying the subjective scope of the statutory protection, its essence and goals.

Of fundamental importance for the state energy policy is, of course, the contents of Article 13 of the ELA, which determines the goals of the state energy policy. It should be noted, however, that in the light of the provisions of the Energy Law Act, the term 'state energy policy' can be understood in two ways. Firstly, in a narrow sense, this term refers to the name of an internal policy document adopted by resolution of the Council of Ministers (Article 15a section 1 of the ELA). Secondly, in the broad (proper) sense, this term comprises all the actions taken by the state authorities in order to achieve the goals in the field of the energy sector of the economy.[17] That is why, it should be acknowledged that the goals of the national energy policy result from Article 13 of the ELA, while the resolution of the Council of Ministers, referred to in Article 15a section 1 of the ELA, is the main legal instrument of concretisation of the statutory goals of the state energy policy.

Although there is no doubt that administrative policy acts (documents)[18] that concretize the statutory norms forming the basis for the determination and implementation

15 Cf. M. Kamiński, *Mechanizm i granice weryfikacji sądowoadministracyjnej…*, p. 113 et seq.

16 Cf. e.g. A. Walaszek-Pyzioł, *Kształtowanie i realizacja polityki energetycznej państwa na gruncie ustawy Prawo energetyczne (podmioty i instrumenty)* in: *Administracja publiczna w państwie prawa. Księga jubileuszowa dla prof. Jana Jendroski w osiemdziesiątą rocznicę urodzin i pięćdziesięciolecie pracy naukowej*, eds. B. Adamiak, J. Boć, K. Nowacki, M. Miemiec, „Acta Universitatis Wratislaviensis" *No.* 2154, Prawo CCLXVI, Wrocław 1999, p. 411 et seq.; A. Walaszek-Pyzioł, *Prawne problemy kształtowania i realizacji polityki energetycznej państwa*, „Przegląd Ustawodawstwa Gospodarczego" 1999, Vol. 9, p. 5 et seq.

17 M. Domagała, *Polityka energetyczna* in: *Polityka administracyjna. IV Międzynarodowa Konferencja Naukowa, Stryków 7–9 września 2008*, ed. J. Łukasiewicz, Rzeszów 2008, p. 205.

18 In the Polish theory of administrative law, administrative policy acts (documents) are usually identified with broadly understood planning acts (documents). See e.g. Z. Duniewska, M. Górski, B. Jaworska-Dębska, E. Olejniczak-Szałowska, M. Stahl, *Plany, strategie, pro-*

of state policy can be of a different nature, a situation when the basic document that concretizes the state policy goals and in fact determines the contents thereof, assumes a legal form of an internally binding legal act (Article 93 section 1 of the Constitution of the Republic of Poland), arousing legitimate doubts of legal and constitutional character.[19] It is worthwhile to bear in mind that a resolution of the Council of Ministers is not only targeted at organisational units of government administration, but also at self-government administration entities, and – what is even more important – at non-public entities. Despite the fact that, by means of simplification, it can be assumed that the authorities of self-government units are, in terms of functions or tasks, subordinated to the contents of the above resolution as part of the broadly understood state apparatus, even indirect binding force of the resolution towards private entities disturbs the dualistic division into externally (generally) and internally binding sources of the law.

Second, of essential importance are the statutory directional and determinative norms. Such norms determine the obligations of state authorities and other bodies performing public tasks regarding the preferred direction of actions or the manner of implementation of preferred values that are to be realized. In addition, such norms determine specific guiding principles, which provide a basis for any actions taken in order to achieve the statutory goals and tasks or which are to be taken into account as part of actions of this type.

The elements and contents of such norms can be found in the provisions of Article 1 section 2 and Article 15 section 1 of the ELA. The lawmaker explicitly declares the directions and determinants of the energy law regulation and energy policy, pointing out that they should aim at creating the "conditions for sustainable development[20] of the country, ensuring energy security, economical and rational use of fuels and energy, development of competition, counteracting the negative effects of natural monopolies, taking into account the environmental protection requirements, obligations resulting from international agreements and balancing the interests of energy enterprises and fuel and

gramy i inne zbliżone formy prawne działania administracji in: *Podmioty administracji publicznej i prawne formy ich działania. Studia i materiały z Konferencji Naukowej poświęconej Jubileuszowi 80-tych urodzin Profesora Eugeniusza Ochendowskiego*, Toruń 2005, pp. 364–373; M. Stahl, *Szczególne prawne formy działania administracji* in: *System Prawa Administracyjnego. Prawne formy działania administracji, Vol. 5*, eds. R. Hauser, Z. Niewiadomski, A. Wróbel, Warszawa 2013, p. 364 et seq.; J. Jeżewski, *Polityka administracyjna. Zagadnienia podstawowe* in: *Administracja publiczna*, ed. J. Boć, Wrocław 2003, p. 325 et seq.

19 See e.g. A. Walaszek-Pyzioł, *Energia i…*, p. 16.

20 Polish legislator defines the term sustainable development in Article 3 point 50 of the Act of 27 April 2001 Environmental Protection Law (Journal of Laws of 2018, item 799 as amended), assuming that it is "the socio-economic development, in which there occurs the process of integration of political, economic and social activities, with the balance of nature and the sustainability of core environmental processes, in order to guarantee the possibilities to meet the basic needs of the individual communities or nationals of both the present generation and future generations".

energy consumers", and the resolution adopting the state energy policy is to be worked out "in accordance with the principle of sustainable development of the country".

Third, an important category of norms that form the basis for the shaping and implementation of state energy policy and state energy security policy are task-oriented norms.

Norms of this category, on the one hand, determine detailed areas of state activity, the management of which lies in the public interest and serves the common good, and on the other hand – determine the manners and means of achieving the state policy goals in these areas. The task-oriented norms are, in some sense, of executive character in relation to the constitutional and statutory goal-oriented norms of a higher degree of generality.

With regards to the energy policy, the task-oriented norms are assigned to entities obliged to accomplish tasks in the field of energy management. Thus, in accordance with Article 12 section 2 of the ELA, the tasks in the field of energy policy entrusted to the minister competent for energy matters include: 1) proposal preparation of the state energy policy and coordination of its implementation; 2) specifying the detailed terms of planning and operation of fuel and energy supply systems according to the procedure and in the scope specified by the Act; 3) supervising the security of supply in gaseous fuels and electricity and the supervision of the operation of the national energy systems to the extent specified by the Act; 4) cooperation with the voivodes (governors) and local authorities in the issues related to planning and construction of fuel and energy supply systems; 5) coordination of the cooperation with international government organisations to the extent specified by the Act.

Regardless of the tasks of the competent minister, specific tasks have been also entrusted to the Government Plenipotentiary for Strategic Energy Infrastructure appointed by the Prime Minister (Article 12a of the ELA). What is more, one must not forget that the supreme authority of the state energy policy is the Council of Ministers, which by way of a resolution – at the request of the minister competent for energy matters – adopts the state energy policy. The above act (document) is published through an announcement by the minister competent for energy matters in the Official Gazette of the Republic of Poland "Monitor Polski" (Article 15a of the ELA).

Specific tasks from the field of energy policy have been also assigned to independent regulators, including the President of the Energy Regulatory Office and the President of the Office of Competition and Consumer Protection.

In cooperation with the President of the Office of Competition and Consumer Protection, the President of the Energy Regulatory Office prepares a report on abuse of dominant positions by energy enterprises and their conduct contrary to the competition rules in the electricity market and submits it, by 31 July each year, to the European Commission (Article 15c section 1 of the ELA), together with the minister competent for energy matters, cooperates with the bodies of other European Union member states

in order to create in the European Union a fully competitive market of gaseous fuels and electricity, and in particular promotes and facilitates cooperation of transmission system operators as regards provision of cross-border interconnection capacity (Article 15f section 1 of the ELA), agrees draft development plans concerning the satisfaction of the current and future demand for gaseous fuels and electricity (Article 16 section 14 of the ELA), issues an invitation to tender, organizes and carries out tenders for the construction of new electricity generating capacities or implementation of projects reducing electricity demand and concludes with the tender participant whose proposal has been selected, a contract which specifies in particular the participant's obligations, types of economic and financial instruments enabling the construction of new generating capacities or implementation of projects reducing demand for electricity under preferential conditions, as well as the settlement rules for financial support resulting from such instruments (Article 16a sections 1–7 of the ELA).

The addressees of task-oriented norms as regards to the energy policy and the energy security policy are also authorities of self-government units.

Pursuant to Article 17 of the ELA, the self-government of a voivodeship takes part in the planning of energy and fuel supply within the area of the voivodeship to the extent specified in Article 19 section 5 of the Act and examines compliance of the energy and fuel supply plans with the state energy policy, whereas in accordance with the provisions of Article 19 section 5 of the ELA, draft assumptions to the heat, electricity and gaseous fuels supply plan are subject to review by the self-government of a voivodeship with reference to the coordination of cooperation with other communes and regarding compliance with the state energy policy. The authority competent to accomplish the above tasks – falling within the scope of government administration tasks – is the board of the voivodeship acting on behalf of the self-government of voivodeship (Article 14 section 2 of the Act of 5 June 1998 on self-government of voivodeship[21] in conjunction with Article 17 of the ELA).

The catalogue of public tasks in the field of energy policy to be performed by communes is much more extensive. Such form of the energy law regulation is a consequence of the provisions of legislative act establishing the state system, in accordance with which matters associated with satisfaction of collective needs of the local government community within the commune as regards the electricity, heat and gas supply belong to the commune's own tasks (Article 7 section 1 point 3 of the Act of 8 March 1990 on communal self-government[22]). In Article 18 section of the ELA, the legislator has specified and listed commune's own tasks as regards the electricity, heat and gaseous fuels supply, including among them the following: 1) planning and the organisation of heat, electricity and gaseous fuels supply within the territory of the commune; 2) planning of lighting

21 Journal of Laws of 2019, item 512 as amended.
22 Journal of Laws of 2019, item 506 as amended

located within the territory of the commune: a) public places, b) commune roads, poviat roads, voivodeship roads, c) national roads, other than motorways and expressways as specified by the Act of 21 March 1985 on public roads[23], within the boundaries of a built-up area, d) certain national roads other than motorways or expressways as specified by the Act of 27 October 1994 on toll motorways and the National Road Fund[24], requiring separate lighting intended for pedestrian or bicycle traffic, constituting additional roadways serving traffic from the areas adjacent to the road lane of a national road; 3) covering the costs of lighting, located within the commune: a) streets, b) squares, c) commune roads, poviat and voivodeship roads, d) national roads other than motorways and expressways as specified by the Act of 21 March 1985 on public roads within the boundaries of built-up area, e) certain national roads, other than motorways and expressways as specified by the Act of 27 October 1994 on toll motorways and the National Road Fund, requiring separate lighting: intended for pedestrian or bicycle traffic, constituting additional roadways serving traffic from the areas adjacent to the road lane of a national road; 4) planning and organisation of actions aimed at rationalisation of energy consumption and promotion of solutions that reduce energy consumption within the territory of the commune; 5) assessment of the potential for electricity generation from high-efficiency cogeneration[25] and energy efficient heating and cooling within the territory of the commune. The above tasks must be performed not only in accordance with the generally applicable laws (ratified international agreements, legal acts of the European Union, acts, implementing regulations and local law acts, including – which is clearly emphasised in Article 18 section 2 of the ELA – local spatial development plans and air protection programs), but also with the state energy policy (cf. Article 17 and Article 19 section 5 of the ELA) and directions of commune development included in the study of conditions and directions of spatial development of a commune – in the absence of the local spatial development plan (Article 18 section 2 point 1 of the ELA).

Specific public tasks relating to the implementation of the state energy policy are also assigned to energy enterprises[26] as well as to the operators of the electricity and gas transmission and distribution systems[27]. The above entities are obliged to draw up and update development plans about the satisfaction of the current and future demand for gaseous fuels and energy. The above entities are also entrusted with other obligations in the area of planning, forecasting, notification and coordination of actions (see Article 16 of the ELA).

23 Journal of Laws of 2018, item 2068 as amended.

24 Journal of Laws of 2018, item 2014 as amended.

25 Pursuant to Article 3 point 33) of the ELA 'cogeneration' is simultaneous generation in one process of thermal energy and electrical or mechanical energy.

26 *V*. 3 point 12 of the ELA.

27 *V*. Article 3 points 24–25 of the ELA.

In addition, pursuant to Article 16b of the ELA, the energy or combined energy transmission system operator[28] first of all performs the tasks needed to ensure the security of electricity supply, protection of consumer interests and environmental protection (section 1), while the profit of the energy or combined energy transmission system operator, as specified by the Act of 1 December 1995 on dividend payments by wholly owned State Treasury companies[29], is primarily allocated to funding the performance of tasks and obligations referred to in Article 9c section 2 of the ELA. The above provision is not only a manifestation of statutory regulation of activity in the field of energy management, but also constitutes a serious form of interference in the freedom and independence of economic activity, justified, however, by important public reasons (Article 22 of the Constitution of the Republic of Poland), relating to the goals of energy policy and ensuring energy security.

Fourth, of separate and essential importance for the implementation of the state energy policy are the planning norms.[30]

In the content of this category of norms, the lawmaker specifies an internal or – in case of direct impact on the sphere of rights and obligations of external entities towards the state – a generally applicable normative plan or program for the implementation of the state policy in a given field, specifying in more detail the goals, directions, conditions and means of operation.

Essentially, two content levels of planning norms can be differentiated. The direct level of planning comprises the setting and defining of goals, conditions and directions to be taken in a specific field of state policy. At the statutory level, the planning norms within this scope are only set in general; they need to be further defined in the basic internally or generally applicable law enactment or enforcement documents. The indirect planning level is of executive (implementation) character in relation to the first level, as it sets the principles, methods and manners of its implementation.[31]

Planning norms are concretised in the so-called 'planning acts (documents)'[32], which can be of typically imperative or informative and advisory, educational or stimulating character. The goals, directions and conditions of implementation of a given type of state policy are concretised and further defined in documents called 'plans' ('concepts', 'strategies', 'assumptions'), while a set of the necessary or possible actions serving the

28 *V.* Article 3 point 28) of the ELA.

29 Journal of Laws of 2019, item 426 as amended.

30 *V.* U. Di Fabio, *Die Struktur von Planungsnormen* in: *Planung. Festschrift für Werner Hoppe zum 70. Geburtstag*, eds. W. Erbguth, J. Oebbecke, H.-W. Rengeling, M. Schulze, München 2000, p. 75 et seq.

31 M. Kamiński, *Mechanizm i granice weryfikacji sądowoadministracyjnej…*, p. 122 et seq.

32 *V.* M. Stahl, *Szczególne prawne formy działania…*, p. 364 et seq.; J. Jeżewski, *Polityka administracyjna…*, p. 325 et seq.

implementation of the plan (or generally the assumed goals of the state policy in a given field) is defined in documents called 'programs'.

Planning norms are the substantive (material)-law basis for the content of the planning acts (documents). Pursuant to Article 14 and Article 15 section 1 of the ELA, the basic planning act (document) for energy policy and energy security referred to as the 'state energy policy'[33] specifies in particular: 1) the fuel and energy balance of the country; 2) the generation capacity of domestic fuel and energy sources; 3) the transmission capacity, including cross-border connections; 4) energy efficiency of the economy; 5) activities in the field of environmental protection; 6) development of the use of a renewable energy source installations; 7) volumes and types of fuel stocks; 8) directions of restructuring and ownership transformation of the fuel and energy sector; 9) directions of scientific and research work; 10) international cooperation. In addition, such a document must include: 1) assessment of the implementation of the state energy policy for the previous period; 2) a forecast covering the period of no less than 20 years; 3) a program of executive actions for a period of 4 years containing instruments for its implementation. The content determinants of the other planning acts in the field of energy policy are defined by other planning norms (e.g. Article 16 of the ELA specifies normative requirements for the content of development plans as regards the satisfaction of the current and future demand for gaseous fuels or energy).

Planning in the field of energy supply within the territory of the commune is of specific character. The commune executive authority (the president/mayor of the city) develops draft assumptions to the heat, electricity and gaseous fuels supply plan. The above draft assumptions are developed for the territory of the commune for a 15-year period and updated at least once every 3 years. The document should include, *inter alia*, an assessment of the current condition and expected changes in demand for heat, electricity and gaseous fuels and projects which rationalise the use of heat, electricity and gaseous fuels (Article 19 sections 1–3 of the ELA). The draft assumptions are available for public inspection for 21 days and a notice thereof is communicated in a manner generally accepted in a given locality. The persons and organisational units interested in the supply of heat, electricity and gaseous fuels within the commune have the right to submit proposals, objections and comments to the draft assumptions, while the competent commune council adopts assumptions to the heat, electricity and gaseous fuels supply plan, examining at the same time the proposals, objections and comments submitted when the draft assumptions were available for public inspection (Article 19 sections 6–8 of the ELA).

33 *V.* R. Stankiewicz, *Prawotwórcza rola administracji w kształtowaniu sektora energetycznego (na przykładzie polityki energetycznej państwa)* in: *Legislacja administracyjna. Teoria, orzecznictwo, praktyka*, eds. M. Stahl, Z. Duniewska, Warszawa 2012, pp. 260–266.

A resolution of the competent commune council adopting the assumptions to the heat, electricity and gaseous fuels supply plan is a normative pattern for assessing the development plans of energy enterprises in respect of satisfying the current and future demand for gaseous fuels and energy (Article 16 of the ELA). If the above development plans do not guarantee implementation of the assumptions to the heat, electricity and gaseous fuels supply plan (Article 19 section 8 of the ELA), the commune executive organ (e.g. the president of the city) develops a draft heat, electricity and gaseous fuels supply plan for the territory of the commune or for part thereof. The draft plan is developed based on the assumptions adopted by the commune council and should be consistent therewith. The supply plan is adopted by the competent commune council (Article 20 sections 1–4 of the ELA). In addition, in order to implement the plan, the commune may conclude agreements with energy enterprises. If, however, implementation of the plan on the basis of the above-mentioned agreements is not possible, the commune council – in order to ensure the heat, electricity and gaseous fuels supply – may indicate by way of a resolution the part of the plan which actions taken within the area of the commune must be consistent with (Article 20 sections 5–6 of the ELA). In this way, through the above resolution – being an act of local law – energy enterprises are obliged to implement a specific part of the supply plan in order to ensure security of heat, electricity and gaseous fuels supply.

Concluding Remarks

Finally, it is worthwhile to point out that the acts (documents) concretising the planning norms providing basis for the implementation of the state energy policy also include reports, forecasts and their updates drawn up by competent authorities, transmission and distribution system operators and energy enterprises (Article 15b-15c and Article 16 of the ELA). Although the planning documents of this type do not have an imperative character, they can have a significant impact on the further shaping and implementation of the state energy policy. Therefore, one may assume that the non-binding acts of the goal-oriented norms concretisation play a significant role in the process of energy policy realization.

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Act of 27 October 1994 on toll motorways and the National Road Fund, Journal of Laws of 2018, item 2014 as amended.

Act of 1 December 1995 on dividend payments by wholly-owned State Treasury companies, Journal of Laws of 2019, item 426 as amended.

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SUMMARY

The Norms of National Law Forming the Basis for the Shaping and Implementing of State Policy in the Field of Energy Security. Discussion Based on the Polish legal Order

The essential aim of the article is the theoretical analysis of the normative basis of the Polish state policy in the field of energy security. The analysis begins with the presentation of the state policy and energy policy concepts. The author argues that in the Polish legal order the concept of energy policy is concentrated around the premise of energy security. The next part of the analysis deals with the issues of categories of the norms shaping and implementing of the energy security policy in the Polish legal order.

This part of the considerations shows that the normative basis for the determination, implementation and verification of political actions taken by the public authorities in the field of energy security requires the use of specific normative structures. The analysis refers to the conception of 'goal-oriented norms'. The norms of this kind set binding goals, directions and conditions for the actions of state authorities as well in the field of energy policy. The types of the acts which concretize the goal-oriented norms (e.g. task-oriented norms; directional and determinative norms; planning norms) in the discussed field of state policy are also discussed.

Keywords: state policy; energy policy; energy security policy; Polish energy law; administrative law norms; goal-oriented norms in administrative law; task-oriented norms; planning norms; directional and determinative norms.

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The Good Neighbourliness Principle in Relations Between the European Union and its Eastern European Neighbours

Introduction

In international practice, there exists a set of legal principles intended to enable neighbouring states to maintain peaceful and harmonious interstate relations and to cooperate in a peaceful manner, which is called the international law of neighbourliness. This term may be understood as a set of conventional and customary norms regulating the relationship between neighbouring states in the adjacent parts of their territories (e.g the prohibition to use or permit to use the frontier zone with a view to cause damage on the territory of a neighbour state; the obligation to take into consideration legitimate interests of neighbours or the obligation to inform, consult and notify any situation that may cause damage beyond the border).[1] Currently there is a claim for good neighbourliness relations among neighbouring states.

Nevertheless, there is no legal definition of it in international law. The first attempt to define this issue was made at the Bandung Conference which took place on 18–24 April 1955 in Indonesia. Later, in the 1980s, the United Nations General Assembly (UN General Assembly) adopted many resolutions on the development and strengthening of good neighbourliness, which however did not contain one commonly accepted legal definition of this term.[2] For that reason, good neighbourliness can be, for instance,

1 L. Boisson de Chazournes, D. Campanelli, *Neighbour States*, in: *Max Planck Encyclopedia of Public International Law*.

2 The General Assembly, for its part, started to mention good-neighbourliness in its Resolutions 1236 (XII) of 14 December 1957 and 1301 (XIII) of 10 December 1958, with reference to 'peaceful and neighbourly relations among States'. In 1979, it expressed its intention to develop and strengthen the content of the notion of good-neighbourliness, as well as ways of enhancing its effectiveness (UNGA Res 34/99 [14 December 1979] § 3). In 1981, the General Assembly decided to prepare a 'suitable international document' on good-neighbourliness (UNGA Res 36/101 of 9 December 1981, § 4 and 5), an objective that has been reiterated in subsequent resolutions (UNGA Res 37/117 of 16 December 1982, §. 4; UNGA Res 38/126 of 19 Decem-

defined as an extension of the law of neighbourliness to the whole territory of two neighbouring states or of the states of a region.[3]

The main objective of this article is to scrutinize the good neighbourliness principle as a contemporary model of external interstate peaceful cooperation and dialogue. Its first part focuses on the role and main aspects of good neighbourliness as an international principle whereas its second part looks very closely at this principle but in the context of the two European Union's specific external policies: the neighbourhood policy and the enlargement policy.

The Good Neighbourliness Principle in International Law

The good neighbourliness principle is a fundamental principle in international law governing friendly relations among states. Most scholars consider it as a principle of international law. Kelsen points out that "good neighbourliness is a principle of international law which should have been included into the first chapter of the UN Charter".[4] According to Verdross it is a "gradually emerging principle, which has now been solemnly anchored to the Preamble of the Charter of the UN".[5] Fitzmaurice and Elias see it as "fundamental in law governing the use of shared resources".[6] Jenks regards the good neighbourliness principle as "a potential source of specific obligations".[7] Goldie points out that "good neighbourliness is an emerging principle of international law with many transnational law qualities".[8] Finally, Jasudowicz considers it as a "model principle of contemporary international public law and international relationships, which, however, requires to be supplied with meaning and application by the UN Charter principles

ber 1983, § 3; UNGA Res 39/78 of 13 December 1984, § 4). The General Assembly referred again to the notion of good-neighbourliness in its Resolutions 50/80 of 12 December 1995, 52/48 of 9 December 1997, 56/18 of 29 November 2001, 57/52 of 22 November 2002, and 50/59 of 3 December 2004, dealing with the Balkan States and South-Eastern Europe.

3 J. Andrassy, *Les relations internationales de voisinage*, Recueil des Cours,1951, p. 77–181; I Pop, *Voisinage et bon voisinage en droit international*, Paris 1980, p. 315; J. Salmon ed., *Dictionnaire de droit international public*, Bruylant Brussels 2001, p. 1138.

4 H. Kelsen, *The Law of the United nations: A Critical Analyses of its Fundamental Problems*, London 1951, p. 11–13.

5 A. Verdross, *Völkerrecht*, Vienna 1964, p. 292–295, translated in: J.G. Lammers, *Pollution of International Watercourses*, The Hague 1984, p. 565.

6 M. Fitzmaurice and O. Elisa, *Watercourse Co-operation in Northern Europe: A Model for Future*, The Hague 2004, p. 5.

7 C.J. Jenks, *Law in the World Community*, New York 1967, p. 92.

8 L. F.E. Goldie, *Development of International Environmental Law- an Appraisal*, in: J.L. Hargrove ed., *Law, Institutions and the Global Environmental*, Leiden 1972, p. 104–165.

which are fundamental principles of international law".[9] So, a majority of authors presume that the legal nature of this principle flows from customary international law, however a smaller group argue that it is a general principle of law in the sense of Article 38 (1)(c) of the Statute of the International Court of Justice (ICJ Statute).[10] Such disagreement between them may be explained firstly, by the broad and unclear scope of this principle and secondly, by the lack of a precise distinction between the customary rules and the general principles of law, except for the conclusion that the general principles of law are vaguer than international customary rules.[11] From a legal point of view, the good neighbourliness principle can be classified as a general principle of law, but also as being of customary nature, which implies that it will never be overridden by any customary rule and will be observed repeatedly by the majority of states in similar circumstances and thus will be accepted as binding law by states.[12]

According to the UN General Assembly, the good neighbourliness principle fully conforms with the objectives of the United Nations and is founded upon the strict observance of the principles of the United Nations Charter (UN Charter), and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States.[13] The Preamble of the UN Charter declares that the peoples of the United Nations will practise tolerance and live together in peace with one another as good neighbours. Under Article 1(1) and (2) of the UN Charter, the purposes of the United Nations are *inter alia* 'to maintain international peace and security' and to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples".[14] So, it is based on the universal principle in favour of peaceful resolution of disputes over the use of force.[15] This was also reassured in the Helsinki Act of 1975 of the Conference on Security and Cooperation in Europe (Helsinki Act), in which participating states declare to develop their cooperation with one another and with all states in all fields in accordance with the purposes and principles of the UN Charter. They also reaffirmed to promote mutual understanding and confidence,

9 T. Jasudowicz, *Zasada dobrego sąsiedztwa w Karcie Narodów Zjednoczonych*, "Acta Universitatis Nicolai Copernici" 1989, p. 67, 81.

10 E. Basheska, *The Position of Good Neighbourliness Principle in International and EU Law*, in: B. Kochenov and E. Basheska eds., supra note 1, p. 34.

11 *Ibidem*, p. 34.

12 *Ibidem*, p. 35.

13 General Assembly, Declaration on Principles of International law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, 24.10.1970, A/8082.

14 Charter of the United Nations and Statue of the International Court of Justice, <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>.

15 A. Uilenreef, *Bilateral Barriers or Good Neighbourliness? The role of Bilateral Disputes in the EU Enlargement Process*, Netherlands Institute of International Relations, Clingendael, June 2010, p. 9.

friendly and good neighbourly relations among themselves, international peace, security and justice.[16] Moreover, Article 74 of the UN Charter refers directly to the general principle of good neighbourliness. The commentary of the UN Charter edited by *Simma* states that the principle of good neighbourliness sets a general and legally binding aim for policy, that is why more than just a political principle.[17] The commentary to the UN Charter edited by Cot, Pellet, and Forteau confirms this point of view: it says that the principle of good neighbourliness is but a guide for policymakers, void of any precise legal content. It is, however, admitted that the lack of precise legal content does not signify the total absence of a legal profile, as the strict observance of a set of basic international law norms is required.[18] So, in this case, the good neighbourliness principle requires to be supplied with meaning and application by means of subsidiarity rules which give it content reflecting the standards, needs, and capabilities of the time and place.[19] Finally, the judge Weeramantry in his Dissenting Opinion regarding the Advisory Opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons* declares that the good neighbourliness principle is one of the bases of modern international law, which the UN Charter's provisions expressly recognise a general duty of good neighbourliness, which makes it an essential part of international law.[20]

To sum up, the good neighbourliness principle is one of the most essential general principles of international law, where the notion "good" stresses positive relations among neighbouring states. We may also say, that it is intended to enable neighbouring states to avoid frictions, reconciling their divergent interests through continuous cooperation in all activities comporting a necessary interpenetration between them.[21] So, it designates a model of peaceful cooperation, a certain type of good-natured international relations between neighbours[22]. Moreover, the good neighbourliness principle obligates states to respect independence and territorial integrity. In this way the good neighbour-

16 Conference on Security and Co-operation in Europe, Final Act, Helsinki 1975, p. 7, available at: <https://www.osce.org/helsinki-final-act?download>. J. Symonides, *Deklaracja zasad stosunków międzypaństwowych KBWE*, „Sprawy Międzynarodowe" 1975, p. 45–50.

17 B. Simma et al., *The Charter of the United Nations: A Commentary. Vol. 1*, 3rd ed, Oxford 2012, p. 1097.

18 J-P. Cot, A. Pellet and M. Forteau eds., *La Charte des Nations Unies: Commentaire article par article*, Paris 2005, p. 1779–1780.

19 L. F.E. Goldie, *Special Règimes and Pre-Emptive Activities in International Law*, "International Comparative Law Review", 11, 1962, p. 690.

20 Advisory Opinion of 8 July 1996 of the Legality of the Threat or Use of Nuclear Weapons, Dissenting Opinion of Judge Weeramantry, ICJ Rep. 1996, p. 505.

21 RIAA, Affaire concernant le filetage à l'intérieur du golfe du Saint-Laurent entre le Canada et la France (Canada v. France), Judgement 17 July 1986, RIAA 1986, § 27.

22 I. Pop, *Components of Good Neighbourliness Between States- Its Specific Legal Contents- Some Considerations Concerning the Reports of the Sub-Committee on Good-Neighbourliness Created by the Legal Committee of the General Assembly of the United Nations*, Editura R.A.I, Bucharest 1991, p. 58.

liness principle is similar to the *sic uetere tuo ut alienum non laedas* principle[23], which in international relations prohibits a state to use its territory to harm other states.[24] Furthermore, it is closely related to the duty to cooperate, which has been also formulated by the Court of Justice of the European Union (CJEU) in the *MOX Plant* case.[25]

The European Union and International Law-General Remarks

According to Article 47 Treaty on the European Union (TEU) the European Union (EU) has legal personality and therefore has rights and obligations under international law.[26] So, the EU is bound by international law, however, the precise scope of powers and obligations are determined pursuant to its primary law. Under Article 3(5) TEU and Article 21(1) TEU, the EU is to contribute to the strict observance and the development of public international law. As is apparent from, *inter alia*, Article 38(1)(b) of the ICJ Statute[27], customary international law is one of the generally recognised sources of international law. However, the Treaties are silent on the status of international customary law in the Union's legal order, but in general terms Article 3(5) TEU hints at the idea that the EU considers itself bound by international law.[28] It was confirmed by the CJEU in the *AATA* judgement, where it stated that the EU is bound by customary international law as well as by the international agreements applicable to it, which means that the relevant principles of customary international law form a part of the Union's legal order.[29] Consequently, when the EU adopts an act, it is bound to observe international law in its entirety, including customary international law, which is binding upon its institutions. So, the status of customary international law does not differ from that of international agreements binding on the EU.[30] Therefore, its primacy is recognised in Union legal or-

23 In Latin the maxim means „Use your own property in such a way as not to injure that of other".
24 P. Sands, *Principles of International Environmental Law*, Oxford 2003, p. 249.
25 Case C-459/03 Commission of the European Communities v. Ireland, EU:C:2006:345, § 174.
26 Consolidated version of the Treaty on European Union, OJ C 202, 7.06.2016, p. 13–388.
27 Statue of the International Court of Justice, https://www.icj-cij.org/en/statute.
28 B. Van Vooren, R. A. Wessel, *EU External Relations law. Text, Cases and Materials,* Cambridge 2014, p. 233.
29 Case- 366/10 Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change, EU:C:2011:864, § 101; Case C-286/90 Anklagemyndigheden v. Peter Michael Poulsen and Diva Navigation Corp., EU:C:1992:453, § 9 and 10, Case C-308/06 The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v. Secretary of State for Transport, EU:C:2008:312, § 51; and Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities, EU:C:2008:461, § 291.
30 P. Koutrakos, supra note 12, p. 228.

der. However, the case-law of the CJEU has not given rise to any clear criteria for the determination of whether and to what extent a principle of customary international law can serve as a benchmark against which the validity of EU legislation can be reviewed. It would appear that the CJEU have not in the past had occasion to undertake such a review of validity; customary international law has, up to now, been called upon only in relation to the interpretation of provisions and principles of EU law. In line with the case-law on international agreements, the CJEU should not recognise principles of customary international law as a benchmark against which the lawfulness of EU acts can be reviewed unless two conditions are satisfied: firstly, there must exist a principle of customary international law that is binding on the EU and secondly, the nature and broad logic of that particular principle of customary international law must not preclude such a review of validity; the principle in question must also appear, regarding its content, to be unconditional and sufficiently precise.

To sum up, under Article 3(5), Article 21(1), (2)(b), and (3), Article 23 TEU and Article 205 TFEU, the good neighbourliness principle is placed among the essential principles of the European Union which must guide its action on the international scene. As the CJEU many times ruled, compliance with the principles of international law including respect for the principles of the United Nations Charter is required of all actions of the European Union, as is clear from the provisions, read together, set out in the first subparagraph of Article 21(1), Article 21(2)(b) and (3) TEU, and Article 23 TEU'.[31] This all means that the EU must respect international law in the exercise of its powers.[32] The EU is bound by the good neighbourhood principle, which is enshrined in Article 1(2) of the UN Charter. Article 3(5) TEU, Article 21(1) TEU, Article 21(2) (b) and (c) TEU and Articles 23 TEU and 205 TFEU require the EU to respect the principles of the United Nations Charter. Declaration 13 concerning the common foreign and security policy, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, states that 'the European Union and its Member States will remain bound by the provisions of the Charter of the United Nations'. In addition, the good neighbourhood principle is among the principles of the Helsinki Final Act referred to in Article 21(2)(c) TEU. So, the good neighbourliness principle forms part of the general rules of international law, which are also the primary sources of the Union's law and respect for them is a condition of the lawfulness of Union acts and measures incompatible with them are not acceptable in the Union's legal order. Thus, the

31 Judgments of 21 December 2011, Air Transport Association of America and Others (C-366/10, EU:C:2011:864, § 101), and of 14 June 2016, Parliament v Council (C-263/14, EU:C:2016:435, § 47).

32 See judgments of 24 November 1992, Poulsen and Diva Navigation (C-286/90, EU:C:1992:453, § 9); of 16 June 1998, Racke (C-162/96, EU:C:1998:293, § 45); and of 3 September 2008, Kadi and Al Barakaat International Foundation v Council and Commission (C-402/05 P and C-415/05 P, EU:C:2008:461, § 291).

obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EU and FEU Treaties, such as Article 3(5) TEU and Article 21 TEU, which provide that the Union's external action is to respect for the principles of the United Nations Charter and international law. It is therefore incumbent on the CJEU to ensure that they are respected in the context of the full system of remedies established by the EU and FEU Treaties.

The Good Neighbourliness Principle and the European Neighbourhood Policy

The EU may maintain relations with neighbouring countries on the basis of Article 8 TEU. The main objective of such cooperation is the establishment of an area of prosperity and good neighbourliness, characterised by close and peaceful relations based on cooperation. Article 8 TEU obliges the EU to develop a special relationship with neighbouring countries on the base of the Union values and the good neighbourliness principle that are characterized by close and peaceful relations. The European Neighbourhood Policy (ENP) was established on 12 May 2004 with the objective to prevent the emergence of new dividing lines between the enlarged EU and its neighbours, to offer them the chance to participate in various EU activities through greater political, security, economic and cultural cooperation and to foster closer cooperation both across the EU's external borders and among the EU's neighbours themselves, especially among those that are geographically close to each other.[33] The ENP founding documents do not regard the good neighbourliness principle as a fundamental principle of the ENP. Nevertheless, within the ENP, the good neighbourliness principle may be analysed from three complementary aspects: firstly, Union values; secondly, the promotion of international peace and security; and thirdly, the settlement of international disputes by peaceful means in accordance with the UN Charter.

In its relations with the wider world, the EU's objectives are to uphold and promote values which have inspired its own creation, development and enlargement. Within the ENP, these values include strengthening democracy and the rule of law; respect of human rights and fundamental freedoms, including rights of minorities and children, gender equality, trade union rights and other core labour standards, freedom of media and

33 Communication from the Commission - European Neighbourhood Policy - Strategy paper, COM(2004) 0373 final, p.3; M. Cremona, *The European Neighbourhood Policy: More than a Partnership?,* in: M. Cremona ed., *Developments in EU External Relations Law*, Oxford 2008, p. 121–147; A. Kalicka- Mikołajczyk, *Ramy prawne i zasady unijnej Europejskiej Polityki Sąsiedztwa wobec partnerów wschodnich,* Wrocław 2013, p. 32–42; B. Van Vooren, *EU External Relations Law and the European Neighbourhood Policy: A Paradigm for Coherence*, New York 2012, p. 52.

expression; the promotion of good neighbourly relations; the principle of a market economy and sustainable development; the reform of the judiciary and the fight against corruption and organised crime; and the fight against the practice of torture and prevention of ill-treatment; support for the development of civil society; cooperation with the International Criminal Court; the fight against terrorism and the proliferation of weapons of mass destruction; abidance by international law and efforts to achieve conflict resolution.[34] Moreover, according to Article 1 (1) Regulation establishing a European Neighbourhood Instrument, its main objective is to promote good neighbourliness, involving the EU and its neighbours, and to develop a special relationship founded on cooperation, peace and security, mutual accountability and a shared commitment to the universal values of democracy, the rule of law and respect for human rights in accordance with the TEU.[35] Therefore, the ENP, *experssis verbis* recognises the good neighbourliness principle as a part of the Union's values to be shared by the EU with its neighbours.[36]

Secondly, the ENP Strategy paper underlines that conflict prevention and conflict solution are some of the most important objectives of this policy. Moreover, preserving peace, preventing conflicts and strengthening international security with the purposes and principles of the UN Charter and the principles of the Helsinki Act, are also confirmed by the 2015 Communication on Review of the ENP[37] and by the provisions of all Association Agreements (AA) concluded on 27 June 2014 by the EU with Georgia[38], Moldova[39] and Ukraine[40]. According to Article 1, their main objectives *inter alia* are: to promote political association and economic integration between the Parties based on common values; to contribute to the strengthening of democracy and to political, economic and institutional stability; to promote, preserve and strengthen peace and stability

34 N. Ghazaryan, *The European Neighbourhood Policy and Democratic Values of the EU: A Legal Analysis*, Oxford 2014, p. 35; N. Wichmann, *Rule of Law Promotion in the European Neighbourhood Policy: Normative or strategic power Europe?*, Baden-Baden 2010, p. 85.

35 Regulation (EU) No 232/2014 of the European Parliament and of the Council of 11 March 2014 establishing a European Neighbourhood Instrument, [2014] OJ L 77, p. 27–43.

36 R. Petrov, *The Principle of Good Neighbourliness and the European Neighbourhood Policy*, in: B. Kochenov, E. Basheska eds., supra note 1, p. 305.

37 Joint Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Review of the European Neighbourhood Policy, JOIN(2015) 50 final, p. 14–17.

38 Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, [2014] OJ L261, p. 4. Entered into force on 01.07.2016.

39 Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and the Republic of Moldova, of the other part, [2014] OJ L260, p. 4. Entered into force on 01.07.2016.

40 Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Ukraine, of the other part, [2014] OJ L161, p. 3. Entered into force on 01.09.2017.

regionally and internationally, including through joining efforts to eliminate sources of tension, enhance border security; to promote cross-border cooperation and good neighbourly relations and to promote cooperation aimed at peaceful conflict resolution. Furthermore, the Parties reaffirmed their commitment to the principles of territorial integrity, inviolability of internationally recognised borders, sovereignty and independence, as established in the UN Charter and the Helsinki Act, and their commitment to promote these principles in their bilateral and multilateral relations.

The good neighbourliness principle can be also found within the provisions on regional stability, which oblige the Parties to intensify their joint efforts to promote stability, security and democratic development in their common neighbourhood, and in particular to work together for the peaceful settlement of regional conflicts and to maintain international peace and security as established by the UN Charter, the Helsinki Act and other relevant multilateral documents.[41] For example, Article 9 EU-Georgia AA states that, "the Parties reiterate their commitment to peaceful conflict resolution in full respect of the sovereignty and territorial integrity of Georgia within its internationally recognised borders"; Article 8 EU-Moldova AA underlines that "the Parties shall intensify their joint efforts to promote stability, security and democratic development in the region and, in particular, shall work together for the peaceful settlement of regional conflicts…The Parties reiterate their commitment to a sustainable solution to the Transnistrian issue, in full respect of the sovereignty and territorial integrity of the Republic of Moldova", and according to Article 9 EU-Ukraine AA the Parties decided to intensify their joint efforts to promote stability, security and democratic development in their common neighbourhood, and in particular to work together for the peaceful settlement of regional conflicts. All these efforts will be based on common shared principles of maintaining international peace and security as established by the UN Charter, the Helsinki Act and other relevant multilateral documents.[42].

The Good Neighbourliness Principle and the EU Enlargement Policy

For the first time, the concept of good neighbourliness relations was introduced to the enlargement policy in June 1993 by the *Pact on Stability in Europe*. The Pact covered Central and Eastern Europe states, which were looking westwards in the hope of future enlargement, to maintain close mutual relations, to help stabilise relations among them,

41 Article 8 of the EU-Georgia AA; Article 8 of the EU-Moldova AA and Article 9 of the EU-Ukraine AA.

42 Article 9(4) of the EU-Georgia AA; Article 8(3) of the EU-Moldova AA and Article 9(2) of the EU-Ukraine AA.

and to promote cooperation between the countries of the former Warsaw Pact which, in the words of the French government, "may eventually be associated to varying degrees with the European Union". In July 1997, the European Commission stated in the *Agenda 2000: for a stronger and wider Union*, that all applicant countries should take all necessary measures to solve outstanding disputes among themselves and third countries in accordance with provisions of the UN Charter.[43] Next, in September 2009, the European Commission adopted its communication entitled *Enlargement Strategy and Main Challenges 2009–2010*, in which for the first time stated that all bilateral questions should be resolved in conformity with the principle of peaceful settlement of disputes in accordance with the UN Charter. Moreover, all parties concerned are expected to make every effort towards solving outstanding bilateral issues with their neighbours along these lines. All parties involved in such bilateral disputes have the responsibility to find solutions in a spirit of good neighbourliness and bearing in mind the overall EU interests.[44]

By virtue of Article 49 TEU, any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the EU. So, this provision formulates requirements which any third "European State" must fulfil to join the EU. However, additional criteria which have to be taken into account are agreed upon by the European Council on a case to case basis.[45] The European Council has defined the additional conditions of eligibility in its two documents: Conclusions of 22 June 1993 at Copenhagen[46] and Conclusions of 10 December 1994 at Essen.[47] The good neighbourliness principle is *expressis verbis* mentioned in the second document, where the European Council called on Central and Eastern Europe States to cooperate "between the associated countries for the promotion of economic development and good neighbourly relations". The Eastern Europe countries will be able to join the EU once the criteria of Article 49 TEU, including the Copenhagen and Essen criterias, are met**.** In order to meet all membership conditions and strengthen democracy, comprehensive and convincing reforms are required in crucial areas, notably on: rule of law, fundamental rights, governance; strengthening the economy; applying EU rules and standards and reconciliation, good neighbourly relations and regional cooperation.

43 Commission of the European Communities, *Agenda 2000: for a Stronger and Wider Union*, COM (1997) 2000 final.

44 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Enlargement Strategy and Main Challenges 2009–2010, COM (2009) 533 final, p. 8.

45 According to § 1 sentence 4: „The conditions of eligibility agreed upon by the European Council shall be taken into account".

46 Copenhagen European Council – 21 and 22 June 1993, Presidency Conclusions, available at: <http://www.europarl.europa.eu/enlargement_new/europeancouncil/pdf/cop_en.pdf >.

47 Essen European Council - 9 and 10 December 1994, Presidency Conclusions, available at: <http://www.europarl.europa.eu/enlargement_new/europeancouncil/pdf/ess_en.pdf>.

So, good neighbourly relations are essential elements of the EU's enlargement processes. However, the European Commission reaffirms that the EU cannot not import bilateral disputes, which must be solved as a matter of urgency by the parties. Achieving this objective will be facilitated by an atmosphere of good neighbourly relations. In the situation where disputes are not resolved bilaterally, parties should submit them unconditionally to binding, final international arbitration, the rulings of which should be fully applied and respected by both parties before accession. Moreover, the European Commission urges the avoidance of any kind of threat, source of friction or action that damages good neighbourly relations and the peaceful settlement of disputes.[48] This all means that the EU has directly connected the good neighbourliness principle as a pre-accesion condition to the principle of peacful settlement of disputes in accordance with the UN Charter. So, the good neighbourliness within the EU enlargement policy is a principle, which means that all third States which would like to accede the EU are obliged to make any necessary affords to resolve any outstanding border or other disputes by peaceful means in such a manner that international peace and security and justice are not endangered.[49]

Concluding Remarks

The UN Charter in its Preamble refers to the determination of the UN peoples "to practice tolerance and live together in peace with one another as good neighbours". The principle of good neighbourliness, however, does not refer only to cooperation among the neighbouring states, so it is not restricted only to states sharing the same border, but it covers states which share the common values and common interests. This principle is no longer related to geographical proximity, but also applies to states that are geographically separated.[50] Within Union's legal order the good neighbourliness principle complements the EU's neighbourhood policy principles and the EU's enlargement policy principles and that is why occupies a special place under their framework. So, the good neighbourliness principle, as a general principle of international law, forms an integral part of Union's primary law, which means that it has legally binding force upon all the EU institutions and all Member States in the process of application and implementation of Union law. In other words: firstly, the EU and its Member States are legally bound by the provisions of Article 8 TEU and Article 49 TEU; secondly, on the basis of Article 3(5)

48 *Ibidem*, p. 9.

49 N. Ghazaryan, *„Good neighbourliness" and Conflict Resolution in Nagorno-Karabakh: a Rhetoric or Part of the Legal Method of the European Neighbourhood Policy*", in: B. Kochenov and E. Basheska eds., supra note 1, p. 308.

50 According to Poland, „In its objective aspect, good neighbourliness is being presently applied not only to relations among States having common frontiers or separated by seas, but also to relations in a sub region or in a supranational dimension", UN Doc A/36/336/Add.1, 36.

TEU and Article 21 TEU, the EU is obliged to respect and promote the principles of international law; thirdly, on the base of Article 4(3) TEU the EU and the Member States are obliged to: assist each other in carrying out tasks which flow from the Treaties; take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the EU institutions; and finally, to facilitate the achievement of the EU's tasks and refrain from any measure which could jeopardise the attainment of the EU's objectives. This all means that any infringement of such obligations within the neighbourhood policy or the enlargement policy may lead to legal action for annulment before the CJEU. Under Article 263 TFEU, the CJEU is competent to review any decisions, including relating to the intergovernmental action of Member States, adopted by the EU institutions and by the Member States. However, in so doing, the CJEU is not taking a position on the Member States' intergovernmental action as such as that would lie outside its jurisdiction.[51] Therefore, an action for annulment must be available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects.[52] Moreover, an applicant country may try to bring the case before the CJEU for violation of those obligations, even though its *locus standi* is not clear.[53]

To sum up, the EU and its Member States are bound to respect the good neighbourliness principle, which forms an integral part of international law and is a source of Union's primary law. This means that both the EU and its Member States are obliged to maintain the good neighbourly relations with all its neighbours. Such relations, however, must be founded on EU values and characterised by close and peaceful relations based on cooperation. So, on the base of Article 3(5) TEU, Article 8 (1) TEU, Article 21 TEU and Article 49 TEU, the EU is obliged to promote the good neighbourliness principle in its relations with third states, especially with neighbouring ones.

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51 Joined Cases C-181/91 and C-248/91, §12.

52 Case 22/70, § 42; Joined Cases C-181/91 and C-248/91, § 13; Case C-27/04, § 44.

53 Opinion of Advocate general Jääskinen in Case C-547/10P, Swiss Confederation v European Commission, EU:C:2012:565.

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SUMMARY

The Good Neighbourliness Principle in Relations Between the European Union and its Eastern European Neighbours

The good neighbourliness principle is one of the most important principles in international law which designates a model of peaceful cooperation and mutual tolerance among neighbouring states. Its violation in the past, however, very often led to military conflicts and many international disputes and may lead to serious disputes among neighbouring states in the future. Thus, the good neighbourliness principle has a clear legal value[54]. This article analyses the good neighbourliness principle as a key principle that obligates neighbouring states to develop and to maintain peaceful interstate relations. The focus is twofold: firstly, on the scope, content and nature of the good neighbourliness principle in international law and secondly, on the impact of the good neighbourliness principle on the relations between the European Union and its Eastern Neighbours within the framework of the neighbourhood policy and the enlargement policy.

Keywords: good neighbourliness, European Union, European Neighbourhood Policy, EU enlargement policy.

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54 E. Basheska, *The Position of Good Neighbourliness Principle in International and EU Law*, in: B. Kochenov and E. Basheska eds., *Good Neighbourliness in the European legal context*, Leiden 2015, p. 25.

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Katarzyna Badźmirowska-Masłowska

The Protection of Whistle-blowers within the Latest Initiatives of the Council of Europe

Introductory Remarks

The importance of media safety issues is a result of the media's significant role in democratic societies, which has been emphasised since the beginning of media history (from the printing press to mass audiovisual ones, to those based on information and communications technologies). Media are referred to as the "fourth estate", guardians of the public interest. They inform, educate, and provoke plural debates on crucial political, economic, socio-cultural issues, and present events having serious impact on the daily lives of people, allowing them to express different approaches and opinions and mobilise them to undertake the positive, e.g. fulfilling the public interest actions. Within their control functions, the media are obliged to scrutinize the activity of public authorities, uncover abuses of law, crimes both committed by State and non-State actors. In general, the media, as the biggest platform of performing freedom of expression and an important tool for defending other rights, are essential for democracy and are the cornerstone of the existence of the information society. Thus, their responsibility focuses on embodying the societal and individual dimension of the freedom as it is provided in Art. 10 of the European Convention on Human Rights (ECHR)[1]; the intrinsic connection between the individual protection of journalists or wider the safety of media staff and the guarantee of the proper realisation of media remit must be treated as a basic presumption. This dual position makes meeting the security challenges, which have been implicated by the enormous development of a new media ecosystem, more difficult. Thus, when considering the questioned issues, the implications of changes of media notion ought to be pointed out: "in the same manner as the media landscape has changed through technological convergence, the professional profile of journalists has changed over the last decade. Modern media rely increasingly on mobile and Internet-based communication

1 *Convention for the Protection of Human Rights and Fundamental Freedoms,* Rome, 4 XI 1950.

services. They use information and images originating from non-journalists to a larger extent."[2] From the subjective point of view, the term 'media' traditionally has included all media workers (e.g. freelancers) and support staff;[3] functional and pragmatic approach emphasis public watchdog role of media which requires to take into consideration the fact that the scope of media actors has enlarged as a result of new forms of media in the digital age.[4] Hence, the notion should encompass journalists, other media professionals, those who perform public watchdog functions and even individual bloggers, all actors involved "in the production and dissemination to potentially large numbers of people of content, including information, analysis, comment and opinion."[5] Some journalists` protection privileges may extend to others even though they do not fully qualify as media, in particular whistle-blowers, because they can be considered as an important part of the media mission process.[6] T. McGongale states that whistle-blowers working "(…) as non-journalistic actors fulfil similar functions to those of journalists or media professionals, it can be argued that they should also benefit, *mutatis mutandis*, from the

2 *Recommendation 1950 The protection of journalists' sources adopted by the Assembly on 25 January 2011, point 11*; *Recommendation on a new notion of media adopted by the Committee of Ministers on 21 September 2011, point 7; Appendix to Recommendation n a new notion of media adopted by the Committee of Ministers on 21 September 2011: Criteria for identifying media and guidance for a graduated and differentiated response,* in particular *Part 1 Media criteria and indicators – points 9–55*; K. Jakubowicz, *A new notion of media? Media and media-like content and activities on new communication services*, Media and Information Society Division Directorate General of Human Rights and legal Affairs, Council of Europe, Strasbourg, April 2009, pp. 17–26.

3 *V.* K. Badźmirowska-Masłowska, *Status prawny a bezpieczeństwo mediów w sytuacjach współczesnych konfliktów* „Journal of Modern Science" 2013, no. 3, p. 284; K. Badźmirowska-Masłowska, *Status prawny a bezpieczeństwo mediów w sytuacjach współczesnych konfliktów. Wyzwania XXI wieku,* in: *Nie-bezpieczny świat. Systemy. Informacja. Bezpieczeństwo,* eds. P. Sienkiewicz, H. Świeboda, E. Szczepaniuk, Warszawa 2015, pp. 26–41.

4 *Recommendation on a new notion of media*…, point 5–7; *V.* T. Mc Gonagle, *How to address current threats to journalism?: The role of the Council of Europe in protecting journalists and other media actors*, Expert Paper, pp. 23–27 <https://rm.coe.int/1680484e67>; K. Jakubowicz, *Media revolution in Europe: ahead of the curve,* Strasbourg, Council of Europe Publishing, 2011, pp. 15–20; S. Nikoltchev, T. McGonagle eds., *Freedom of Expression and the Media: Standard-setting by the Council of Europe*, Strasbourg 2011.

5 *Recommendation on a new notion of media*…, point 7.

6 This approach is confirmed in *Recommendation on the protection of journalism and safety of journalists and other media actors adopted by the Committee of Ministers on 13 April 2016 at the 1253rd meeting of the Ministers' Deputies, point 4*. In practice, definitions of journalist and other media actors have been in a permanent process of change; they also can differ from country to country depending on national legislation V. *Resolution No. 3 Safety of journalists*, in: *Political declaration and resolutions,* Council of Europe Conference of Ministers responsible for media and information society, Belgrad, 7–8 November 2013, point 8; S. Parma, *The Protection and Safety of Journalists: A Review of International and Regional Human Rights Law Background paper,* in: *Towards an effective framework of protection for the work of journalists and an end to impunity,* Seminar and Inter-regional Dialogue on the protection of journalists, European Court of Human Rights, Strasbourg, 3 November 2014.

freedoms enjoyed by their professional counterparts".[7] For that reason, the review of the latest, relevant examples of the soft law of the Council of Europe (COE) seems to be purposive, in particular in the situation when they have reflected the current reaction on an unsafe situation of whistle-blowers as well as the other initiatives devoted to their protection, including the assumptions of the proposal for a future legally-binding act which should be introduced to set up the status of the whistle-blowers.[8]

The Protection of Whistle-Blower within the Soft Law of the Council of Europe

A development of new information and communication technology (ICT) has caused a bourgeoning of new categories of contributors to the public debate. WikiLeaks and the Snowden Effect have elicited increased interest of whistle-blower issues, which have been at the attention of the COE since 2010. In resolution 1729(2010) and in recommendation 1916(2010) the *Protection of "whistle-blowers"*[9], they were defined as "individuals who [in good faith] sound an alarm in order to stop wrongdoings that place fellow human beings at risk" and play an important role in the fight against corruption and mismanagement, both in the private and public sector, regardless of the public (e.g. the member of authorities power, armed forces, special services) or private position of the informer.[10] They have often suffered because of *inter alia* the fear of reprisals together with the lack of relevant, protective law, adequate procedures, and the detriment of public interest in mentioned issues. Thus, the main conclusions included in the abovementioned Acts were devoted to the creation of comprehensive legal provisions at the national level (within the scope of the COE`s guidelines – see point 6.1.-6.4. of the resolution), encompassing the following legal areas: 1) media – mainly within the protection of journalistic sources ("the identity of the whistle-blower is only disclosed with his or her consent, or in order to avert serious and imminent threats to the public interest" – point 6.2.1.2.); 2) employment law – in particular in preventing unfair dismissals; 3) criminal law and procedure – with protection against criminal prosecution for defamation or the breach of secrets protected by law, and 4) specific anti-corruption measures dedicated respectively to the abovementioned sectors (point 6.1.3.). "Relevant legislation should afford *bona fide* whistle-blowers reliable protection against any form of retaliation (…)" (point 6.2.5; 6.2.2) and "must be accompanied by a positive evolution of the cultural attitude towards whistle-blowing" (point 7).

7 *V.* T. Mc Gonagle, *op. cit.*, p. 24.

8 *V.* <https://www.coe.int/en/web/cdcj/activities/protecting-whistleblowers>.

9 *Recommendation 1916 Protection of "whistle-blowers" adopted by the Assembly on 29 April 2010.*

10 *Resolution 1729 Protection of "whistle-blowers" adopted by the Assembly on 29 April 2010, point 1.*

On 30th April 2014, the Committee of Ministers adopted the recommendation CM/Rec(2014)7 *on the protection of whistle-blowers*[11], reaffirming again that freedom of expression is fundamental for the functioning of genuine democracy. Therefore, "individuals who report or disclose information [on acts and omissions in the workplace] on [serious] threats or harm to the public interest, "whistle-blowers", can contribute to strengthening transparency and democratic accountability" (preamble), as they are treated as an essence of the 'public watchdog institution'[12]. It is important to stress that "whistleblowing can act as an early warning to prevent damage as well as detect wrongdoing that may otherwise remain hidden".[13] By the way, it is useful to make a few remarks about the contemporary blogosphere. As blogs are of different personal or 'public' character with or without specific value of a watchdog role, they need to be distinguished. D. Domingo and A. Heinonen state, "even within the range of blogs that do contribute to public debate more specific typologies can be useful to further specify the nature of their contribution to news-making, for example, the distinction between media blogs, journalist blogs, audience blogs and citizen blogs".[14]

The framework on the national level should be based on common principles, considering within the scope of an internal, normative, institutional and judicial system to protect those actors who can contribute to strengthening transparency and democratic accountability (preamble, item 5). For the purposes of this recommendation and in the meaning of COE standards, 'whistle-blower' is described more precisely than in the resolution 1729/2010, as "any person who reports or discloses information on a threat or harm to the public interest in the context of their work-based relationship, whether it be in public or private sector" (definition – point A); it means that at the national level the definition should cover all individuals, irrespective "of the nature of their working relationship[15] and whether they are paid or not" (point 3). They ought to be protected by national law, by establishing rules guaranteeing their rights and interests. They should be entitled to have the confidentiality of their identity and should be protected against retaliation of any form (directly or indirectly) as well as they ought to be subjected to: "appropriate civil, criminal or

11 *Recommendation on Protection of whistleblowers adopted by the Committee of Ministers of the Council of Europe on 30 April 2014 and Explanatory Memorandum*, *v. declaration on the protection of journalism and safety of journalists and other media actors adopted by the Committee of Ministers on 30 April 2014*.

12 *Appendix to recommendation CM/Rec 2014, 7, Principles, Definitions*, T. McGonagle, *op. cit.,* p. 26.

13 *Appendix to recommendation CM/Rec 2014*, *point 3*.

14 V. D. Domingo, A. Heinonen, *Weblogs and Journalism: A Typology to Explore the Blurring Boundaries*, "Nordicom Review" 2008, No. 29/1, pp. 3–15.

15 "It is the de facto working relationship of the whistleblower, rather than his or her specifc legal status (such as employee), that gives a person privileged access to knowledge about the threat or harm to the public interest". *Appendix to recommendation CM/Rec 2014, 7, Explanatory Memorandum…, op. cit.,* point 31.

administrative proceedings" (point 23). Moreover, they have to be assured: "that the report or disclosure was made in accordance with the national framework" (point 23). The system should be based on a transparent, effective mechanism for acting on public interest reports and disclosures, including the periodic assessments of the effectiveness of the national framework, undertaken by the national authorities. On the other side, any prejudiced person by the reporting or disclosure of inaccurate or misleading information should retain the protection under the rules of general law (point 10).

Member States are obliged to specify the scope of the national framework. They should at a minimum include adequate provisions concerning disclosing information of public interest concerning violations of law and human rights, risks to public health, safety and to the environment. The term 'public interest' in the described context is determined at the national level. "The normative framework should reflect a comprehensive and coherent approach to facilitating public interest reporting and disclosures [of information on acts and omissions that represent a threat or harm]"; exceptions and restrictions subject to the principal of proportionality and should be in line with the rules set out in this recommendation (point 7, 8).

Nota bene., the imposed restrictions under ECHR subject to legality and proportionality tests, as well as a test to whether a legitimate aim was being pursued. According to Art 10(2) any interference with the right to freedom of expression should be prescribed by law and can not be imposed for political reasons. A different scheme of rules may apply to national security, defense intelligence, public order or international relations. "The national framework should foster an environment that encourages reporting or disclosure in an open manner. Individuals should feel safe to freely raise public interest concerns" (point 12). The public reports and disclosures should be investigated promptly by relevant bodies in an efficient and effective manner. The rights of whistle-blowers ought to be subject to fair trial guarantees. Finally, the recommendation has possessed an awareness obligation of promoting the national framework in order to develop positive attitudes in society and to "facilitate the disclosure of information in cases where the public interest is at stake", by e.g. facilitating access to information and, free of charge, confidential advice for individuals contemplating making a public interest report or disclosure (point 27, 28).

As the COE considered that "whistle-blower protection measures should cover all individuals who denounce wrongdoings which place fellow human beings at risk of violations of their rights protected under the ECHR"[16], in 2015 the Parliamentary Assembly issued the resolution 2060(2015) and recommendation 2073(2015) *Improving the protection of whistle-blowers.*[17] These acts are particularly devoted to the problem of improving

16 *Resolution 2060 on Improving the protection of whistle-blowers adopted by the Assembly on 23 June 2015, point 8.*

17 *Recommendation 2073 Improving the protection of whistle-blowers adopted by the Assembly on 23 June 2015.*

the balance between the public's right to be informed and the protection of legitimate security concerns.[18] The point is that whistle-blower protection measures (in particular granting asylum to those who are threatened by retaliation) ought to be extended to the persons (employees) working for national security and intelligence agencies as well as private firms working in this field (without infringing the human rights of others). The abovementioned topics have reflected and determined a range of main contemporary challenges for the protection of journalists and other media actors, including whistle-blowers.[19]

Whistle-Blowers – Contemporary Challenges

A very good example of problems with the relevant protection against dismissal is the case of *Guja v. the Republic of Moldova*[20]. In January 2003, the President of Moldova, within the debate on the problem of public officials placing pressure on law-enforcement bodies about pending criminal proceedings, stressed the need to fight corruption. A few days later, Mr. Guja, the journalist who has been employed as Head of the Press Department of the Prosecutor General`s Office, leaked two genuine letters about pressure put on the Office by high-ranking politicians (e.g. the Vice-President of Parliament); because of his activity, the information concerning criminal law infringements, which had been perpetrated by police officers, including one, who, against former conviction, has been re-employed by the Ministry of Internal Affairs, were disclosed. Based on the abovementioned letters, the national newspaper *Jurnal de Chişinău* published an article. Just after publishing, Mr. Guja was dismissed by the Prosecutor General as "he had failed to consult the heads of other departments of the Office, a behaviour which constituted a breach of the press department's internal regulations."[21] Before the domestic courts, the applicant, argued that: 1) the letters had not been confidential; 2) their disclosure had been dictated by good faith and 3) had been directed to counteract the trading in influence phenomena and had been in line with the Moldovan President`s anti-corruption drive. His civil action seeking reinstatement was not successful, thus on 30th March 2004 he lodged an application with the European Court of Human Rights.

V.<https://rm.coe.int/factsheet-on-whistleblowers-and-their-freedom-to-impart-information-ma/16807178d9>.

18 *Resolution 1954 and Recommendation 2024, National security and access to information adopted by the Assembly on 2 October 2013.*

19 *Protection of whistleblowers: a brief guide for implementing a national framework, COE 2015.*

20 *Guja v. Moldova*, *No. 14277/04*, *Judgment of the European Court of Human Rights* of *12 February 2008*.

21 *V.* D. Voorhoof, *Right case of Guja v. Moldova*, European Court of Human Rights IRIS 2008, 6:2/1.

In a judgement of 12th February 2008, the Court held that the dismissal had infringed the applicant`s right to freedom of expression, as guaranteed by Art. 10 of ECHR. Taking into consideration both the fact that "the case concerned the pressure exerted by a high-ranking politician on pending criminal cases"[22] and – as neither Moldovan legislation nor the internal regulation and prescribed procedures contained any provisions concerning the reporting of such irregularities – he had not had any alternative way for disclosure. Therefore, such an external reporting, even to a newspaper, could be justified. The Court also concluded that the national decisions constituted an interference with the applicant`s right to impart information and was not necessary in a democratic society. Referring to the execution of the Court`s judgement of 12th February 2008, the Government of Moldova has not accomplished its conclusion in practise. In 2009, Mr Guja lodged another complaint. In his opinion: "(…) the authorities had only simulated performance of that judgment by reinstating him in his job but had then swiftly engineered his dismissal again. [The opinion was shared by the Court who in 2018 found that]: "the Government had never intended truly to reinstate the applicant. In reality, his second dismissal had been a continued retributory measure in response to his whistleblowing of 2003. Furthermore, the domestic courts had contributed to the violation of the applicant's rights by refusing to examine his allegations and evidence, and by ignoring the principles set out in the earlier *Guja* case."[23] The *Guja v Moldova* case shows in brief the basic practical problems connected with the broadness of the term 'whistle-blowers', which encompasses employees of relevant government agencies or private contractors.[24] Besides, the relation between whistle-blower as a media actor and a professional journalist issue ought to be subjected to further, more detailed studies. That is because the inclusion to the certain category brings results in different legal status, *ergo* the differentiation in privileges, duties and the scope of protection, might occur. The problem is current due to the increasing number of attacks against media professionals' physical safety, integrity, and their property. This not only affects their freedom of expression but also the collective dimension of the right.[25] Having regarded the gravity of the infringements, it must be underlined, that for the last five years the considered situation has been deteriorating.

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22 *Ibidem.*

23 *Press Release issued by the Registrar of the Court, ECHR 079, 2018*; *Guja v. Moldova*, No. 1085/10, *Judgment of the European Court of Human Rights* of 27 February 2018, in particular points 21–22; 28–29; 41–46).
"At the time of issuing the present judgment [2018], the procedure for supervising the execution of the judgment of 12.02.2008 is still ongoing before the Committee of Ministers", the abovbementioned judgement, point 22.

24 *Notabene,* it is in line with the point 9 of the resolution 2060(2015).

25 *Resolution 1438 on the freedom of the press and the working conditions of journalists in conflict zones, point 2; Recommendations and resolutions adopted by the Parliamentary Assembly of the Council of Europe in the field of media and information society, point 3.*

Even in Europe, protection for journalists and other media actors operating in more and more difficult environments has been declining.[26] "It is alarming and unacceptable that journalists and other media actors in Europe are increasingly being threatened, harassed, subjected to surveillance, intimidated, arbitrarily deprived of their liberty, physically attacked, tortured and even killed because of their investigative work, opinions or reporting, particularly when their work focuses on the misuse of power, corruption, human rights violations, criminal activities, terrorism and fundamentalism."[27] In particular, it invokes serious concern about the grave so-called 'chilling effect' on their remit, when such 'activities' are carried out by State representatives.[28] This implication has been reflected in the case of *Guja v Moldova*. A climate of intimidation and silencing[29] the actors concerned, who report on matters of public interest, leads to self-censorship, impoverishment of public debate, *ergo* the chilling effect may arise, which is opposite to the essence of freedom of expression, and detrimental not only to employees and civil servants but to the society as the whole.[30] Moreover, the climate of attacks on and intimidation of media actors " (…) is compounded by a culture of legal impunity for their perpetrators, [which] (…) is an indicator of endemic abuse of human rights."[31]

According to the Court establishment, public authorities must not only refrain from interfering with the right (negative doctrine). In general, under the essence of positive obligation, the States should "ensure that everyone can exercise all of the rights en-

26 *V. Reports on attacks against journalists and media freedom in Europe 2017–2019*, in particular: *Democracy at risk: threats and attacks against media freedom in Europe*, Annual Report by the Partner Organisations to the Council of Europe Platform to Promote the Protection of Journalism and Safety of Journalists; v. *Parliamentary Resolution 2035 on the Protection of the safety of journalists and of media freedom in Europe adopted by the Assembly on 29 January2015, point 5–14.*

27 *Recommendation CM/Rec 2016 4, point 1.*

28 Therefore, the following issues are considered: 1) prevention – which focuses on establishing a comprehensive legislative framework (combining civil, penal, administrative, labour etc. area of law); 2) protection – which concentrates on criminalisation violence against media staff as well as on reduction of certain risks in practise (guaranteed by the judges, prosecutors, police etc. staff) and 3) promotion of information, education and awarness-raising, combining legal, administrative and alternative measures, *Appendix to Recommendation CM/Rec 2016 4, I. Guidelines.*

29 Even though the civil and administrative, not criminal sanctions have been applied.

30 *Recommendation of the Committee of Ministers to member States on the protection of journalism and safety of journalists and other media actors adopted by the Committee of Ministers on 13 April 2016 at the 1253rd meeting of the Ministers' Deputies; Appendix to Recommendation CM/Rec 2016 4, II. Principles, points 33–39*; v. T. Baumbach, *Chilling Effect as a European Court of Human Rights` Concept in Media Law Cases,* "Bergen Journal of Criminal Law and Criminal Justice" 2018, Vol. 6, Issue 1, pp. 92–114.

31 *Recommendation CM/Rec 2016 4., point 39.*
V. K. Badźmirowska-Masłowska, *Media a współczesne konflikty w świetle wybranych dokumentów Rady Europy. Wstęp do analizy prawnej,* „Zeszyty Naukowe AON" 2012, vol. 3/88, pp. 257–276; K. Badźmirowska-Masłowska, *Status prawny a bezpieczeństwo mediów w sytuacjach współczesnych konfliktów…*, *op. cit.*; K. Badźmirowska-Masłowska, *Status prawny a bezpieczeństwo mediów w sytuacjach współczesnych konfliktów. Wyzwania XXI wieku…, op. cit.*

shrined in the ECHR in a practical and effective manner"[32]; *ergo* they are obliged to create a favorable environment for open public debate, enabling all individuals to freely and without fear express and impart their ideas and opinions.[33]

This 'dual' approach is also strictly connected with the other set of problematic issues which should be mentioned. They are referring to non-legitimate political, economic, etc. influences on the freedom of expression. Hindering access to the free flow of information, caused by public authorities or powerful businesses groups, may have a negative impact not only on media security (their actors and remit) but it basically deprives citizens of their right to receive and impart information, even those which are of serious public concern (for instance issues of general interest).[34] Hence, the effective system of media protection should encompass the strong protection of journalists` sources of information, which constitutes a basic condition for independency and fully exercising of the media mission.[35] It is important to indicate that, as a right of journalists (and wider, authorised media staff) not to disclose their sources is a professional privilege and requested the special protection, both of the journalist and anyone who provides information to him/her (a source);[36] but non-journalists (e.g. individuals with their own website) cannot benefit from the right (point 15).[37] Thus, the question has arisen whether the broad notion of media, including those who perform, similar to media professionals, public watchdog functions (e.g. whistle-blowers) prejudges that they are authorised to enjoy the abovementioned privilege. From the legal point of view, the answer 'yes' seems to be questionable[38] but considering the dynamics of changes in the media system, due to the rapid ITC development, it cannot be unequivocally rejected.

Finally, the performing of relevant soft law from 2010–2015 has revealed an urgent problem, which seems to be crucial for further legal analyses. Infringements on the freedom of expression are considered from a human rights point of view. The COE, whose activity is precursory and traditionally based on this approach,[39] has been significantly involved in initiatives counteracting them.[40] The solutions concerning the whistle-blow-

32 T. McGonagle, *op. cit.*, p. 18; *Towards an effective framework of protection …op. cit.*, pp. 21–22.

33 *V.* P. Leach, *The principles which can be drawn from the case-law of the European Court of Human Rights relating to the protection and safety of journalists and journalism*, 2013; T. Mc Gonagle, *op. cit.*, p. 20.

34 *Resolution 2179 and Recommendation 2111 on Political influence over independent media and journalists adopted by the Assembly on 29 June 2017.*

35 *Recommendation 1950 of the Parliamentary Assembly The protection of journalists' sources adopted by the Assembly on 25 January 2011.*

36 <https://rm.coe.int/factsheet-on-the-protection-of-journalistic-sources-may2017/16807178d7>.

37 *Goodwin v United Kindgdom, Voskuil v Netherlands.*

38 Appendix to Recommendation CM/Rec 2011 7, points 9–55.

39 As it is provided in art. 10 of the *for the Protection of Human Rights and Fundamental Freedoms.*

40 *V.* K. Badźmirowska-Masłowska, *Media a współczesne konflikty…*; *Declaration of the Committee of Ministers on measures to promote the respect of Article 10 of the European Convention on Human*

er's protection—as with any other new media actor—must have been established within the frame of the protection of the freedom of expression; they have been based on conclusions of debates from the end of the 20th century, concerning these issues and bearing in mind the context between governmental wrongdoing and whistleblowing.[41] Due to the worrying implications of the *Snowden 'case',* the attempts to balance two perspectives, mass surveillance[42] and the protection of whistle-blowers[43], have been taken, although without full success. In particular, recommendation CM/Rec(2014)7 *on the protection of whistleblowers* allows the applying of information relating to national security, defence, intelligence, public order or international relations of the State: "a special scheme or rules, including modified rights and obligations" (point 5). However whistle-blowers may not be left completely without protection (e.g. asylum) or without a potential defence.[44] I share the opinion that the main problem in practise is that: "whistle-blower protection laws came about through an anti-corruption agenda, not a human rights one"[45]; which seems to be a paradox, as whistleblowing *prima facie* falls under the right concerned[46], and it is confirmed in a relevant growing jurisprudence from the European Court of Human Rights under Art. 10 of the ECHR.[47]

Concluding Remarks

In conclusion, nowadays, regarding the protection of media issues, the Council of Europe faces a wide spectrum of old and new challenges, strictly connected with a transformation of the media ecosystem from a traditional linear paradigm to a new, proliferated

Rights of 13th January 2010.

41 See the attempt of P. Omtzigt to prepare in 2013 a *Recommendation on Additional protocol to the European Convention on Human Rights on the protection of whistle-blowers who disclose governmental action violating international law and fundamental rights.* **W.** Vandekerckhove, *Freedom of expression as the "broken promise" of whistleblower protection***, "**La Revue des droits de l'homme" 2016, 10, points 5–9.

42 *Resolution 2045 and recommendation 2067 on Mass surveillance adopted by the Assembly on 21 April 2015*; **W.** Vandekerckhove, *op. cit.*, point 42–55.

43 *Resolution on the protection of whistleblowers…*, *op. cit*.

44 *V.* **W.** Vandekerckhove, *op. cit.,* point 7.

45 *Ibidem*, point 9. Additionally, the author has marked that: "even though whistleblowing policies are necessary, they are ethical only to the extent that they succeed in protecting individuality rather than institutionalizing the individual", point 57; this must be taken into serious consideration within the context of art. 9 of the *Civil Law Convention on Corruption*, which provisions perform so-called anti-corruption approach. On the other side, see: *Global principles on national security and the right to information*, *"The Tshwane Principles"*, Tshwane 2013.

46 *V.* **W.** Vandekerckhove, *op. cit.*, point 12–41.

47 *V.* A. Płoszka, *op. cit.*; <https://www.echr.coe.int/Documents/FS_Journalistic_sources_ENG.pdf>; <https://rm.coe.int/factsheet-on-protection-of-sources-june2018-docx/16808b3dd9>.

type. Redefinitions concern the scope of their term, including the broadening of the notion of journalists and other media actors. T. McGonagle says, "the transformation involves the blurring of previously distinct boundaries between production and consumption of media; professionalism and amateurism and the huge variety in types of media, media services and media content".[48] Regarding the special status of whistle–blowers, it is to be said, that serious difficulties have occurred in assessing if it is of legal or practical (ethical) dimension only and whether it is considered within the freedom of expression approach, as any subject which fulfills the definition criteria of a new media actor, performing the same function as journalist. Another question has arisen, whether whistle-blowers in certain circumstances might be treated not as media actors but journalist sources. Besides, this uncertainty impacts an interpretation of a range of their duties and privileges; it also increases the scope of threats. As the new challenges for the proper protection have occurred, the comprehensive legal instrument on the protection of the whistle-blower should be considered.[49] In this context, it must be pointed out that both the resolution 2060(2015) and recommendation 2073(2015) on *Improving the protection of whistle-blowers* has promoted launching the process of negotiating a binding legal instrument, within the described scope, covering disclosures of wrongdoings by those who are employed in the national security and intelligence area; the framework convention should be open also to non-member states (point 10.1.3. of the resolution and 3.1. of the recommendation).[50] The complexity of current security situation, both on international and certain national levels, might seriously impede the adoption of the freedom of expression approach or even achieve a proper balance with anti-corruption regulations.

Until then, in an era of rapidly developing communication technologies, changing both the communication and safety paradigm is necessary. The main issue is to apply existing European standards and key principles to the reconfigured environment in an adequate and comprehensive manner, without their devaluation, at the national level. Furthermore, their proper implementation and execution in domestic law is the core to achieve a more effective level of whistle-blower safety. It is important to mention that after the first legal initiatives from 2010, the COE has taken a wide spectrum of activities devoted to the protection of whistle-blowers. For example, the Committee of Ministers on 19th May 2014 organized the *Round Table on Safety of Journalists*: *From commitment to action*.[51] It was aimed at the following practical aspects: identifying better ways of addressing threats and violence against journalists; taking into consideration the discrete nature of a wider group of non-professionals like whistle-blowers or human rights

48 *V*. T. McGonagle, *op. cit.*, p. 30.

49 The questionable issues request a wider, separate coverage.

50 *V*. *Platform to promote the protection of journalism and the safety of journalists…*, *op. cit.*

51 <http://www.coe.int/t/dghl/standardsetting/media/roundtable-en.asp>; <https://rm.coe.int/16-8049166a>.

defenders, who communicate in the public interest; and protecting journalism effectively. It has set up guidelines on protecting all individuals who denounce wrongdoing, concerning the concept of "public interest" and has defined terms such as: openness, confidentiality, anonymity, etc. Then, in 2015 the COE set, hosted and served the technical arrangements for *the Internet-based Platform to promote the protection of journalism and safety of journalism*,[52] via facilitating the compilation (and recording), processing and online dissemination of information on serious concerns, such as: 1) personal non-verbal and verbal attacks against "journalists and other media actors, bloggers, writers, human rights defenders and other persons communicating in the public interest"[53]; 2) their detention and imprisonment, harassment, impunity in the mentioned cases; 3) threats to the confidentiality and security of journalists' sources as well as impinge on media freedom,[54] causing chilling effects, (related *inter alia* to: judicial – e.g. defamation or political intimidation – e.g. hate speech). These criteria reflect the consistent approach of binding the personal safety of media actors with the safety of their remit. Undoubtedly, the Platform is one of the most valuable, outstanding initiative, both from the legal and practical point of view, with the perspective of world-wide cooperation in the media field; hence, the consideration of launching the whistle-blower support groups within its scope, seems to be worthwhile.[55]

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52 <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c5ceb>; <https://www.coe.int/en/web/media-freedom/all-alerts)>; <https://www.coe.int/en/web/media-freedom/the-platform>.

53 *Ibidem.* By the way, the whistle-blower as a part of a category "new media actor" is not *explicite* enumerated but the catalogue is not of the *numerus clausus* character.

54 V. M. Clark, A. Grech, *Journalists Under Pressure - Unwarranted Interference, Fear and Self-Censorship in Europe*, COE 2017.

55 V. W. Vandekerckhove, *op. cit.,* point 64; also issue about implications of spreading of leaks sites, point 65.

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SUMMARY

The Protection of Whistle-blowers within the Latest Initiatives of the Council of Europe

The protection of whistle-blowers under the Article 10 of ECHR has faced a lot of complex problems, which had been a result from the implications of ICT`s development and change of the media environment. The COE is involved in a worldwide debate about changes taking places in a contemporary legal system in the context of the protection of human rights.

Therefore, the review of the latest legal initiatives (resolutions, recommendations, etc.) as well as other activities in the field concerned might be helpful to put the questionable issues.As the article is of the introductory character, further analysis is required. Within the human rights approach, it should concern, in particular the legal status of the whistle-blower and the issues, pertaining to legal and alternative ways of her/his protection.

Keywords: whistle-blower; approaches of protection; contemporary challenges; Council of Europe activities.

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The Significance of Effective Labour Inspectorates for Cross-border Labour Mobility[1]

Introduction

According to the latest available data, cross-border labour mobility has almost doubled compared to a decade ago. In 2017, 17 million citizens lived or worked in a Member State other than that of their nationality and 1.4 million EU citizens commute to go to work in another Member State.[2] There has also been an increase in the number of posted workers from more than 1.9 million postings recorded in the EU in 2014 to 2.3 million in 2016. It accounts for about 1% of the total employment in the EU.[3] Despite the rather small quantitative share of posted workers in the movement of persons between Member States, the economic significance of posting is considerable. On the one hand, it may aid in temporary dealing with shortages of the supply of a labour force in some sectors, e.g. transport, or construction. However, the unrestrained posting of workers to specific regions or sectors may also bring about adverse effects, e.g. distortion in competition or limitation of workers' rights, on the other.[4] Therefore, clearly regulating as well as

1 Research for this paper has been supported financially by the Polish National Science Centre, decision no. 2015/17/B/HS5/00419.

2 2017 Annual Report on Intra-EU Labour Mobility.

3 It needs to be remembered that the situation is different in the individual Member States. *Opinion of the European Economic and Social Committee of 14 December 2016 on the Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.*

4 J. Cremes, *Rules on working conditions in Europe: Subordinated to freedom of services?,* "EJIR" 2010, No. 16/3, p. 302; J.E. Dølvik, J. Visser, *Free movement, equal treatment and workers' tights: can the European Union solve its trilemma of fundamental principle?,* "IRJ" 2009, No. 40/6, p. 497. *V*. C. Barnard, *The UK and posted workers: The effect of Commission v Luxembourg on the territorial application of British labour law*, "ILJ" 2009, No. 28/1, p. 122 and *European Parliament resolution on the implementation of Directive 96/71/EC in the Member States.*

effectively enforcing the protection of cross-border workers, including posted workers, and providing the conditions of fair competition on the internal market are important.

Generally, the objectives identified above were to be accomplished under the provisions of *Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending directive 96/71/EC concerning the posting of workers in the framework of the provision of services* (*Directive 2018/957*).[5] The number of practical problems identified during the process of implementing the provisions of the *Directive 96/71/EC* became the reason for adopting *Directive 2014/67/EU of the European Parliament (PE) and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services* (*Directive 2014/67/EU*).[6] These problems concerned, for example, poor administrative cooperation between the Member States, including national labour inspectorates.

The effectiveness of exercising rights by the internal market participants would certainly be at risk if there was no suitable and adequate institutional base. A question can be raised whether the institutional system functioning within the EU is sufficient to provide protection of these rights or establishing additional institutions should be taken into consideration. Maybe it would be enough only to enhance cooperation of the suitable national authorities. Main attention should be focussed on national labour inspectorates which contribute to enhancing the protection of social rights.

In connection with the above, a brief description of the cross-border posting of workers is provided first, especially showing the role that labour inspectors play in this area. Then, the initiative of a European Platform for undeclared work for labour inspectors is analysed. This was to allow confrontation with other initiatives functioning in this field on the EU level, i.e. the Committee of Senior Labour Inspectors, but also with those requested for possible approval, i.e. European Social INTERPOL, or the European Labour Authority.

The Purpose and Scope of the Cross-Border Posting of Workers in the Framework of the Provision of Services

The main purpose of Directive 2018/957 is to ensure the protection of posted workers during their posting in relation to the freedom to provide services. It lays down mandatory provisions of the hosting Member State regarding working conditions and the protection of workers' health and safety that must be respected (Article 1(1) Directive 2018/957). It is also to remove obstacles and uncertainty as regards freedom to

5 OJ EU 1997 L 18/1.
6 OJ EU 2014 L 159/11.

provide services.[7] This purpose is to be accomplished by improving legal certainty and facilitating identifying the terms and conditions of employment applied towards workers temporarily employed in a Member State other than the one whose legislation regulates employment relationship. Directive 2018/957 also aims at guaranteeing the balance between the internal market freedoms and workers' rights during the period of their posting. Equal legal protection is to be available by both the employers providing services on the internal market, posted workers themselves, but also the beneficiaries of the services provided by them.[8]

The question of ensuring the coordination of Member States legislation by establishing mandatory requirements concerning the minimum protection of posted workers, which their sending employers are to comply with, has turned out to be of a great essence.[9] A catalogue of this type of mandatory regulations concerning the minimum protection are provided by Article 3(1) of Directive 2018/957.Aapplying its labour law by the host Member State may be a barrier to the free movement of services, arising out of Article 56 of the Treaty on the Functioning of the European Union. It was the reason why RG *Mengozzi* in the case C-341/05 *Laval* deemed Article 3 of the former Directive 96/71/EC as derogation of the host Member State control principle.[10] The main purpose of its 'successor', Directive 2018/957, is to remove all barriers to the freedom to provide services. The purpose of establishing the aforementioned minimum working conditions of the host Member State is, however, not only to avoid distortion in competition and to remove barriers to the free movement of services, but also to guarantee that posted workers' rights will be complied with.[11]

7 This has been confirmed by the case-law of the Court of Justice of the European Union, firstly the judgements in the following cases: C-341/05 *Laval* and C-346/06 *Rüffert* where the Court ordered to make an interpretation of *Directive 96/71/EC* in light of Article 56 of the Treaty on the Functioning of the European Union, stressing that its purpose is, among others, to achieve the freedom to provide services, 'being one of the fundamental freedoms guaranteed by the treaty', respectively items 61 and 63.

8 A. M. Świątkowski, *Prawo pracy Unii Europejskiej*, Warszawa 2015, p. 168. *V.* V. Kosta, *Fundamental Rights in EU Internal Market Legislation*, Oxford-Portland-Oregon 2015, pp. 196–200; T. van Peijpe, *Collective labour Law After Viking, Laval, Rüffert, and Commission v. Luxembourg*, "IJCLLIR" 2009, No. 25/2, pp. 83–86. More about plurality of purposes which Directive 96/71/EC seems to serve and which unfortunately affects uncertainty and vagueness of its provisions *v.* S. Evju, *Posting Past and Present. The Posting of Workers Directive – Genesis and Current Contrasts*, "FWP" 2009, No. 8, pp. 21–22 and 24–15.

9 *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, The implementation of Directive 96/71/EC in the Member States.*

10 RG Mengozzi's opinion in the case C-341/05 Laval.

11 RG Trstenjak's opinion in the case C-319/06 *Commission v Luxembourg,* item 33. *V.* C. Barnard, *The substantive law of the EU. The Four Freedoms. Fourth edition,* Oxford 2013, p. 381. On posting of workers' good and bad sides look especially at: J. Cremers, *In search for cheap labour in Europe – Working and living conditions of posted workers,* "CRL News" 2011, No. 1, pp. 8–9.

To overcome the practical problems related to the insufficient enforcement of Directive 96/71/EC, Directive 2014/67/EU was adopted. It was also a reaction to the discussion about the need to ensure a real balance between social rights, and the internal market freedoms which has broken out as a result of the rulings of the Court of Justice of the European Union in the following cases: C-438/05 *Viking,* C-341/05 *Laval,* C-346/06 *Rüffert*, and C-319/06 *Commission v Luxembourg*.[12] In response to numerous accusations, both from the EU institutions, and also from the doctrine representatives, towards the aforementioned judgements, the compliance of the Directive provisions with the fundamental rights and with the principles laid down in the Charter of Fundamental Rights was pointed out in Recital 48 of Directive 2014/67/EU. Therefore, when bringing in its provisions, one should be guided by such rights and principles as the freedom to conduct business (Article 16 of the Charter of Fundamental Rights) or the right of collective bargaining and action (Article 28 of the Charter of Fundamental Rights). The provisions of Directive 2014/67/EU are thus to fulfil a double purpose. Its provisions are both to protect posted workers and ensure that all legal measures introduced under it cause no administrative burdens or restrictions on the freedom to provide services (Recitals 4 and 16 of Directive 2014/67/EU and Article 1(1) paragraph of Directive 2014/67/EU). Therefore, a common framework for suitable control measures and mechanisms for a more efficient and a more uniform implementation of posted workers' provisions proved to be necessary.

For efficiently accomplishing the purposes of the posting of workers' legal basis, the Member States were called on to enhance cooperation between the offices which are responsible for supervising the compliance with the working terms and conditions provided for in its provisions. The authorities of the host state in cooperation with the authorities of the Member State of establishment are responsible for inspecting the terms and conditions of employment to be complied with (Article 7(1) of Directive 2014/67/EU). This cooperation may also rely on exchanging all relevant information, e.g. regarding the legality of registration of a service provider registered office or compliance of their operations with the law. Generally, this is about the labour inspectors' work, although it should be remembered that this cooperation is to be carried out not only between them, but also between the suitable offices of the Member States, and the European Commission.[13]

12 *Opinion of the European Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, Official Journal of the EU 2012 C 351/61, item 3.2*. *V*. V. Kosta, *Fundamental…*, pp. 200–209.

13 Here, the Commission's participation in principle takes a form of financial support, including exchanges of relevant officials and organising training, language courses in order to develop, facilitate, and propagate best practice initiatives such as the development and updating of databases or joint websites containing information concerning terms and conditions of employment to be respected – Article 8 of *Directive 2014/67/EU*. Language barriers have in fact

For the purposes of ensuring effective monitoring of compliance of their own legislation with the obligations arising out of directives on the posting of workers, Member States may only impose such administrative requirements and control measures which are justified and proportionate in accordance with EU law (Article 9(1) of Directive 2014/67/EU). From among those which are acceptable, there are, for example, the following: an obligation for a service provider established in another Member State to make a simple declaration containing the relevant information necessary in order to allow factual controls at the workplace; an obligation to keep or make available and/or retain copies, in paper or electronic form, of the employment contract or an equivalent document during the period of posting, and also an obligation to designate a person to liaise with the competent authorities in the host Member State (Article 9(2) of Directive 2014/67/EU). It needs to be highlighted that these obligations are at the same time to facilitate works of national labour inspectorates connected with fulfilling the obligations of employers' posting their workers in order to provide services on the territory of the host Member State.

The European Platform for Undeclared Work and European Labour Authority

There should not be any doubt as to the key role that labour inspectorates play for both fair mobility and the protection of workers' rights. If they function effectively, this ensures protection of health and safety at work. It could generally take a form of combating and eliminating hazardous working conditions and contributing to the remuneration and social insurance premiums being actually paid. It should be highlighted that labour inspectorates are of particular significance in the context of the posting of workers, especially by establishing the liability as regards compliance with host Member States' minimum working conditions. It causes serious practical difficulties. Therefore, labour inspectors play a key role not only in relation to protecting workers' rights, but also in relation to preventing abuses and supporting economic and social development.

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turned out to be one of the fundamental practical problems. *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, The implementation of Directive 96/71/EC in the Member State*s, *COM 2003 458 final, p. 14. V. Commission Recommendation of 31 March 2008 on enhanced administrative cooperation in the context of the posting of workers in the framework of the provision of services, Official Journal of the EU 2008 C 85/1* and *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions of 6 November 2008 - Delivering the benefits of the single market through enhanced administrative cooperation, COM 2008 703 final.*

Member States use various, often different methods for carrying out inspections at work, and labour inspectorates functioning there have many times suffered from a shortage of staff and constant training courses, especially those concerning EU issues.[14] Insufficient language competences have also occurred to be a serious problem. National inspection systems should therefore be strengthened, for example, by providing moderately uniform training for the labour inspectors as well as by increasing the intensity of language courses, e.g. by making use of financial support under the European Social Fund for the implementation of so-called 'soft projects.'

A system of electronic networking used by all relevant social security authorities, would certainly help them exchange information and be a very useful tool for national labour inspectors. On the other hand, inspections carried out by labour inspectorates could be considerably facilitated as a result of creating national systems of electronic networking imposing an obligation on employers to immediately register workers from abroad, e.g. posted workers.[15] In connection with the aforementioned practical problems, the European Platform for undeclared work for labour inspectors has been established (henceforth: Platform).[16]

The following were indicated as the headline goals of the Platform: improving working conditions, supporting integration on the labour market and social inclusion, including better enforcement of the regulations in these fields, and also limiting the scale of undeclared work and increasing the number of legal jobs, thereby preventing the deterioration in the quality of work as well as occupational health and safety. Above all, these goals are to be accomplished through cooperation between competent authorities of the Member States, by improving their potential in counteracting cross-border undeclared work and contributing whereby to providing equal terms and conditions of carrying out business activities as well as raising social conscience in all issues related to the undeclared work. Here, the cooperation of the Member States should, among others, take the form of exchanging best practices and information in order to develop specialist knowledge and analyses as well as to support and facilitate using innovative methods for having effective and efficient cross-border cooperation.[17]

14 *European Parliament Resolution of 14 January 2014 on effective labour inspections as a strategy to improve working conditions in Europe, Official Journal of the EU 2016 C 482/31, items 6–7* and a motion for a *Resolution of the European Parliament of 12 December 2013 on effective working conditions as a strategy to improve working conditions in Europe 2013/2112 INI.*

15 *Ibidem*, items 17–18.

16 *Decision EU 2016/344 of the European Parliament and of the Council of 9 March 2016 on establishing a European Platform to enhance cooperation in tackling undeclared work, Official Journal of the UE 2016 L 65/12*. Undeclared work is understood as "any paid activities that are lawful as regards their nature but not declared to public authorities, taking into account differences in the regulatory systems of the Member States'. *Communication from the Commission of 24 October 2007 entitled 'Stepping up the fight against undeclared work', COM 2007 628 final.*

17 Articles 4 and 5 of *Decision 2016/344*.

By developing and enhancing the cooperation, Member States and their suitable authorities maintain the competences for identifying, analysing, and resolving practical problems related to the enforcement of EU legislation concerning social protection and working conditions. They were to decide which measures need to be applied at a national level to introduce the platform results. Therefore, collaborative tools being developed under the platform were rather to take form of soft EU legislation, e.g. guidelines and good practice handbooks or common principles of carrying out inspections for tackling undeclared work.[18]

The composition of the Platform has three levels and includes a high-ranking representative of a given Member State, a representative of the European Commission as well as representatives of cross-sectoral social partners acting at the EU level. The Platform meets at least twice a year. Its tasks are to be carried out on its rules of procedure, 2-year work programmes, activity reports compiled every two years as well as on establishing, if needed, suitable working groups.[19] The Platform was officially launched in May 2016. At the first plenary session, which was held on 10 October 2016, the work programme for 2017–2018 was adopted, assuming three strategic priority axes: cooperation and joint action, mutual learning, broadening knowledge.[20] It was assumed that the platform could be used as a tool for supporting Member States in carrying out structural reforms as well as for the better enforcement of primary and secondary legislation. The actual Platform's work programme for 2019–2020 aims to deepen important aspects of the previous programme with a special attention on work to tackle bogus self-employment and fraudulent letterbox companies. Its activity will entail the four following sectors, which have been identified as heavily affected by undeclared work, that are: agriculture, aviation, tourism and hotel, restaurant and catering sectors.[21]

It needs to be stressed, that in order to bring an operational dimension to the activities of the platform, just after nearly three years of its establishment, it is to be taken over by a new EU agency - the European Labour Authority. The proposal for this new agency was presented by the European Commission in March 2018.[22] It shall assist Member States and the Commission in matters relating to cross-border labour mobility and the coordination of social security systems within the Union. To contribute to ensuring fair labour mobility in the internal market the Authority shall: 1) facilitate access for individuals and employers to information on their rights and obligations as well as to relevant services; 2) support cooperation between Member States in the cross-border enforcement of relevant

18 Recital 18 and Article 3 and Article 6(1)(e) of *Decision 2016/344*.

19 Article 8 sections 2 and 3 of *Decision 2016/344*.

20 European Platform Undeclared Work Programme 2017–2018 adopted on 10 October 2016.

21 European Platform Undeclared Work Programe 2019–2020 adopted on 18 October 2018.

22 *Proposal for a regulation of the European Parliament and of the Council establishing a European Labour Authority, COM 2018 131 final, preambule, item 31.*

Union law, including facilitating joint inspections; 3) mediate and facilitate a solution in cases of cross-border disputes between national authorities or labour market disruptions.[23] The second aim especially seems to cover activities that are actually taken in the framework of the Platform. Joint labour inspections are thus needed to deal with complex cases of fraud or abuse that have a transnational dimension. They are to be coordinated by the European Labour Authority under the scope of its competences and on the request of one or several Member States. The Authority may also suggest to the authorities of the Member States concerned that they perform a concerted or joint inspection. The organisation of a concerted or joint inspection shall be subject to the prior agreement of all participating Member States via their National Liaison Officers. This agreement shall set out the conditions for carrying out such an exercise. Concerted and joint inspections and their follow-up shall be carried out in accordance with the national law of the Member States concerned with logistical and technical support of the European Labour Authority (together with translation and interpretation services). National authorities carrying out a concerted or joint inspection shall report back to the Authority on the outcomes within their respective Member State. In the event that the Authority, in the course of concerted or joint inspections, becomes aware of suspected irregularities in the application of Union law, it shall report on this to the Commission and authorities in the Member State concerned, where appropriate.[24]

Committee of Senior Labour Inspectors and other Collaborative Forums Consolidating the Effectiveness of Labour Inspectorates on the Internal Market

Effectiveness of activities aiming at ensuring decent working conditions requires that activities of different groups of experts and committees acting in this field at the EU level are not duplicated. The activity of the Platform (soon to be renamed the European Labour Authority) and the Committee of Senior Labour Inspectors functioning within the European Commission is an example of such an assumption regarding each other.[25] Its task is to support the European Commission in monitoring compliance with the EU legislation regarding occupational health safety at a national level. Analysing and resolving practical problems in this field is within competences of suitable

23 *Ibidem*, Article 1 and 2.

24 *Ibidem*, Article 9 and 10.

25 Among other groups of experts and committees, Article 9 of *Decision 2016/344* lists the Committee of Experts on Posting of Workers, the Administrative Commission for the Coordination of Social Security Systems, the Network of Public Employment Services, the Employment Committee, the Social Protection Committee and a working group for administrative cooperation in the field of direct taxation.

national supervision offices and requires close cooperation between these offices, and the European Commission.[26]

The Committee's most important tasks include: assisting the Commission in defining common principles of labour inspection in the field of health and safety at work and developing methods of assessing the national systems of inspection in relation to those principles; promoting improved knowledge and a mutual understanding of different national systems and practices of labour inspection; developing exchanges between national labour inspection services of their experiences; promoting exchanges for labour inspectors between national administrations and setting up training programmes for inspectors; drawing up and publishing documents to facilitate the activities of labour inspectors and developing a reliable and efficient system of rapid information exchange between labour inspectorates.[27]

As it can be observed, the tasks carried out under the Platform - and the Committee of Senior Labour Inspectors are generally similar and focus mainly on developing knowledge, exchanging experiences and enhancing administrative cooperation of Member States in this field of EU integration. However, the material scope of the Platform activity is wider because it concerns cooperation on the fight against undeclared work. Nevertheless, the initiative of expanding this activity to also include issues related to the posting of workers could be considered. One could use projects being already carried out under the European Commission initiative entitled 'Eurodetachement'[28] and transform them into a permanent platform for exchanging information and good practices as well as common training courses for labour inspectors and liaison offices for posted workers. This permanent platform could be incorporated into the European Platform for unde-

26 It should be stressed that a 'Group of Senior Labour Inspectors' has informally been in operation under the then EC already since 1982, and formally under the *Committee Decision No. 95/319/EC of 12 July 1995 setting up a Committee of Senior Labour Inspectors*, *Official Journal EC 1995 L 188/11* amended by the *Commission Decision of 22 October 2008*, *Official Journal of the EU 2008 L 288/5*. See also the *Commission Decision of 31 March 2016 on the appointment of members of the Committee of Senior Labour Inspectors for a new term of office, OJ EU 2016 C 115/17.*

27 Article 3 *Commission Decision 95/319/EC*. The Committee plenary sessions are held twice a year, usually chaired by the Member State exercising the current presidency in the EU Council. Usually, the representatives of labour inspectorates of the EU Member States, EOG and EFTA states, and also observers from ILO and EU-OSHA participate in the sessions.

28 It is a project carried out and assisted by the Directorate-General for Employment, Social Affairs and Inclusion of the European Commission which is designed to examine the current state of knowledge and the practice of posting of workers in the EU. Three implementing projects have already been carried out, that is: *Common training for labour inspectors and public officials of liaison office on posting involved in control and monitoring 2010–2011, The Posting of Workers: Improving Collaboration between Social Partners and Government Authorities in Europe 2012–2013 as well as Act on situations of posting workers: 'Learning by doing' 2014–2015*. Information about the project available at: <http://www.eurodetachement-travail.eu>.

clared work. However, if this process fails, coordination of tasks carried out under these platforms should be undertaken.[29]

The coordination of activities carried out under the Platform and the Committee of Senior Labour Inspectors could, in addition, be enhanced by setting up bilateral task forces or, where needed, a multilateral task force including national competent authorities and labour inspectors. They would carry out on-the-spot cross-border checks (subject to the approval of all Member States concerned), in accordance with the national law of the Member State in which the controls are taking place. Generally, their activities could be launched in cases of social dumping, work under illegal conditions or fraud, to identify *letterbox companies*, fraudulent recruitment agencies and abuses of any rules that result in the exploitation of workers. All those forces could create a network of national social inspection services with the main aim to promote information exchange.[30] Also the European Economic and Social Committee points out the need to ensure coherence of activities undertaken at the EU level in relation to all issues related with labour inspection, both under the Platform, and under the Committee of Senior Labour Inspectors.

Better education in EU issues of labour inspectors and increasing their numbers are required as it has not even reached the minimum of what the International Labour Organization recommends, i.e. one inspector per ten thousand workers. In several Member States, the level of activity of labour inspectorates needs to be improved, particularly as regards information, consultation, and also the identification of undeclared work. Required improvement of labour inspectors' qualifications can be obtained *inter alia* through exchange and training programmes and by enhancing cooperation between labour inspection authorities under the Committee of Senior Labour Inspectors.[31]

It would also be helpful to improve EU cross-border labour market control instruments, including improving the enforcement of penalties at a cross-border level.[32] National labour inspectorates should play a key role in counteracting *letterbox companies*,

29 *Resolution of the European Parliament of 14 September 2016 on social dumping in the European Union 2015/2255 INI, item 4.*

30 *Ibidem,* item 5.

31 *Opinion of the European Economic and Social Committee of 11 December 2014 on the communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a EU strategic framework on health and safety at work 2014–2020, SOC 512, items 1.4., 5.1.5.-5.1.6.*

32 *Opinion of the European Economic and Social Committee of 4 April 2016 on fairer labour mobility within the EU 2016/C 264/02, OJ EU 2016 C 264/11, items 1.9. and 4.4.* It seems that Chapter VI of Directive 2014/67/EU concerning cross-border enforcement of financial administrative penalties and/or fines corresponds to this challenge. Competent authorities should have the possibility to impose effective, proportionate and dissuasive sanctions, including also the possibility to suspend the provision of services in the case of a serious breach of the provisions concerning posting of workers and/or the applicable collective agreements.

detecting and counteracting social dumping cases as well as in deterring undeclared work.[33] Greater involvement of the border regions in this process might become one of the solutions contributing to enhancing cooperation of the national labour inspectorates. Improving cross-border cooperation between labour inspection services, exchanging common practices and popularising an electronic exchange of information should not only consolidate the effectiveness of combating social frauds, bogus self-employment and undeclared work, but also help in preventing them.[34]

From a European Social INTERPOL to a European Labour Inspectorate?

In one of its opinions, the European Economic and Social Committee, without defining this notion, or even setting out general assumptions of its activity, proposes to consider establishment of a 'European Social INTERPOL' which could support labour inspectors' from different Member States.[35] When trying to capture the essence of this proposal, one should first define fundamental features of INTERPOL as such. Second, the adequacy of these solutions for the protection of social rights on the internal market should be assessed. INTERPOL is an international criminal police organization assisting law enforcement bodies in fighting against all forms of crime. Its organizational structure consists of a network of National Central Bureaus coordinated by the General Secretariat as an administration and technical body which, in turn, is responsible for their actions before the General Assembly and the Executive Committee.[36]

It seems that special attention should be devoted to the INTERPOL National Central Bureaus' activity because of its 24/7/365 availability of duty officers and therefore quick exchange of information in INTERPOL's official languages. Achieving this type of rapid reaction capability by national labour inspectorates would undoubtedly contrib-

33 *Opinion of the European Economic and Social Committee of 14 May 2009 on the impact of legislative barriers in the Member States on the competitiveness of the EU 2009/C 277/02, OJ EU 2009 C 277/6, item 1.10.*

34 *Resolution of the European Parliament of 14 September 2016 on social dumping in the European Union 2015/2255 INI.*

35 *Opinion of the European Economic and Social Committee of 5 May 2010 on the social dimension of the internal market, 2011/C 44/15, OJ EU 2011 C 44/90, item 1.7.*

36 INTERPOL general structure is provided in Article 5 of its Constitution, whereas the competencies of individual bodies in its consecutive Articles from 6 to 33. *The Constitution of the ICPO-INTERPOL adpoted by the General Assembly at its 25th session, I/CONS/GA/1956 2008*. While at the EU level, the European Union Agency for Law Enforcement Cooperation should be pointed out here, operating under *Regulation EU 2016/794 of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation Europol, OJ EU 2016 L 135/53.*

ute to improve cooperation between them and thereby indirectly increase the control of compliance with workers' social rights in the internal market. Activities of the 'European Social INTERPOL' might include support for enforcing cross-border labour law provisions, and exchanging information and best practices about working conditions and control mechanisms of individual Member States. It should be noticed that some of these mechanisms already exist. The activity of the aforementioned Committee of Senior Labour Inspectors as regards monitoring of exercising the EU cross-border labour legislation at the national level, the activity of the Platform, in exchanging good practices, or the EU agencies, i.e. EUROFUND and EU-OSHA providing an expert base for issues being the object of their activity, can be given as an example.

A question can be raised whether the effectiveness of the initiatives mentioned here would be better, if they were replaced by a new EU institution, e.g. in the form of a European Labour Inspectorate. It could be composed of, e.g. the representatives of Member States having knowledge and experience in carrying out compliance with the labour law provisions, particularly the condition of occupational health and safety, and of the legality of employment. They could exercise their competences under jointly agreed principles of carrying out these types of inspections, thus supervising national labour inspectorates. Considering current division of competences between the EU and Member States in the field of social policy, there is, however, no opportunity of setting up this type of institution. It would involve a supervision of competences over national labour inspectorates which is not actually provided in any of the treaty provisions. It is worth mentioning, that even in its proposal on setting up the 'European Social INTERPOL', the European Economic and Social Committee points out supporting labour inspectors in different Member States. It suggests that its function should be auxiliary, rather than supervisory. The same has to be stated about the supporting character of the proposed European Labour Authority. Taking into account opportunities presented in the White Paper of the European Commission on the Future Europe, a different scenario should however not be completely excluded.[37] Everything depends on an eventual agreement of all Member States on the possibility of changing the division of competences in the field associated with social affairs.

Conclusion

Directive 2018/957 is of unquestioned significance for the cross-border labour mobility of posted workers, providing them with minimum terms and conditions of employment in the host Member State. It also obliges service providers from other Member States to

37 *White Paper on the Future of Europe. Reflections and scenarios for the EU27 by 2015, COM 2017, 2025.*

make suitable declarations related to posting prior to its commencement as well as an obligation to keep the documentation of posted workers in the host Member State, which is simultaneously to ensure the protection of posted workers. Relevant authorities of the host Member State (usually labour inspectors) are to verify compliance with the minimum terms and conditions of employment applied on its territory. This must not lead to unjustified restrictions in the freedom to provide services related to the necessity of dealing with too-far-reaching formalities by employers sending their employees to other Member States. In connection with the insufficient, as it turned out, introduction and enforcement of the provisions regarding the cross-border posting of workers, Directive 2014/67/EU was adopted, which provided a number of measures aimed improving the situation in this field, including enhancing cooperation between labour inspectors of individual Member States.

A number of initiatives and advisory bodies which were undertaken/set up for the aforementioned cooperation (e.g. the European Platform for improving cooperation for tackling undeclared work, the proposed European Labour Authority, Committee of Senior Labour Inspectors, Expert Committee for Posting of Workers, Social Protection Committee or the 'Eurodetachement' initiative) can be pointed out. Generally, they are to guarantee the exchange of knowledge and good practices between national labour inspectorates in the form of collaborative platforms and to contribute to efficiently and effectively inspecting working conditions as well as the enforcement of the obligations resting with employers on this account. Undoubtedly, EUROFUND and EU-OSHA also play an indispensable role as regards experts' analyses concerning working conditions and the level of complying with them in the EU Member States. Due to the division of competences between the EU and Member States, it is assumed that the result of their work takes a form of soft legal acts in the form of guidelines, recommendations or good practice handbooks, and the competences of these bodies are of supporting character to activities of national labour inspectorates.

The conclusion should be drawn that plurality of initiatives and bodies mentioned above requires systematisation. They could be categorised into three task forces. The first one gathers bodies that are to ensure expertise knowledge in order to develop training programmes for labour inspectors and necessary analyses. The second one would include a platform under which this knowledge and these analyses would be disseminated between national labour inspectorates. The third group of bodies would have the task of monitoring the use of data available under the platform as well as supporting the activities undertaken at a national level. Reinforcing the European Commission's work connected with financing mutual learning programmes for labour inspectors in the Member States might turn out to be an additional complement to the effective labour inspection system within the EU.

The initiatives or activities do not exclude the possibility of establishment of an additional institution, e.g., in the form of a European Labour Inspectorate. There are thus different scenarios of the EU development demonstrated, for example, in the White Paper of the European Commission on the Future of Europe. Current division of competences between the EU and Member States in the field of social policy excludes however an opportunity of such a solution which would involve supervising national labour inspectorates. Currently, it should thus have competences only of a supporting character, as is in the case of the proposed European Labour Authority.

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SUMMARY

The Significance of Effective Labour Inspectorates for Cross-border Labour Mobility

Efficiently functioning labour inspectorates play a key role for both fair mobility and the protection of workers' rights. They contribute, for example, to combating and eliminating hazardous working conditions, and ensuring that remuneration and social insurance premiums are actually paid. This is significant in the context of the posting of workers in the framework of the provision of services. Establishing the liability regarding compliance with the occupational health and safety regulations is causing serious practical difficulties. Therefore, it is important above all to identify initiatives undertaken at the EU level designed to enhance cooperation of national labour inspectors in this field. It is also important to carry out an assessment whether they work efficiently, require systematising, or perhaps it is necessary to undertake more formalised initiatives, e.g. in the form of a new EU institution.

Keywords: posting of workers, undeclared work, labour inspectors.

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Interpretation of Art. 54 of the Convention Implementing the Schengen Agreement

Introduction

Article 54 of the Convention implementing the Schengen Agreement (CISA)[1] states that:

> A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party.

Although the *ne bis in idem principle* expressed in this provision has already been the subject of many rulings of the Court of Justice of the European Union[2] it still raises many doubts among academics and practitioners. In the judgments C-129/14 PPU *Spasic*[3] and C-398/12 *M.*[4], the CJEU settled significant issues for the judicial cooperation in criminal matters pertaining to the interpretation of Art. 54 of the CISA.

In the *Spasic* case, the CJEU ruled whether enforcement clause provided for in Article 54 of the CISA contradicts the Charter of Fundamental Rights of the European Union[5], which also states the principle of *ne bis in idem* but does not make its application subject to the condition of execution of the sentence. Second, in the judgment C-398/12

1 Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks and their common borders, 22.09.2000, OJ L 239/19. Hereinafter: CISA.

2 Hereinafter: CJEU.

3 EU:C:2014:586.

4 EU:C:2014:1057.

5 Hereinafter: Charter.

M., the CJEU ruled on several doubts regarding the interpretation and scope of the term "finally disposed" contained in Art. 54 of the CISA. The reasoning of the CJEU in these two cases differs significantly, which might be surprising given the fact that the issuing dates of these two judgments are separated by only a few days.

The principle of *ne bis in idem* is well-established regulation in both domestic and international law[6]. The issue of a prohibition of recurring criminal proceedings in the same case and against the same person has been included in the various instruments of international criminal law, including conventions adopted within the Council of Europe, among which the Conventions of 1970[7] and of 1972[8] deserve special attention. In the European Union[9],the *ne bis in idem* principle was expressed at first in the framework of European Political Cooperation, before the Treaty of Mastricht. entered into force of the, the Member States - then - the European Community, adopted on 27 May 1987 the Convention on double punishment. Due to the lack of enough ratifications, this Convention has never entered into force. However, it turned out to be important for further development of the judicial cooperation in criminal matters. Its provisions were included in Art. 54–58 of the CISA and are currently applicable to the majority of the EU Member States. In addition, the principle is included in the number of instruments based on the principle of mutual recognition and, as already mentioned at the outset, in the Charter.

Enforcement Clause. Spasic Case C-129/14 PPU

In accordance with Art. 50 of the Charter: "No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law".

In the Charter, therefore, the prohibition of re-judging is not dependent on the condition envisaged in the CISA, i.e. that "the penalty has been imposed, it has been enforced, is actually in the process of being enforced". When trying to explain the differences in the burden of these provisions, it should be noted that the CISA, signed in 1985, was primarily aimed at abolishing checks at common borders, including the abolition of checks in relation to the movement of persons and not fostering judicial cooperation in criminal matters. At that time, the idea of a common area of justice, was not yet expressed in the treaties. The CISA was incorporated into the EU legal order under the Treaty of Amsterdam. Article 54 of the CISA has for the first time successfully in-

6 With regard to the definition of the principle see: A. Sakowicz, *Zasada ne bis in idem w prawie karnym w ujęciu paneuropejskim*, Białystok 2011.

7 European Convention on the International Validity of Criminal Judgments.

8 European Convention on the Transfer of Proceedings in Criminal Matters.

9 Hereinafter: EU.

troduced the principle of the prohibition of double punishment, which is applicable in a situation involving criminal proceedings in the two states. Other regulations narrowed the scope of the *ne bis in idem* principle to domestic matters only. An example of such a regulation is contained in the Protocol to the European Convention on Human Rights of 22 November 1984.[10]

Against the background of the numerous judgments of the CJEU regarding the principle of *ne bis in idem*[11], it could be foreseen that it is only a matter of time when the CJEU will decide on the mutual relationship between the provisions of the CISA and the Charter. Ultimately, this was the subject matter of a request for a preliminary ruling from the German court in the case C-129/14 Zoran Spasic. Since the accused was in custody, the case was dealt with in the urgent preliminary ruling procedure[12]. The CJEU issued the verdict quickly, even though the case concerned a very complicated matter. Perhaps the pressure of time influenced somehow the analysis made by the Court and its argumentation, which is not fully convincing in this matter.

Z. Spasic, a citizen of Serbia[13], was accused of fraud committed to the detriment of a German citizen. The offense was committed in Milan in 2009. Based on a verdict issued in Italy, Z. Spasic was sentenced to one year's imprisonment and a fine of 800 euros. At that time, Z. Spasic was in Austria, where he had served a prison sentence for another offense. For these reasons he paid a fine but was not able to serve the imprisonment sentence for the fraud committed in Italy. Since the crime in Milan was committed against a German citizen, the criminal proceedings were also initiated simultaneously by the German authorities. Under the European arrest warrant issued by the German authorities, Austria transferred Z. Spasic to Germany. As a result, he was in Germany waiting for a trial whose object was a crime for which Z. Spasic had already been convicted in Italy.

In the course of the trial in Germany, the accused referred to the *ne bis in idem* principle expressed in Art. 50 of the Charter demanding the discontinuance of proceedings. Due to the mentioned differences in the concept of the *ne bis in idem* principle in various legal instruments, the Higher Regional Court in Nuremberg referred the question for a preliminary ruling to the CJEU, which was intended to clarify the following issue:

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10 Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms.

11 Eg.: C-187/01 and C-385/01, Gözütok and Brügge, EU:C:2003:87; C-469/03, Miraglia, EU:C:2005:156; C-436/04, Van Esebroeck, EU:C:2006:165; C-467/04, Gasparini and others, EU:C:2006:610; C-150/05, van Straaten, EU:C:2006:614; C-288/05, Kretzinger, EU:C:2007:441; C-367/05, Kraaijenbrink, EU:C:2007:444; C-297/07, Bourquain, EU:C:2008:708; C-491/07, Turansky, EU:C:2008:768.

12 Hereinafter: PPU.

13 Article 54 of the CISA applies to third-country nationals; Cf. for example, Judgment of the CJEU in joined Cases C-187/01 and C-385/01, Gözütok and Brügge, § 9.

"Is Article 54 CISA compatible with Article 50 of the Charter, in so far as it subjects the application of the *ne bis in idem* principle to the condition that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing State?"

The court found that the "enforcement clause" is compatible with the Charter. The CJEU came to this conclusion after analysing the provision of Art. 52(1) of the Charter, which sets the rules for admissibility of restrictions of rights and freedoms. This provision provides that all such limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. The CJEU pointed out that enforcement clause is to be seen in that context since it is intended to prevent, in the Area of Freedom, Security and Justice, the impunity of persons definitively convicted and sentenced in the EU Member State.[14] According to the CJEU, it cannot be contested that the execution condition laid down in Article 54 of the CISA is appropriate. By allowing, in cases of non-execution of the sentence imposed, the authorities of one Member State to prosecute a person definitively convicted and sentenced by another Member State on the basis of the same acts, the risk that the person concerned would enjoy impunity by virtue of his leaving the territory of the State in which he was sentenced is avoided.[15] The CJEU did not agree with the arguments presented, among others by the European Commission, that the numerous instruments of secondary law based on the principle of mutual recognition at least in a large number of cases can eliminate the risk of impunity. Such instruments – in opinion of the CJEU – are not capable of fully achieving the objective pursued since the existing instruments provided for in the Framework Decisions and the Directives are not perfect enough to guarantee the avoiding of impunity in case where the person concerned would leave the territory of the State in which he was sentenced. In this context – according to the CJEU – the obligation to take direct consultations between Member States on any effective solution aimed at avoiding the negative consequences of parallel proceedings, provided in framework decision on preventing the conflicts of jurisdiction[16] is also insufficient. With regard to the obligation of mutual support envisaged in Article 4(3)[17] of the Treaty on the European Union, the CJEU stated that one *cannot exclude* that the Member States can contact each other and initiate consultations in order to verify whether the Member State which imposed

14 Judgment of the CJEU in Case C-129/14 PPU, § 63.

15 Judgment of the CJEU in the Case C-129/14 PPU, § 64.

16 Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings OJ L 328, 15.12.2009.

17 In accordance with art. 4 (3) of the Treaty on the European Union: "Pursuant to the principle of sincere cooperation, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties".

the first sentence really intends to execute the penalties imposed.[18] In the opinion of the CJEU, however, it does not change the fact that the enforcement condition provided for in the CISA is necessary and proportionate and therefore justified in the light of the provision of Article 52 (1) of the Charter.

View of Advocate General Jääskinen

Advocate General[19] N. Jääskinen assessed the case differently. In his view[20], the emergence of a more effective system of cooperation in criminal law matters cannot in itself affect the interpretation of the enforcement clause laid down in Article 54 CISA, however, that development must have some bearing on assessment of its compatibility with Article 50 of the Charter. In the opinion of the AG it is questionable whether the enforcement clause in CISA is "still needed in an Area of Freedom, Security and Justice, where cross-border enforcement now takes place through the mutual recognition instruments"[21].

In the view, the AG compares the provisions of the Charter to Art. 4 of Protocol 7 to the European Convention on Human Rights[22], which also establishes the *ne bis in idem principle*. The AG rightly points out that the wording of the provisions is identical, with the difference that application of Art. 4 of Protocol 7 of ECTHR is limited to domestic issues only. As an exception to the principle *ne bis in idem* Art. 4 par. 2 of Protocol 7 to the ECHR allows reopening of the case in accordance with the law and penal procedure of the State concerned if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case. Although Protocol 7 to the ECTHR has not been ratified by all the European Union Member States, the AG believes that there is no doubt that Art. 50 of the Charter should be interpreted in accordance with the provisions of the ECTHR and the relevant case law of the European Court of Human Rights[23].[24] This opinion is supported also by the position of the CJEU reflected in the case C617/10 Åkerberg

18 Judgment of the CJEU in the case C-129/14 PPU, § 63.

19 Hereinafter: ECTHR.

20 View of AG Jääskinen in the case C-129/14 PPU.

21 *Ibidem*, § 52.

22 Hereinafter: AG.

23 Hereinafter: ECHR.

24 AG claims that the fact that some Member States have not ratified Protocol No 7 cannot have any bearing on the interpretation of Article 50 of the Charter, since it does not change the scope of that provision. To conclude otherwise would be tantamount to granting the Member States a unilateral power of interpretation as regards the substance of the European Union's system of fundamental rights. In view of the principle of the autonomy of EU law, in conjunction with the CJEU's task of ensuring its uniform interpretation, such a conclusion must be excluded.

Fransson.[25] The analysis of the provisions of both the Charter and the CISA in the light of the ECTHR leads the AG to the following conclusion: 'It is undisputed that the execution condition (enforcement clause) laid down in Article 54 of the CISA makes the application of the *ne bis in idem* principle subject to additional conditions which are not present in Article 50 of the Charter and which do not correspond to the derogations allowed under Article 4(2) of Protocol 7'.[26] In other words, the enforcement clause is a derogation which does not coincide with the exceptions provided for in Protocol 7 to the ECTHR. In the most important part of the view, the AG points out that the European Union law now offers legal instruments that allow the Member States to enforce criminal sanctions in cases where the convicted person is in another Member State, as well as the exchange of relevant information to avoid impunity.[27]

The AG also notes that a number of secondary legislation in the field of cooperation in criminal matters refers to the *ne bis in idem* principle, which is not subject to a condition of enforcement of penalty.[28] For these reasons, in the opinion of the AG, systematically subjecting persons who have already been finally convicted and sentenced in one Member State to a risk of further prosecution in another Member State exceeds the limits of what is appropriate and necessary *for the purpose of attaining the objective pursued*.[29] The AG also pointed to the fact that the Member States are obliged not only to interpret, but also to apply the secondary legislation (and thus also the CISA) in accordance with fundamental rights. That obligation may entail a duty not to apply the given instrument (its provisions).[30] In the final part of the view, the AG concludes that for all the above reasons, the enforcement condition of the CISA in the general application does not meet the proportionality test.

In the AG's opinion, only in three cases the application of the enforcement clause must be considered necessary: the first exception concerns situations that fall within the scope of Article 4(2) of Protocol No 7, as interpreted by the European Court of Human Rights (cases where reopening of the case is allowed). The second exception concerns the perpetrators of crimes which the Member States are required to punish under general rules of international law, such as crimes against humanity, genocide and

25 EU: C:2013:280.

26 View of AG Jääskinen in the Case C-129/14 PPU, § 63.

27 Eg. Framework decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union or Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings.

28 View of AG Jääskinen in the Case C-129/14 PPU, § 93–100.

29 *Ibidem*, § 101.

30 In this regard, the AG refers to the judgment of the CJEU of 21.12.2011 in the Joined Cases C-411/10 and 493/10 N.S. and others - EU:C:2011:865.

war crimes. The third situation pertains to the event of a lasting obstacle to cooperation as regards the execution of judgments; such an obstacle must exist despite the application of the less intrusive instruments available to the Member States.

Assessment of the Ruling of the CJEU in Spasic case

It is worth pointing out that the analysis of the enforcement clause contained in Art. 54 of the CISA was already carried out by the CJEU in the judgment of 18 July 2007 (*Kretzinger case*).[31] In both judgments, i.e. Spasic and Kretzinger, the CJEU has indicated that the purpose of the enforcement clause is to avoid a situation in which a person whose trial has been finally disposed of in the first State can no longer be prosecuted for the same acts and therefore ultimately remains unpunished if the State in which the sentence had first been passed did not enforce the sentence imposed.[32]

It is doubtful if there was a real risk of impunity in the Spasic case. The CJEU analyzes the risk of impunity in the event the perpetrator leaves the territory of the convicting state before the sentence is enforced. In the discussed case, however, it seems that such a risk did not exist.

Z. Spasic was under arrest in Austria. There were no circumstances indicating that the Italian authorities would not take necessary actions in due time to enforce the previously imposed penalty. Secondly, the CJEU categorically accepted that continuing prosecution in the same case in another state would automatically allow avoiding the risk of impunity. However, the mere fact of continuing the prosecution or opening separate proceedings in another Member State does not guarantee that the punishment will be enforced. While it may be argued that parallel proceedings will limit such a risk, there may still be certain circumstances (in the Member State that is taking the case for the second time), which cause that the punishment will never be imposed. The CJEU's argument on the relationship between the enforcement clause and the avoidance of penalty cannot be accepted uncritically, although prima *facie it* may seem persuasive. One cannot exclude that the second proceedings will end with the discontinuation of the proceedings or with the acquittal[33]. In that case, the conflicting decisions of national courts would create additional difficulties in the judicial cooperation in criminal matters. This would certainly have a negative impact on the level of mutual trust between Member States. The inevitability of punishment is not the only important aspect in the Area of Freedom, Security and Justice. The second proceedings cause to offender - a additional costs and negative mental experiences

31 EU:C:2007:441.

32 Judgment of the CJEU in Case C288/05, § 51.

33 Cf. M. Wasmeier, *Ne bis in idem and the enforcement condition. Balancing Freedom, Security and Justice?* "New Journal of European Criminal Law" 2014, no. 4.

associated with the uncertainty of his situation. The CJEU's reasoning focuses entirely on the need to avoid impunity and omits other important aspects such as legal certainty. Also, the remaining arguments of the CJEU regarding the interpretation of the enforcement condition in the context of Art. 52(1) of the Character are not completely accurate. In the opinion of the CJEU, due to the fact that the existing instruments of mutual assistance are not conditional on fulfilling the condition analogous to the enforcement condition, they cannot ensure that the set objective (i.e. avoidance of impunity) is fully achieved. Unfortunately, the CJEU did not consider the more balanced position (supported by the European Commission), which implies the obligation to use all available instruments of cooperation in the EU before initiating the second criminal proceedings against the same person. This position assumes that a possible re-initiation of criminal proceedings would be possible only if all available forms of cooperation have failed. M. Wasmeier has rightly observed that the analysis of the existing cooperation instruments made by the CJEU was not complete[34]. For example, there was no reference to the coordination and mediation provided by Eurojust, which in this case was not only an option but an obligation of the judicial authorities. According to the framework decision on the prevention of conflicts of jurisdiction[35] the competent authorities of the Member States are required to enter into direct consultations with a view to reaching an agreement on an effective solution that will allow avoiding negative effects of parallel proceedings. This obligation may also be interpreted from Article 57 of the CISA[36].

> The considerations of the CJEU in the *Spasic* case are not profound. The ruling was issued without the careful examination of all aspects and consequences of application of the enforcement condition.

Final Disposal of the Judgment

Surprisingly, in other judgments referring to the interpretation of the provision of Art. 54 of the CISA, the CJEU presented a different course of reasoning. In the judgment of joined Cases C-187/01 and C-385/01 - H. Gözütok and K. Brügge[37], the CJEU

34 *Ibidem,* p. 542.

35 Council Framework Decision 2009/948/JHA of 30 November 2009.

36 In accordance with art. 57 of the CISA: 'Where a Contracting Party charges a person with an offence and the competent authorities of that Contracting Party have reason to believe that the charge relates to the same acts as those in respect of which the person's trial has been finally disposed of in another Contracting Party, those authorities shall, if they deem it necessary, request the relevant information from the competent authorities of the Contracting Party in whose territory judgment has already been delivered'.

37 EU:C: 2003:87.

emphasized the freedom and justice aspects, whereas concerns of impunity seemed to receive not as much attention[38]. The CJEU emphasized that the purpose of Art. 54 of the CISA is to ensure the exercise of the right to free movement in the Schengen Area and that the *ne bis in idem* principle enshrined in Article 54 of the CISA implies that the Member States have mutual trust in their criminal justice systems and that each of them recognises the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied[39]. Likewise in the case C-150/05 *Van Straaten*[40], when answering the question whether the principle *ne bis in idem* applies to judgments, as a result of which the accused is acquitted due to lack of sufficient evidence, the CJEU stated that 'in the case of a final acquittal for lack of evidence, the bringing of criminal proceedings in another Contracting State for the same acts would undermine the principles of legal certainty and of the protection of legitimate expectations'.[41] The interpretation given by the CJEU in these judgments supports the protective nature of the regulation of Art. 54 of the CISA. While interpreting this provision, the CJEU seemed to emphasize that it is intended to counteract the unlimited and unjustified right of punishment (*ius puniendi*) of the Member States in the area of freedom, security and justice.[42] The above-mentioned rulings were issued in 2006 and 2013.

Has the CJEU therefore changed its position regarding Art. 54 of the CISA since then and it has lost faith in the means of mutual recognition? Against such argumentation speaks reasoning presented in the case C-398/12 M.[43]). This case also concerned the interpretation of Art. 54 of the CISA.

In relation to M., an Italian citizen living in Belgium, criminal proceedings were conducted due to allegations on crimes committed against sexual freedom of a minor. As a result of preparatory proceedings, in the course of which various evidences had been collected and examined, the court of first instance (the court supervising the preparatory proceedings) discontinued the proceedings and did not refer the case to the court ruling on criminal liability due to insufficient evidence. This decision was also upheld by the higher court after the appeal. At the same time, criminal proceedings in a case involving the same acts were initiated in Italy. In this case M. referred to the *ne bis in idem* principle, indicating that the proceedings for the same acts had already been validly concluded in Belgium. In consequence, there was doubt if a final judgment that terminates criminal proceedings after an investigation, but which permits the proceedings to be reopened in

38 Cf. B. Nita – Światłowska, *Prawomocność orzeczenia jako element wyznaczający zakres zasady ne bis in idem w art. 54 Konwencji z Schengen*, „Europejski Przegląd Sądowy"2014, no.5, p.30.

39 Judgment of the CJEU in Case C-187/01 and C-385/01, §33.

40 EU:C: 2006:614.

41 Judgment of the CJEU in Case C-150/05, § 59.

42 M. Wasmeier, *The principle of ne bis in idem*, "Revue Internationale de Droit Penal" 2006, no. 1–2, pp. 121–130.

43 EU:C: 2014:1057.

the light of new evidence, preclude the initiation or conduct of proceedings in respect of the same facts and the same person in another Member States. The CJEU answered the question in the affirmative. Its arguments resemble those which were previously presented in the cases of Gözütok/Brügge and Van Straaten presented above.

In the first place, the CJEU recalled that in order to determine if a judicial decision constitutes a 'final' judgment[44] in the meaning of Art 54 of the CISA, it must be ensured that that decision was issued following the assessment of the merits of the case.[45] The aptness of that interpretation of Article 54 of the CISA is borne out by the fact that it is the only interpretation to give precedence to the object and purpose of the provision rather than to procedural or purely formal matters. In the M. case the decision on discontinuance of proceedings was made at the end of an investigation during which various items of evidence were collected and examined. Therefore, in the opinion of the court, the decision met the condition of assessment of the merits of the case.

In a further part of the judgment, the CJEU stated that the possibility of reopening the criminal investigation if new facts and/or evidence become available, cannot affect the final nature of the order of the national court.[46] In this regard, the CJEU indicated that Art. 54 of the CISA should be interpreted in the light of Art. 50 of the Charter and as a consequence[47] also in the light of Art. 4(2) Protocol No. 7 to the ECHR. These provisions provide that the principle *ne bis in idem* does not preclude the possibility of resuming the proceedings if there is evidence of new or newly discovered facts. It his respect, it was held in the judgment of the ECHR in *Sergey Zolutukhin v. Russia*,[48] that Article 4 of Protocol No 7 to the ECHR 'becomes relevant on commencement of a new prosecution, where a prior acquittal or conviction has already acquired the force of *res judicata*.' On the other hand, extraordinary remedies are not taken into account for the purposes of determining whether the proceedings have reached a final conclusion.

Moreover, the CJEU stressed that 'in view of the need to verify that the evidence relied on to justify the reopening of the proceedings is indeed new, any new proceedings, based on such a possibility of reopening, against the same person for the same acts can be brought only in the Contracting State in which that order was made'.[49] In con-

44 With regard to the condition of 'final disposal' of the case see also: B. Nita – Światłowska, *Prawomocność orzeczenia…, op.cit. ;*B. Nita, *Artykuł 54 konwencji wykonawczej z Schengen* w wyrokach Europejskiego Trybunału Sprawiedliwości z 28 września 2006 r.: C-467/04, postępowanie karne przeciwko Giuseppe Francesco *Gasparini* i innym oraz C-150/05, Jean Leon Van *Straaten przeciwko Niderlandom i Republice Włoskiej*, „Europejski Przegląd Sądowy" 2007, no. 9, pp. 44–52; A. Sołtysińska, *Zasada ne bis in idem* z art. 54 *konwencji wykonawczej z Schengen,* „Europejski Przegląd Sądowy" 2007, no. 12.

45 Judgment of the CJEU in the Case C469/03 - Filomeno Mario Miraglia; EU:C:2005:156.

46 Judgment of the CJEU in Case C469/03, § 40.

47 Cf. Judgment of the CJEU in the Case C617/10.

48 *Sergey Zolutukhin v. Russia*, no. 14939/03, § 83, ECHR 2009.

49 Judgment of the CJEU in the Case C398/12, § 40.

clusion, the CJEU held that order finding that there is no ground to refer a case to a trial court which precludes, the bringing of new criminal proceedings in respect of the same acts against the person to whom that finding applies, unless new facts and/or evidence against that person come to light, must be considered to be a final judgment, for the purposes of the Article 54 of the CISA.

In this case, the CJEU in its reasoning did not refer to arguments related to broadly understood security or impunity, although the subject matter of the case at first glance seemed at least as sensitive as in the case of Spasic. It also stressed the impact of the Charter on the interpretation of rules set in the CISA.

Conclusions

Regarding the Spasic case, it is difficult to see the need for additional criminal proceedings in the absence of a real threat that the penalty will not be enforced. It is regrettable that the CJEU has not thoroughly analysed all the existing advanced possibilities of judicial cooperation in criminal matters in the EU, which allow minimizing the risk of impunity to the extreme and rare cases. The consequences for the accused related to parallel proceedings are severe. In this context, the position of the AG, according to which the initiation of another criminal case in another Member State is possible only in three exceptional cases, is more convincing and balanced. Permission granted by the CJEU to unlimited application of the enforcement clause with omission of the secondary law instruments and wording of Art. 50 of the Charter is an extreme position. It may also be surprising that in the Spasic case, the CJEU as the only criterion accepted the necessity of preventing impunity without considering other important aspects including legal certainty.

The reasoning in the Spasic case is in contradiction with the judgment in the M. case, issued just a few days later. In the latter, the CJEU underlined that a Member State must comply with a final decision that has already been passed in another Member State, even when the outcome of the case would be different if its own national law were applied.

The ruling of the CJEU in the M. case seems to share the arguments of the previous judgments in the Gözütok/Brügge cases, where the primacy was given to the freedom of movement and legal certainty. Differences in the adopted legal hierarchy and the way in which decisions in the Spasic and M. cases are justified might be surprising given that the judgments were issued in the same period. Such a contradict ruling is detrimental for the creation of the European Union's Area of Freedom, Security and Justice.

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SUMMARY

Interpretation of Art. 54 of the Convention Implementing the Schengen Agreement

The paper discusses the problem of the *ne bis in idem* principle stipulated in the Convention Implementing the Schengen Agreement (CISA) and the Charter of Fundamental Rights of the European Union. Article 54 of the CISA makes the application of the principle *ne bis in idem* subject to the condition of execution of the penalty. An analogous condition is not provided for in the Charter. These differences caused doubts regarding the application of the *ne bis in idem* principle and were subject of the question for preliminary ruling in the *Spasic* case (C-129/14 PPU). The paper contains a critical review of the reasoning of the Court of Justice of the European Union in this judgment. In addition, the article also contains an analysis of the CJEU's decision in Case C-398/12 M. in which the CJEU has analysed the meaning of "final disposal" of the judgment in the

context of the *ne bis in idem* principle. Based on the above judgments, the article presents arguments indicating that the reasoning of the CJEU on the conditions for the application of the *ne bis in idem principle* in judicial cooperation in criminal matters in the EU is not consistent.

Keywords: European criminal law; Area of Freedom; Security and Justice; ne bis in idem principle; mutual trust; mutual recognition.

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Spectators` "Blacklists" and Recovery of Damages by Football Clubs from Spectators for the Violation of Rules of Conduct: A Russian Experience

Introduction

Is the refusal to sell a football ticket to a certain person lawful? Is it possible to use the so-called "black lists" that are conducted by football clubs in relation to offenders at a sporting competition, regardless of whether the supporter was brought to administrative responsibility under Art. 20.31 of the Code of the Russian Federation on Administrative Offenses (hereinafter referred to as the Code of Administrative Offenses) or not? The urgency of this issue is caused, among other things, by the latest initiatives of Russian football clubs. There was news that FC Krasnodar had limited access to home games for six supporters due to a fight.[1] However, the unified and legalised way of regulating this issue at the level of the Russian Football Union (hereinafter referred to as RFU) or the Russian Premier League (hereinafter referred to as RPL) is not currently represented. Therefore, we are analysing the possibility of applying these measures to persons who violate the Rules of Conduct for spectators during football matches [2] (hereinafter referred to as the Rules of Conduct) by a football club, given that there are a number of problems with the identification of supporters, as well as with access to spectators` personal data. In addition, an important aspect when considering this issue is the legitimacy of establishing the proposed restrictions with respect to civil law, since the sale of football tickets services contract Art. 779 Civil Code of the Russian Federation (hereinafter referred to as the Civil Code), which has a public nature (Art. 426 Civil Code).

Thus, according to Art. 779 Civil Code, the contractor undertakes to provide the service, and the customer , to pay for it. The subject matter of the contract when buying football tickets is a direct opportunity to watch a football match from the places specified

1 Krasnodar FC supporters were banned for a year to attend home games after a fight with the supporters Anzhi FC, <https://www.sports.ru/football/1050866272.html>.

2 The Act of the Russian Government on 16.12.2013 No. 1156 "Rules of conduct for supporters at official sports competitions".

in the ticket. Then, it is necessary to define the concept of "ticket sales", which is contained in the Russian Statute, "On The Preparation for and Observance in the Russian Federation, the FIFA World Cup 2018 Year FIFA Confederations Cup 2017 Year and Amendments to Certain Statutes of the Russian Federation": "The realization means sale, resale, distribution, dissemination, exchange, and use of associated or not associated with profit-making". Thus, by declaring the refusal to sell a football ticket, as well as the ban on visiting matches, the football club refuses to conclude a public contract. The issue of rejection of a public contract is quite an important aspect in civil law since the very construction of a public contract implies the fulfillment of obligations in respect of everyone who applies for the service. It should be noted that the lawful rejection of a public contract is provided by Art. 426 (3) Civil Code and implies the actual impossibility of execution of such a contract. The rejection may also be due to circumstances beyond the control of the parties that led to this result. That, is evidenced by the case of the Izmailovo regional court[3], in which the claimant was unable to get to the football match due to the fact that he had been denied in obtaining a visa. Referring to circumstances beyond the control of the parties, as well as Art. 781 (3) Civil Code, the court did not satisfy the claim, since there were no sufficient grounds for imposing liability on the defendant due to the absence of guilt. On the other hand, in the case related to the refusal to execute a public contract, considered by the Regional Court Primorsky (Saint Petersburg) [4], the plaintiff's claims were satisfied, since there was evidence of deliberate non-provision of tourist services.

As a general rule and in accordance with Art. 426 (2) Civil Code, the preference to any person, as well as unjustified refusal is not allowed. However, one should not forget about local acts of sports organisations, which can regulate the order of sports activities and internal relations in such organisations. So, at the sports stadium, there are rules of conduct governing security, ticket sales and passes to sports facilities. According to para. 17 of the Rules of Conduct [5], organisers of official sports competitions are entitled to set additional requirements regarding the spectators' conduct during official sports competitions. However, as we see it, this is an opportunity to directly complement only the rules of the supporters' conduct, but not to individualise ticket sales and the provision of related services. These issues are in the sphere of civil law regulation; the establishment of such prohibitions may lead to the conflict-of-law *situation*.

3 The Decision of Izmailovo Regional Court.

4 The Decision of the Regional Court Primorsky of St. Petersburg Saint Petersburg on 4.08.2010 in case No. 2–3012/10.

5 Act of the Russian Government on 16.12.2013 No. 1156 "Rules of conduct for supporters at official sports competitions".

Spectators` "Blacklists"

During the establishment of bans on selling football tickets by a sports organisation (football club), several problems may arise. First, the formation of "blacklists" implies the identification of the spectator purchasing the ticket. However, according to para. 21.9 of the Regulations of the Russian Premier League, season 2018–2019, it is not required to present an identity document when buying a ticket for a football match of the Russian Premier League[6]: "the organizer of the Match at active support sectors (and / or on any other sectors of the Stadium) is obliged to ensure phased input viewer identification on identity documents when selling and/or controlling tickets, passes or invitations using a PL spectator identification system, having held at least three test matches in the 2018–2019 season". Thus, the clubs participating in the Premier League are obliged to identify spectators only in active support sectors during at least three matches. In other matches, the identification of viewers on identity documents, even at active support sectors, is not a compulsory procedure for clubs. Therefore, it is difficult for football clubs to identify supporters who are on the "blacklist", given that they have no right to demand a passport when selling a ticket. For example, according to para. 2.1 and 2.2 of the Rules of Season Ticket and Ticket Sales to the Matches of FC ZENIT[7], tickets to the club`s home matches are sold without an identity card, while tickets to the away matches of the main team are sold only if identity card is presented. However, a necessary ground for the refusal to sell a ticket is the presence of a court decision on an administrative offense case confirming the violation of the Rules of Conduct, as well as the imposition of a sanction in the form of a ban on visiting official sports competitions (Art. 20.31 Code of Administrative Offenses).

Para. 2.1 of the Rules of Season Ticket and Ticket Sales to the Matches of FC ZENIT determines that "tickets for FC ZENIT home matches are sold without presenting an identity card", and para. 2.2 requires the supporter to present an identity document for purchasing tickets to away matches of the main team of FC ZENIT.[8] The procedure used to purchase tickets for away matches undoubtedly alleviates the problem of identifying viewers when committing offenses, and helps to identify the fan-offenders when they buy a ticket for a football match.

Based on the above, it can be concluded that the use of a ban on visiting matches ("blacklists") as a way of influencing supporters' illegal behaviour has a narrow application, as one of the sanctions imposed by Art. 20.31 Code of Administrative Offenses: "Violation of spectator behaviour rules during official sports competitions". Thus, the

6 The Regulations of Russian Premier League, season 2018–2019, <https://premierliga.ru/netcat_files/86/58/Reglament_RPL_2018_2019.pdf>.

7 The Rules of Season Ticket and Ticket Sales to the Matches of FC ZENIT, <http://tickets.fc-zenit.ru/info/tickets/football/rules>.

8 *Ibidem*.

ban can be implemented only through a court decision on an administrative offense case, limiting the audience`s right to attend all official sporting events, not just the matches of a specific football club for a specified period. According to Art. 20.31 Code of Administrative Offenses, the maximum term of the ban is 7 years. However, as can be seen from the overview of law enforcement practice, this sanction is additional to the main punishment and, if not related to gross violation of the rules of spectator behaviour during official sports competitions, on average, is 6 months.[9] An exception is an offence prescribed in Art. 20.31 (3) Code of Administrative Offenses, the sanctions for which were tightened due to the introduction of the composition of "gross violation of the rules of spectators' conduct during official sports competitions". Thus, judicial practice demonstrates that for a gross violation of the rules of conduct, the period of a ban on visiting official sports competitions is 5 years or more.[10]

In addition, para. 16 (c) of the Rules of Ensuring Security during Official Sporting Events[11] gives the organisers binding powers, including non-admission offenders to competition venues in respect of whom the court order for administrative prohibition has come into force. Based on this, the organisers have the right to refuse to implement the service, despite the fact that a viewer has a ticket or a pass, referring to a court decision.[12] At the same time, there is also a question of control by the organiser: how to identify the offender when purchasing a ticket to the club`s home games if there is no requirement to present an identity document? Moreover, anyone can purchase more than one ticket to home games[13] and give them away to persons for whom a court order for administrative prohibition has come into force. As for the refusal without such a ground as an administrative prohibition, then the legality of the actions of the football match organiser raises questions. In addition, para. 19 of the Rules of ensuring security during official sporting imposes several responsibilities on the organisers of the competition, including establishing access control and intra-object regimes in the venues during

9 The Decision of the 5th Judicial District of the Novosibirsk Judicial District in case No. 5–410–2015; The decision of the Judicial District of the Kirovsky Judicial District on 15.10.2014 in case No. 5–385/2014; The decision of the Kolpinsky District Court of St. Petersburg on 04.25.2017 in case No. 5–129/2017; The decision of the Petrograd district court of St. Petersburg on 06.21.2017 in case No. 5–363/17.

10 The decision of the Central District Court of the City of Tula on 21.05.2017 in case No. 5–193/2017.

11 Act of the Russian Government on 18.04.2014 No. 353 "On Approval of the Rules for Ensuring Safety during Official Sports Competitions".

12 In addition, this will be consistent with Art. 426 (3) of the Civil Code of the Russian Federation, according to which the refusal to execute a public contract will be legal with a justified evasion of a person to execute it.

13 For example, para. 2.1 of the Rules of Season Ticket and Ticket Sales to the Matches of FC ZENIT: one spectator can purchase up to 5 tickets to home games of the club without identification.

the competitions, as well as controlling the presence of entrance tickets for viewers. A strict reading of this provision stipulates that the only reason for the refusal of a pass to a football match is the lack of an admission ticket. There are no other formal grounds in the process of access control for the denial of admission to a sporting event.

What is the reason for the freedom that determines the decisions of football clubs and football associations to use the "blacklist" of supporters? Often, this is due to the specifics of the formation of football clubs and associations and their activities.[14] For example, in England, clubs operating based on a statute are granted considerable freedom regarding their internal organisation. Such statutes govern those matters that are not covered by legislation and common law. The football club, along with the national association, has a similar structure, but unlike the latter, it is formed as a joint stock company. It should be noted that since England belongs to the common law countries, the powers of sports organisations are quite large, given that they are limited by general principles established by law. For example, the actions of associations are recognised as illegal only in the absence of insignificant circumstances (in fact, when it is impossible to establish the low significance of violation).[15] In addition, the most important principle of common law is the requirement of compliance with the principle of proportionality, which sports organisations, including football clubs and associations, must adhere to.[16] And in general, if one pays attention to FIFA and UEFA as associations created in Swiss jurisdiction, their status reasonably causes a wide discretion both in establishing regulatory standards and holding accountable their members: national associations, clubs, and football players. This position has been formulated and consistently confirmed by the Court of Arbitration for Sport (CAS).[17] National associations, which are members of FIFA and UEFA, but registered as legal entities in other states, have a different status; they are subject to the rules of other legal orders. Therefore, the regulation of FIFA and UEFA that does not interfere with the prosecution of supporters with the use of bans on visiting matches is applied until it is regulated by the national law of a particular state, in whose jurisdiction a club is registered and a specific sporting event is held.

Accordingly, we can make a conclusion about the limits of the use of football clubs` sanctions in relation to their fans: the possibility of applying the ban on visiting matches of a certain club is based on the freedom of activities of such organisations, taking into account the general principles of law, but within the established rules, including national legal order. A certain autonomy of the football club as a legal entity is also present within the framework of the civil law of the Russian Federation, which provides for disposi-

14 R. van Kleef, *The legal status of disciplinary regulations in sport*, "The International Sports Law Journal" 2014, Vol. 14, Issue 1–2, pp. 24–45.

15 Bradley v Jockey Club 2004 EWHC Civ 2164 QB, para 43.

16 Enderby Town Football Club Ltd v The Football Association Ltd 1971, 1 Ch. 591.

17 CAS 98/208 N, J, Y, W v. FINA; CAS 2005/C/976&986 FIFA & WADA.

tive nature of civil relations. So, according to Art. 1 Civil Code, citizens (individuals) and legal entities acquire and exercise civil rights on their own will and in their interest. They are free to establish their rights and obligations based on a contract and to determine any conditions of the contract that do not contradict the law.

An obstacle in the implementation of the ban for fans to attend matches is, as mentioned earlier, the construction of a public contract. In such a situation, the club clearly goes beyond the limits established by the legislator, which is unacceptable from the perspective of any legal order, regardless of the particular state.

It should be noted that there is a significant difference between the structures of public contracts in the Russian Federation and in foreign countries. Both are aimed directly at protecting a weaker party in legal relations, but in foreign countries there is emphasis on the terms of the contract. In the Russian Federation consumer rights are protected by the Federal Law on Protection of Consumer Rights[18], which stipulates the terms of contracts, rights and obligations of consumers and manufacturers, as well as the procedure for protecting consumers' rights in case of a violation of their duties by the performing party. The construction of the public contract has a clear statement about the provision of services in respect of everyone who applies for the service or goods. In this regard, in foreign countries, the ban on the sale of football tickets to a person who applied for such a service may be considered unfair or not meeting the general principles of consumer protection. However, such a decision will be ambiguous from the perspective of judicial review because of a specified wording of the "compulsory contract" and self-regulation that has become firmly established in the foreign legal order - the breadth of lawmaking of national football associations and clubs.

Recovery of Damages by Football Clubs from Spectators for the Violation of Rules of Conduct

One of the manifestations of the football clubs' self-regulation to counteract supporters' illegal behaviour is the possibility of bringing civil suits against persons who violate the rules of spectator behaviour.

In Russia, football clubs are held accountable under disciplinary rules for the supporter behaviour irrespective of fault.[19] The clubs themselves lack the means to deal with the illegal behaviour of fans. It makes it difficult to increase the efficiency of organizing sporting

18 The Statute of the Russian Federation No. 2300–1 of February 7, 1992 "On Consumer Rights Protection".

19 The Disciplinary Regulations of the Russian Football Union.

events. In addition, property losses of clubs[20] arising from spectators' wrongdoings lead to such a method of protecting rights as damages. It should be noted that this civil law institution not only performs the function of restoring the property status of a football club, but also carries out general and private prevention among fans, since the fine amount when attracting a fan under Art. 20.31 of the Code of Administrative Offenses is insignificant in comparison with those established for the clubs by the Disciplinary Regulations of the Russian Football Union (hereinafter – the RFU).[21]

Considering such claims, the courts often refuse to meet the requirements, motivating this refusal not only by the lack of a causal connection, but also by a different legal nature of football clubs` sanctions for the behaviour of fans and damages (direct actual damage), called in the norms of Art. 15 of the Civil Code. As a result, it seems necessary to consider Russian judicial practice examples.

The applicant clubs, first, refer to attracting the spectator of a football match to administrative responsibility under Art. 20.31 of the Code of Administrative Offenses, which confirms the violation of the rules of conduct by the fan. However, the fact of bringing the viewer to responsibility under this article of the code cannot serve as an unconditional, prejudicial basis for satisfying the claim presented to the fan to compensate the club for the fine imposed by the decision of the RFU jurisdiction authority.[22] This is explained by the fact that, along with the illegal behaviour of the fan, the reason for the RFU to impose a fine on a football club can be the failure to take the necessary measures when organising and holding a sporting event by the organisers (competition and (or) match) and the illegal behaviour of other people who were at the stadium.

Referring to the Russian law enforcement practice of football clubs bringing civil suits to persons who violated the rules of spectator behaviour, the following trends can be pointed out. In the decision of the Lyubertsy District Court[23], the refusal to meet the requirements of FC Spartak-Moscow was motivated by the fact that the losses did not occur as a result of a violation of the rules of conduct by one fan, but as a result of a set of offenses that occurred during the match. In this case, in addition to the fan running out on the field, the report of the RFU inspector of the match established the use of pyrotechnics, demonstration of improper banners, as well as mass riots occurring at the stadium. Considering the

20 As the inherent consequences of the application of various sports (disciplinary) sanctions, ranging from a fine and ending with a match without spectators.

21 Disciplinary regulations of the Russian Football Union.

22 The Decision of the Lyubertsy District Court on 17.02.2014, the fan was brought to administrative responsibility under Art. 20.31 of the Administrative Offences Code, and in the case of the Leninsky district court of Vladimir on 06.06.2014 in case No. 2–1362/2014 the fan was not brought to administrative responsibility. However, in both cases, the court did not satisfy the requirements of the football clubs for the lack of a causal connection.

23 The Decision of the Lyubertsy District Court on 17.02.2014.

appeal, the Moscow Regional Court[24] agreed with the decision of the first instance and indicated that there was no causal link, because in the resolution part of the decision the Control and Disciplinary Committee of the Russian Football Union (hereinafter referred to as RFU CDC) specifically refers to the offense committed by the defendant (viewer) is not contained. Since the RFU CDC did not associate the imposition of a disciplinary responsibility with a specific offense and personally with the defendant-fan, a causal connection cannot take place in this case. It is interesting to note that FC Spartak-Moscow filed lawsuits against other fans who violated the rules of conduct for this match, but the result of their consideration was similar. Another example is the case considered by the Leninsky District Court of Vladimir[25], in which the applicant claimed damages from a fan who displayed a racist banner. However, the requirements of the football club were also not satisfied and motivated by a court in the same way - the lack of a causal link between the illegal behaviour of the fan and the losses incurred by the club.

In addition, the resulting losses may be associated not only with the imposition of a fine by RFU CDC, but also with a number of other reasons, one of which, for example, is the holding of the match without spectators (which is one of the sanctions applied by the RFS CDC in relation to clubs) and, as a consequence, not the sale of tickets. For example, in the decision of the Lyubertsy District Court[26], it was noted that the football club was prosecuted in the form of a fine and holding the next two home matches without spectators, but mainly the club's losses were due to matches without spectators, since the sale of tickets became impossible. However, in this case the court did not establish any evidence of a causal link between the losses claimed by the club and the actions of the defendant-fan.

In the decision of the Soviet District Court of Tula[27], the law enforcer also did not establish the existence of a causal link between the single offense and the losses incurred by the club, which the court associated with the decision of the RFU CDC. However, such an understanding by the court of a causal relationship does not seem to us true because, firstly, the CDC's sanction was imposed directly on the fans' violation of the rules of conduct and, secondly, such a violation, in this case, was the only basis for bringing the club to responsibility.

Proof of the existence of a causal relationship allows the law enforcement authority to take the opposite position. Thus, considering the appeal, the Tula regional court[28] concluded that the losses incurred by the football club as a result of the decision of the RFU CDC were directly due to the unlawful actions of one fan and other violations during the

24 The decision of the Moscow Regional Court in the case No. 33–10571/2014.
25 The Decision of the Leninsky District Court of Vladimir on 06.06.2014 in case No. 2–1362/2014.
26 The Decision of the Lyubertsy City Court of the Moscow Region on 17.02.2014.
27 The Decision of the Soviet District Court of Tula on 01.22.2015 in case No. 2–2656/2014.
28 The Decision of the Tula Regional Court on 04.16.2015 in case No. 33–993.

match, as a result, the judgment at first instance was canceled and the requirements of the football club were partially satisfied. At the same time, the Tula regional court emphasised: the fact that the decision of the RFU CDC on the application of sanctions was not appealed by the club cannot be considered as an admission of guilt of the football club for the offense of the fan.

It is worth noting that in generalised decisions, the courts do not follow a uniform practice with regard to determining the legal nature of damages. Thus, the decision of the Tula Regional Court[29] allowed the football club to incur losses for the football club in connection with the illegal behaviour of the fan under a number of conditions: (1) the presentation of evidence of illegal behaviour of the viewer, (2) the presence of a direct causal link between the violation of the fan and the club arising losses from the decision of the RFU CDC , (3) the absence of other offenses at the match (that means that one person committed a single violation). The Leningrad Regional Court[30] adheres to a different point of view: considering the appeal of FC Zenit to a fan, the court relied on the impossibility of recovering damages due to the different legal nature of the relationship. The penalty that was paid by the football club does not constitute a composition of damages in the sense of Art. 15 of the Civil Code, and cannot be attributed to the direct actual damage, since it is a measure of liability for legal entities guilty of violating the existing rules. In this case, the fine imposed on the club is a type of responsibility for disciplinary offenses, the subject of which is the club itself. Based on such ideas, any negative consequences arising from decisions of the jurisdictional bodies of sports organisations (for example, the RFU CDC), that is, fines imposed on clubs, cannot be recognised as losses.

In our opinion, this interpretation of the norms of civil law, presented by the Leningrad Regional Court should not serve as the only and determining development of practice in such disputes, since the lack of possibility of collection of damages by football clubs as subjects of civil law relations leads to a narrowing of the methods of combating unlawful the behaviour of fans, and also prevents the clubs from restoring their property status. In this regard, it can be assumed that the use of sports (disciplinary) sanctions against a football club should be considered only as evidence of the occurrence of damages, namely as an integral element of civil wrongdoing.[31] Thus, if the viewer's guilt and wrongfulness of his behaviour can be proved in the presence of a court decision in the case of an administrative offense (Art. 20.31 of the Code of Administrative Offenses), then in a situation where the fan was not brought to justice under Art. 20.31 of the Code of Administrative Offenses

29 The Decision of the Tula Regional Court on 04.16.2015 in case No. 33–993.

30 The Decision of the Leningrad Regional Court on 18.05.2016 in case No. 33–2582/2016.

31 The composition of a civil offense, along with the presence of negative consequences in the property sphere of the creditor, includes: the wrongfulness of the behaviour of the causer of harm, the causal relationship between the unlawful behaviour of the causer of harm and negative property consequences, the guilt of the causer of harm.

and there is only a decision of the RFU CDC on the responsibility of the club for the behaviour of this fan, the chances of receiving a positive decision on the recovery of losses by the club, as we believe, tend to zero. The basis for attracting the club to sports (disciplinary) responsibility is the behaviour of the fan, considered in the provisions of the Disciplinary Regulations of the RFU, which is a local legal act of the sports organisation applied to its members. The context of the regulation indicates only the misconduct of the club, expressed in the actions of the audience, and for obvious reasons does not regulate the responsibility of the fans themselves as persons who are not members of the RFU. The decision of the RFU on bringing the club to responsibility for the behaviour of the fan cannot be regarded as the fulfillment of such an element of a civil offense as proof of the wrongfulness of the behaviour of the injurer, unlike the decision on the case of an administrative offense Art. 20.31 of the Code of Administrative Offenses.

The third element of a civil offense, consisting in negative property consequences, is proved easier, since the imposition of a fine on the club by the decision of the RFU CDC creates these adverse consequences (although the Leningrad Regional Court, as we noted earlier, does not agree with this conclusion).[32]

The fourth element (the causal relationship between illegal behaviour and civil damage) seems to us to be real only if there are a combination of the following signs: (1) the only illegal act, made by one spectator, (2) this action and the person who committed it is properly recorded (for example, official RFU report, videotape), (3) a penalty or another sanction was applied to the club by the RFU CDC or another sanction with a civil damage (closure of the sector, sectors stadium or holding a game without spectators), the spectator who committed the act was identified in the decision of the committee, (4) the method of fixing the behaviour and identifying the perpetrator was recognised by the court as evidence when considering the issue of the spectator's liability under Art. 20.31 of the Code of Administrative Offenses. As we can see from the law enforcement practice considered by us, the absence of at least one of the listed signs prevents the court from making a decision on collecting from the viewer the amount of damages caused to the club as a result of a penalty imposed by the RFU CDC.

Concluding Remarks

Having considered the issue of local prohibition ("blacklists") of football clubs to attend matches and the prospects for collecting damages from the audience, we can draw the following conclusions.

32 The Decision of the Leningrad Regional Court on 18.05.2016 in case No. 33–2582/2016.

First, a local ban on attending football matches can act as a measure to combat illegal spectator behaviour, thereby complementing the administrative responsibility of the viewers. However, the pursuit of the goal of ensuring the safety of the audience present should not be carried out through private legal instruments in the presence of the obligations of the organiser of the match (competition), as well as law enforcement agencies. The implementation of a ban on the sale of tickets for a football match by clubs in Russian law is not possible due to the direct instructions of Art. 426 of the Civil Code and the general principles of civil law. In addition, the ban, using the measures of current legislation, is rather difficult to implement, assuming that the sale of tickets (with the exception of tickets for guest matches and season tickets) is currently being carried out without presenting an identity document. In this regard, the experience of introducing a uniform identification RPL fans system using ticket sales and ticket control on the basis of an identity document is very interesting.

The rules of conduct of spectators during the official sports competitions in the current edition do not provide verification of the identity of fans at the entrance to the stadium, which also complicates the identification of "blacklist" spectators. Implementation of the identification system can meet difficulties from the position of legal assessment of compliance with the regulations on the obligation of clubs to sell tickets and exercise control of tickets on the basis of an identity document. We assume that the integration of the audience identification system is a prerequisite for making changes in the legislative regulation and the legalisation of the institution of "blacklists".

Secondly, the right of football clubs to establish local bans depends on a number of reasons (from the specific features of the internal organisation of football clubs as subjects of civil law, to the national regulation of the latter). Due to some discrepancies in the design of public and "coercive" contracts, the possibilities of Russian football clubs are limited, since the existence of direct prohibitions on the refusal to execute a public contract is reinforced by the established judicial practice. At the same time, the provision of legal instruments to football clubs in matters of influencing their fans may be motivated by the need of such organisations for autonomy and self-regulation, which is typical of civil law entities both in the Russian Federation and in other legal orders. In connection with the latter, we can refer to the example of Swiss law, the scope of which includes the overwhelming number of sports organisations having the organisational and legal form of associations (FIFA, UEFA). However, it must be borne in mind that in such a case, the focus on the experience of Switzerland regulating the rights of associations will require significant changes in the legislation of the Russian Federation.

Thirdly, the practice of presenting civil lawsuits of football clubs to fans, as one of the few legal instruments in the Russian legislation available to clubs for the prevention of unlawful behaviour of spectators, is currently not common. There are no uniform approaches to resolving such disputes and consistently positive practices for clubs: how-

ever, the validity of some decisions, as we pointed out, can be reasonably criticised. At the same time, we believe that the formation of the practice of satisfying club civil suits against fans for recovery from recent losses is a necessary part of the activities of football clubs as manifestations of their field of self-regulation. This practice can lead to an increase in the effectiveness of methods to combat the illegal behaviour of fans, as well as increase the chances of football clubs to restore their property status.

Fourthly, the definition of causation is a key problem in the consideration of disputes on the compensation of losses to the club caused by the decision of the CDC of the RFU on the imposition of a fine. In each decision of the courts of the first instance, the causal link was denied due to the presence of sports (disciplinary) responsibility of football clubs. It should be noted that the guilt of football clubs in the framework of bringing to sports (disciplinary) responsibility was not questioned in the presentation of civil lawsuits against fans. It seems the correct position of the court in the satisfaction of such claims when the football club is charged with sports (disciplinary) responsibility for a specific offense of the fan, confirmed by bringing the offender to administrative responsibility under Art. 20.31 of the Code of Administrative Offenses. In such cases, the composition of the civil offense may be motivated by the following: (1) there is a wrongfulness of behaviour, (2) the fault of the fan, (3) there is a causal relationship, (4) civil damage can be proved by referring to the decisions of the CDC RFU.

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In addition, this will be consistent with Art. 426 (3) of the Civil Code of the Russian Federation, according to which the refusal to execute a public contract will be legal with a justified evasion of a person to execute it.

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The composition of a civil offense, along with the presence of negative consequences in the property sphere of the creditor, includes: the wrongfulness of the behaviour of the causer of harm, the causal relationship between the unlawful behaviour of the causer of harm and negative property consequences, the guilt of the causer of harm.

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For example, para. 2.1 of the Rules of Season Ticket and Ticket Sales to the Matches of FC ZENIT: one spectator can purchase up to 5 tickets to home games of the club without identification.

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SUMMARY

Spectators` "BlackLists" and Recovery of Damages by Football Clubs from Spectators for the Violation of the Rules of Conduct: A Russian Experience

The right of football clubs to establish local bans (the so-called "blacklists") depends on a number of reasons. A local ban on visiting football matches can act as a measure to combat the unlawful behaviour of viewers, thus complementing the administrative responsibility of the spectators. In Russian law it is not possible to impose a ban on the sale of tickets to football matches by football clubs. The current wording of the rules of spectators' behaviour during official sporting events does not, by default, allow supporter identity checks when entering the stadium. That also complicates the identification of spectators for being on the "blacklist". The practice of civil suits brought by football clubs against supporters, as one of the few legal tools to influence supporters, is currently not widespread. As a result, there are no uniform approaches to resolve these disputes: the courts motivate refusals by various arguments, the validity of which can be reasonably criticised.

Keywords: football matches; illegal behaviour of supporters; responsibility of clubs for the supporters' behaviour; blacklists; recovery of damages from supporters.

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Is Separation of Powers a Useless Concept? Part II: Tripartite System Criticism and Application Problems[1]

Introduction
The Separation of Powers as a "Metaphysical" Concept

The idea of the separation of powers has never been completely free of criticism, and it is interesting that this critique was often directed at its abstract and fictitious nature. There were authors who did not hesitate to call it a chimera[2] or compare its three-component variants with the theological doctrine of the Holy Trinity.[3] For example, Léon Duguit explicitly stated that it is a metaphysical concept analogous to that religious construction, which is as such unacceptable in the positive theory of law.[4] However, if we want to refer to metaphysics, we must be aware that it is a difficult-to-grasp concept that is often used for negative labelling. Something similar, in the context of science, could also be said about references to theology, chimeras, etc. These are negative connotations we should avoid, yet this is not to say that there are no rational objections behind these connotations that we should try to explore.

In my view, the separation of powers can be factually disputed by pointing out that it does not actually fulfil its objectives, (it is not efficient in their fulfilment), and that it is an unnecessarily complex construction which, in some of its features, does not reflect the logical context, (e.g. its tripartite structure). For now, we understand both these objections as hypotheses to be explored. A third complementary assumption can then be stated about its attraction: its attraction actually lies in the fact that it is a suggestive, rhetorically impressive concept. In other words, its three-member structure was successful

1 The paper is an output from the project Nové teorie dělby moci code: MUNI/A/0736/2017.

2 J. A. Fairlie, *The Separation of Powers,* "Michigan Law Review" 1923, no. 4, p. 419.

3 *Ibidem,* p. 435.; Ch. Möllers, *The Three Branches. A Comparative Model of Separation of Powers*, Oxford 2013, p. 16.

4 J. A. Fairlie, *op. cit.,* p. 420.

not because it structured public authorities clearly and exhaustively into clearly defined entities, but because such a construction evokes strong feelings – it has an "aesthetic" effect on us. It is therefore not an adequate description but an effective figure.

Is it even possible to prove any of these claims? I have already pointed out in the previous paper[5] how evaluating the efficiency of the separation of powers is difficult as there are too many factors involved in the realization of good governance. It is then difficult to evaluate the fulfilment of objectives that lead to it, (such as a balanced position among various state bodies). Our confidence in this idea ultimately relies on the simple assumption that the proper functioning of a system requires some degree of control and diversification. Although the components of the separation of powers do lead to it, the problem remains what the correct rate is. In this respect, classical theories do not help us too much. In its execution, it is therefore more convenient to perceive the separation of powers are as a bet or experiment through which we aim at achieving certain positive effects. I would like to give two comparisons about our ability to evaluate its functioning: When standing on the remains of a burnt house, we can easily find out that a fuse blew. However, we do not know whether it worked at a time when there were no electricity problems. The same applies to the separation of powers – when a dictatorship is established in the country, we can easily see that the separation of powers has been destroyed. However, we do not know and cannot even know if our institutional design works when there are no serious threats to it.

Compared to evaluating efficiency of institutional design, it is still a bit easier to demonstrate the lack of its logical connections, which issue will be discussed in the following section. Now let's take a look at the thesis of rhetorical impressiveness and suggestiveness of the separation of powers. Can we prove this, or is this one those situations when we cannot say what the source of its obvious attraction is and so we resort to using such statements? This cannot be excluded either. The problem is that the reflection of such action can only be sought in our feelings, or generalizations of their expression by people. We can point out that number three is a magic number that often occurs in various stories and works of art: three rods of the Great Moravian ruler Svatopluk[6]; the three Musketeers; and fairy-tale kings usually have three daughters or sons. The identification of such narrative elements supports that thesis to a certain extent. Still, this can be nothing more than pure coincidence – the concept could be both logical and rhetorically or otherwise impressive at the same time. It deserves harsh criticism only if it is illogical

5 M. Hapla, *Is Separation of Powers Useless Concept? Part I: Components and Purpose of Separation of Powers*, "The Adam Mickiewicz University Law Review" 2018, vol. 8.

6 For the original story of Svatopluk's three rods by Konstantin Porphyrogenate, see D. Bartoňková et al. eds., *Magnae Moraviae fontes historici III. Diplomata, epistolae, textus historici varii*, Brno, 1969, pp. 398–399. It is worth mentioning that the very strong use of the number three symbolism throughout the story, together with other reasons, led some to a conclusion that the story is mere literary fiction and not a description of any real event.

and its suggestiveness is meant to hide it. Everything thus seems to lead to whether the separation of powers is or is not a logical concept. The outcome should lead to the evaluation of to what extent it is mere "metaphysical" nonsense. Attention will be focused on two areas of problems: tripartite system criticism and some application problems of the principle of separation of powers.

The Problematic Nature of the Tripartite Separation of Powers

A question was raised above whether the separation of powers is a logical concept, and so it is necessary to analyse it in more detail now, (at least in a slightly narrower framework): one of the most influential concepts of the separation of powers is the tripartite concept, as already outlined by Montesquieu.[7] In its context, the judiciary is perceived as one of the key components of state organization. But are we even able to define the judicial function as something specific enough?

Gradually, a number of concepts emerged that either postulated the existence of only two powers or claimed that there are more than just three. There are also four-member and five-member concepts.[8] In spite of that, however, the three-member concept has retained the greatest popularity of all of them, which then soon reflected in the design of some constitutions.[9] This, however, did not silence the doubts connected with it.

In this context, notable is the critique by František Weyr who perceived as logical the bipartite concept while, according to him, the tripartite concept was, "a mere schema arranged in line with the commonly appearing organization of the legal orders of certain (empirical) states."[10] If we want to properly categorize individual state functions, we must first find their unifying elements. In Weyr's view, the notion of law-making is one of them, "the legislative function is the creation of primary norms (i.e., statutes in the usual sense), while the judiciary and executive functions are the creation of secondary norms (court rulings, administrative and private law decisions) which at the same time appears to be the execution (application) of primary norms."[11] This division removes[12] the

7 C. Montesquieu, *The Spirit of Laws,* Kitchener 2001, p. 173.

8 Five powers were distinguished, for instance, by one of the leading authors of the French liberal school Benjamin Constant. For details, v. J. A. Fairlie, *op. cit.,* p. 409.

9 Explicit references to the division of powers into three different branches (legislative, executive, and judicial) were included, for example, in some of the first constitutions of American states. There were, for example, the Constitution of Maryland of 1776, the Constitution of Massachusetts of 1780, and the Constitution of New Hampshire of 1783. See J. A. Fairlie, *op. cit.,* p. 397.

10 F. Weyr, *Teorie práva,* Praha 2015, p. 244.

11 F. Weyr, Československé právo ústavní, Praha 1937, p. 21.

12 *Ibidem*, p. 22.

difference between the executive and the judicial function, and the tripartite concept is necessarily replaced by the bipartite concept.[13]

It is worth noting that the current approaches tend to distinguish more state functions rather than limit them. Today's functions of state bodies[14]are perceived as too varied to fit into Montesquieu's three categories, for instance, by Eoin Carolan.[15] This, however, does not challenge the logic of Weyr's approach as it does not say that the individual functions in his two-category concept cannot be further broken down. And this would not be anything new as there are many authors in the past who proposed the bipartite concept and further structured the executive component in more detail. For example, Pradier-Fodéré distinguished between the legislative and executive powers, which he then further divided into the judiciary and administrative powers.[16] Théophile Ducrocq even distinguished between three executive branches – governmental, administrative, and judicial[17] – within the executive power.

So how exactly should we deal with the position of the judicial function? Can we place it at the same level as the legislative and executive functions or should we understand it as one of the sub-categories of the latter? Montesquieu himself saw the essence of the judicial function in deciding the facts,[18] which, of course, is not sufficient for its distinction. We could even say that this is highly misleading – it is not excluded that Montesquieu, as part of his reflection on the English government system, confused judges with members of the jury, as Robert Stevens believes.[19]

In František Zoulík's opinion, Ernst Friesenhahn found a criterion in the "dispute over law"[20] that allows us to distinguish the judiciary from public administration. As he states himself, "The possibility of this dispute arises (irrespective of the legal branch) from the basic construction of subjective law as a relationship between different legal entities; this gives the opportunity for one entity to act in its own interest towards another entity of the same relationship. The solution to this dispute can only be carried out by an entity standing outside the legal relationship from which the dispute arose and

13 Compare *Ibidem*, pp. 21–32.

14 E. Carolan, *The New Separation of Powers: A Theory for the Modern State,* New York 2009, p. 42, 257. To this, cf. also M. J. C. Vile, *Constitutionalism and the Separation of Powers,* Indianopolis 1998, p. 16.

15 M. J. Vile puts the crisis of the three-member concept of the separation of powers into the context of the development of bureaucracy, starting from the early 20th century. To this cf. M. J. C. Vile, *op. cit.,* pp. 6–7.

16 J.A. Fairlie, *op. cit.,* pp. 418–419.

17 *Ibidem*, p. 419.

18 L. Claus, *Montesquieu's Mistakes and the True Meaning of Separation*, "Oxford Journal of Legal Studies" 2005, no. 3, p. 423.

19 R. Stevens, *A Loss of Innocence?: Judicial Independence and the Separation of Powers*, "Oxford Journal of Legal Studies" 1999, vol. 19, No. 3, p. 375.

20 F. Zoulík, *Soudy a soudnictví,* Praha 1995, p. 17.

which plays the role of an impartial 'third party'".[21] Zoulík then sees this third party in courts and specifies the idea by asserting that although administrative bodies also apply law, they do it inside the legal relationship. In other words, they differ from courts in that they apply law in public interest and not in order to resolve the dispute.[22]

This distinction can really help us to distinguish courts from administrative bodies. At the same time, it does not necessarily rebut Weyr's bipartite concept of state functions but rather points to the need for its further breakdown, (even the application of law by a court is the execution of primary norms in case of the dispute over the law). It also raises the question of at what level the separation of functions should be applied. It is interesting that one of the main objections against the above definition consisted in the fact that many of the powers that the courts have overlapped the concept of the dispute over the law. According to Zoulík, this is not a bad thing because entrusting certain things into the power of the courts may be subject to various reasons. Therefore, this does not challenge the "dispute over the law" as a defining criterion of the judiciary.[23] Although this assertion is basically correct, it makes the applicability of the principle of the separation of functions highly problematic, and this principle is again not consistently implemented.

Finally, it is worth mentioning another argument that is used to support the specific status of the judiciary in relation to the legislative and executive component – the question of the expert nature of its activities. Maxim Tomoszek states that the judiciary is an expert power that should decide on legal rather than political issues.[24] Leaving aside the fact that sometimes there can be a very thin border between law and politics[25], we can still argue that most administrative bodies do not solve political problems in their ac-

21 *Ibidem*, pp. 17–18. For completeness, it should be added that Zoulík sometimes referred to the "dispute over the law" also as "legal conflict." The reason for this terminological shift was his attempt to eliminate some traditional criticism toward this concept. Still, I do not see this shift as fortunate because it is a concept with very vague boundaries, which even the author himself did not define sufficiently. For details, see *Ibidem*, pp. 18 – 19. Generally, however, we can say that dispute-solving is generally considered the primary task of the judiciary. This concept can be found, for example, in T. Schei, *The Independence of Courts and Judges and Their Relationship with the Other Branches of Government*, in: *The Independence of Judges*, eds. N. A. Engstad, A. Frøseth, B. Tønder, Hague 2014, p. 4.

22 F. Zoulík, *op. cit*., p. 18.

23 *Ibidem*, p. 19.

24 M. Tomoszek, *Dělba moci jako podstatná náležitost demokratického právního státu*, in *Dělba moci. Sborník příspěvků sekce ústavního práva, přednesených na mezinárodní vědecké konferenci Olomoucké právnické dny 2013,* ed. J. Jirásek, Olomouc 2014, pp. 245–246.

25 Unfortunately, Zoulík, who also perceives courts as a certain barrage of law against the turbulent waters of politics, did not sufficiently reflect this fact in his work. To this, see, e.g., F. Zoulík, *op. cit.,* p. 74. Personally, I admit that the judiciary plays this role to a certain extent, especially if we perceive politics as an activity developed by certain interest groups within political parties. To me, it does not seem appropriate to use it as a distinctive criterion, among other things also because some rulings of constitutional courts can be very political in nature.

tivities and require a certain, (sometimes great), degree of expertise for their operations. Yet, it is the distinction between courts and administrative bodies that is the biggest problem. Expertise is certainly one of the characteristics of modern courts,[26] but it is not enough to distinguish them from other organizational components of the state, and the same applies to their activities. The tripartite concept of the separation of powers thus can hardly be called logical.

Approaches to Solving the Application of the Separation of Powers

In general, we can say that the problems associated with the practical applications of the idea of the separation of powers are many, as is the case of the approaches to their solution. The main problem can be seen in that we cannot derive clear applications to specific facts from its traditional form. This can be well illustrated on the tension that exists between its individual components: There is no standard that would allow us to distinguish when to prioritize the institutional independence of a state body or, on the contrary, its control through the system of checks and balances. In other words, when we should perceive intervention by one state body into another state body as negative interference with its independence, and when we should perceive it as a positive check or balance.[27] This inability to draw clear practical consequences can also be perceived as one of the main sources of criticism of the separation of powers as a fictitious construction.

There are basically three solutions to this situation:

1) To accept the open-ended nature of the separation of powers and, when a particular case demonstrates the need to supplement it, to do so through a decision of a state body. More precisely, this is a situation where the state body has no real theory at hand that would allow us to specify the separation of powers as a standard, and therefore this body must specify the separation of powers by its own decisions, the reasons for which can only be speculated on. They might be based on the emotions of judges or on general reasons that we cannot accept as part of any theory of the separation of powers. By this, the problem at hand transforms into the question of which state body is legitimate to make such decisions and for what reasons. The separation of powers then becomes a sort of "legitimizing guise".
2) Also, we can try to complement theories of the separation of powers – to create a more accurate and complex analysis of the relationships between its components and applications. We can supplement it with some other normative

26 See *Ibidem*, p. 38.

27 To this, cf. also E. Carolan, *op. cit.,* p. 32.; J. Baroš, *Dělba moci jako nástroj konstitucionalismu*, "Jurisprudence" 2013, no. 7, p. 16.

thesis that will enable us to construct such applications in a predictable and rationally justifiable way.

3) The separation of powers can be completely excluded and replaced with another set of concepts that would be able to fulfil its tasks more adequately. At this point, however, the question arises as to what extent we can draw a line between this and the preceding approach, and whether the replacement of the concepts and their supplementing is not only about ceasing to use the term "separation of powers".

The following section is devoted to a brief analysis of individual approaches and some of their more specific forms.

Formalism and Functionalism

It is obvious that from the theoretical point of view the first of the approaches defined in the previous section cannot be a satisfactory solution, regardless of how (surprisingly) successfully it can work. Unfortunately, it is practice that often struggles to find transparently justifiable solutions to specific problems that are associated with the institutional applications of the separation of powers. For example, Eoin Carolan points out that U.S. judges who deal with these problems play rather a reactive than prescriptive role, and that they adapt their views of a relevant criterion so that they reflect the questions raised in the individual case.[28] The theory is therefore bent according to the requirements of practice instead of guiding it. It often serves at best to provide a nice coat for an intuitively made decision, the true reasons of which we must search outside of it. All this only confirms our original concerns.

We should not settle for anything like this – we should not be content with the fact that the true reasons for decisions of state bodies can be wholly banal and rationally unjustifiable. One can hardly agree with the idea that the true reason why a party won a legal dispute was in the end that it had a nicer nose. If nothing else, we must at least try to formulate a methodology that a competent state body (most likely a court) should apply in individual cases when specifying the separation of powers and deriving its applications. This will, among other things, strengthen its legitimacy.

Sceptics, of course, may argue that even in this situation the true reasons remain banal and that we only move to another level in our considerations from which we expect to reach an easier agreement. In addition, we can criticize this effort by saying that even though we give state bodies some limitations by this if they wish, they may eventually avoid them. Institutions are indeed constrained by methodological requirements; how-

28 E. Carolan, *op. cit.*, p. 26.

ever, it is rather a silk ribbon that looks pretty but can be easily broken if enough pressure is exerted. In general, these requirements are not strictly binding on institutions, and they cannot be if institutions are to retain some degree of flexibility in decision-making. In spite of all this, it still seems appropriate to support the idea that it is meaningful to think about such a methodology – not only because it opens up more room for discussion about the problems of the separation of powers and their possible solutions. If nothing, it gives us some framework, although imperfect. Under the circumstances, this is the maximum possible.

In view of the above reasons, let us take a closer look at methodologically oriented approaches; first at a division between two of them that is described in detail in the English-language literature – a division into formalism and functionalism. According to Samuel W. Cooper, formalism relies on the assumption that problems associated with the separation of powers will be solved by strict interpretation of the Constitution. On the contrary, functionalism rejects the idea that these problems can be solved by examining the text constraints in the Constitution, and rather focuses on whether the behaviour of one of the components of power can disturb the balance between the powers, or whether the behaviour of one component does not interfere with the core functions of another component.[29] It can be said, therefore, that while formalists place greater emphasis on separation, functionalists prefer the notion of balance.[30] This also results in the typical problems of these directions – the formal doctrine fails to define the units to be separated, while the functional approach cannot deal with the issue of institutional balance.[31] To this we can add that functionalism was dominant in analyses of the separation of powers made by U.S. judges for most of the 19th and 20th centuries. Formalism gained certain influence in the short phase at the end of the 1970's and in the first half of the 1980s.[32] The former thus can be considered the prevailing approach.

Could we draw inspiration from these approaches in the search of approaches that are applicable in the Central European environment? If the authors of Central European constitutions were surrounded by a mystical aura, it would be worthwhile to establish institutional relations between the various state bodies (and thus to specify the principle of the separation of powers) based on their intentions. But that's not the case at all. While Americans, after a few centuries, can see their Founding Fathers as titans, we in the Central European environment, after two decades, see nothing more than ordinary people with their mistakes. The authority of the authors of constitutional documents in post-communist countries is far from being such that would lead us to a discussion of

29 S. W. Cooper, *Considering "Power" in Separation of Powers*, "Stanford Law Review" 1994, no. 2, p. 368.

30 J. Baroš, *op. cit.*, p. 15.

31 E. Carolan, *op. cit.,* p. 26.

32 S. W. Cooper, *op. cit.,* p. 368.

specific applications of the separation of powers and its intentions. It is perhaps a simplified view of this problem; however, I believe that the minds of most people (at least subconsciously) rely heavily on this circumstance.

At a time when the text of the Constitution does not provide us with sufficient clues, we must begin to consider the purposes of the individual components of the separation of powers and apply such methodology that allows us to operate with different types of more open legal standards. This could involve the application of the principle of proportionality, but also the consideration of various impacts in the context of the Law & Economics approach, or general projection of some of the methodological approaches in the field of economics.[33]

If we try to consider this in a more easily graspable context, we can again take a closer look at the dilemma between the application of institutional independence and the system of checks and balances. The common denominator of both components is their relationship to a certain type of intervention. The first stresses the need for its absence, while the second stresses the need for its presence. Rather we could ask, what better leads to the fulfilment of the purpose of the separation of power (good governance) in a given situation? Finding an objective answer to such a question can, however, be very difficult. Therefore, we could consider whether to interpret it in order to find out which components are associated with a lower risk. This would allow us, to a certain extent, to take into account our possible ignorance, or the impossibility of evaluating completely all the aspects of a particular case, which we would also consider risks.

In summary, we can say that under the first approach, a wide array of options opens before us which, however, are generally not very satisfactory, or that are acceptable only if the community agrees to a general need for them.

Should We Innovate or Reject the Separation of Powers?

Other possible approaches to solving the application problems of the separation of powers include efforts to innovate the separation of powers, or to replace it with another principle. How much do they really have in common and how should we evaluate them? In his work, *The Evolution of Parliament*, A.F. Pollard argued that the separation of powers in politics corresponds to the persistence of species in natural science and that both ignore evolution. He also criticized this principle for reducing the real complexity of human governance and for being an artificial category.[34] There is a lot to be found in

33 In connection with the application of knowledge gained from economics, I find remarkable, for example, M. Silver, *Economic Theory of the Constitutional Separation of Powers*, " Public Choice" 1977, vol. 29, no. 1, pp. 95 – 107.

34 J. A. Fairlie, *op. cit.,* pp. 414–417.

these words. The way in which the individual components of the separation of powers are projected into the structure of the state cannot really came to a standstill. It therefore seems natural that the separation of powers should be subject to innovation depending on historical and social developments. If this is not the case, there is a risk that it will become a dead principle, and it cannot be surprising that practice will be governed (and as a rule it is) by a number of other factors rather than blindly following one particular doctrine[35] which rather plays the role of legitimizing fiction, the main purpose of which is to preserve the status quo.

As part of the innovation process, it is not excluded that the separation of powers is so deviating from its initial concept that it will actually become a different principle. Should we be so indulgent to it and be content with this possibility or should we reject it consciously and purposefully? The radical approach is supported by the fact that too many heterogeneous components have been merged under this concept in a misleading way, creating several unnecessary confusions. On the other hand, can this not be avoided by a precise definition, and can we not then build on this purged conceptual system? Personally, I would rather be more reconciled to the separation of powers. If any concept is really to be useful, it must be accepted by the community, which is always easier when it relies, or is based, on an already well-known and accepted idea as this one is. It seems to me more appropriate to try to reformulate and supplement the concept of the separation of powers whereas this process can one day result in the creation of a new principle that will replace it. Therefore, prioritizing the second way over the third seems to be a more rational choice.

There are, of course, many approaches to correcting the separation of powers. And it is definitely not a new effort: already John A. Fairlie[36] favoured more sophisticated concepts analogous to models of atoms and molecules that assume a number of different combinations. It is understandable that, given the scope of this paper, we can only provide a brief outline of them.

The first way we can follow in innovating the separation of powers consists in finding a stronger normative thesis that would create a more complete concept that would already be able to provide some specific institutional considerations.[37] Eoin Carolan applies this principle when he considers replacing the classical model of the separation of powers with a model in which state institutions are identified with specific social interests.[38] This is undoubtedly an interesting idea. A problem that may accompany it is

35 To compare this, e.g., Philip B. Kurland›s statement that the U.S. Constitution was born from a prudent compromise rather than from more experience than doctrine. P. B. Kurland, *The Rise and Fall of the "Doctrine" of Separation of Powers,* "Michigan Law Review" 1986, no. 3, p. 592.

36 J. A. Fairlie, *op. cit.,* p. 435.

37 E. Carolan, *op. cit*., p. 33.

38 *Ibidem*, p. 257.

the unexplained relationship between an institution and a social interest. The requirement that an institution should originate based on a social interest seems to be justified. The difficulty may lie in that most institutions, (and thus also the institutional structure of the state as a whole), reflect a certain tradition. As social conditions gradually evolve, these interests are modified or disappear, and institutions then begin to live their own lives to some extent; but above all, they themselves begin to participate in the constitution of specific social interests. Sometimes, therefore, it may be difficult to separate the two (within one process).

Victoria Nourse proposes another way that is based on a more comprehensive analysis. Nourse states that the U.S. Constitution not only describes the U.S. system of state bodies as, "a compendium of the executive, legislative and judicial powers, but it also creates that government by constituting electoral relationships that confer political authority."[39] The horizontal separation of powers that separates these powers through functional lines is then incomplete if it does not consider the vertical separation of powers. In Nourse's concept, this means the relationships between the system of state bodies and constituency.[40] Changes in these vertical relationships also have an effect on the horizontal relationships of the separation of powers. As an example, Nourse mentions a situation where senators would be elected by congressmen, which would fundamentally change the relationship between the two institutions.[41] Therefore, in order for the separation of powers to be complete, it is necessary to take account of the relationships that each institution has to those groups that constitute it. Such an approach allows us, in its consequences, to free ourselves from arguments about whether we can really define the legislature, judiciary, and executive.[42] Moreover, Nourse further states that verticalism seeks to identify constitutional harm in something more than just excessive power, disturbed balance, or mixing of functions. Verticalism identifies the constitutional harm in that the voice of certain electoral groups is silenced or over-emphasized. The fact that the Supreme Court should not decide on the issue of war is not due to the fact that such decision-making does not belong to the judiciary but rather because it would limit too much the influence of the electorate at the level of national and local constituencies in deciding on such issues. The Supreme Court could then go to war without the people, the decision would become elitist, and democracy would become aristocracy.[43] Finally, Nourse admits that even this approach is not ideal. Yet, it seems more appropriate than some competing alternatives.[44]

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39 V. Nourse, *The Vertical Separation of Powers*, "Duke Law Journal" 1999, no. 3, p. 751.
40 *Ibidem*, pp. 751 – 752.
41 V. Nourse, *op. cit.,* p. 763.
42 *Ibidem*, p. 752.
43 *Ibidem*, p. 759.
44 *Ibidem*, p. 789.

In my opinion, however, a question remains whether such a more sophisticated analysis is able to give us sufficient clues to address some of the above-mentioned application problems, such as the prioritization of institutional independence or the system of checks and balances. I am afraid that it rather allows us to make a more complete description of the current system, but it does not give us enough reasons for a (prescriptive) solution to some new problems.

Finally, we can summarize that innovative approaches to the separation of powers obviously suffer from their specific problems. However, in the context of possible approaches, we can still consider them the most appropriate solutions. Even if they fail to solve the relevant application problems completely, and there would still be open space for discretion by a state body, (in the spirit of the first approach), it would be at least slightly reduced. The separation of powers would then become a more debated issue and deciding on it would at least become more transparent.

Conclusion

The thesis that the separation of powers cannot save us by itself, no matter how well-thought it can be, sounds banal. Still, we are not far from the truth when we conclude that a number of objections against it relate to the many exaggerated expectations that people usually have. Indeed, for the proper functioning of the state it is necessary to have a certain social equilibrium within it and not just an institutional one. The separation of functions is not rigorously implemented anywhere, and neither has it been in the past. Indeed, the relationships between institutional independence and the system of checks and balances are too open to allow us to fine-tune every detail of the system of state bodies with absolute precision. It is the last of the above-mentioned objections that should worry us the most. Is not the separation of powers a too vague concept to have any meaning in our discussions? And not only theoretical, but also practical discussions.

The separation of powers is undoubtedly a confusing concept. If we imagine a sovereign who holds all the power in his hands, the idea of the separation of powers among multiple agents seems easy to understand. It could be (and has been) a catchy political slogan. Difficulties arise if we begin to perceive it as a theoretical concept that should structurally define clearly defined phenomena. At that point, many objections start to pop up that were described in more detail in this paper. The described problem of the uncertainty of the separation of powers has different outcomes. We have suggested three different approaches here. The first one was based on the thesis that, ultimately, all decisions about it are arbitrary – at least in the sense that they are determined by elements that we could consider legal. Yet, in practice, we should rather plead for the second approach – to try to innovate the separation of powers and create its deeper concepts.

Attempting to find at least a partial agreement on some of them is still better than to simply state its unjustifiability. There is a difference between the requirements of the truth of some theory, and practical needs.

Yes, we can eventually agree with sceptics like John A. Fairlie who wrote that, "*A clean-cut scientific analysis of governmental functions as the basis for a fixed plan of political organization is probably impossible.*"[45] But that does not mean that the separation of powers has no meaning. If we want to properly evaluate its significance, we must measure it not only using ideal gauges but also real alternatives we can use. And these alternatives often represent similarly unclear clues. In short, we live in a very complex world, and our knowledge has its limits. In our effort to achieve good governance, we therefore must make do with those instruments that we have available, and the separation of powers is, despite all its imperfections, one of them. Although it is not capable of ensuring good governance by itself alone, it might be too difficult to achieve this ideal without the separation of powers. Although we really do not know much about functionality of this concept, the risks we could face after rejecting it seem too high. So, it seems more reasonable to keep a friendly attitude toward the separation of powers.

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SUMMARY

Is Separation of Powers a Useless Concept?
Part II: Tripartite System Criticism and Application Problems

In this paper, the author raised the question of whether the separation of powers is a useless concept. It summarizes some critical arguments against the tripartite separation of powers. The paper deals with application issues related to the separation of powers and distinguishes several attitudes toward them, which it then analyses in more detail. Great attention is dedicated to formalism and functionalism. Eventually, the author wonders whether it would be better to innovate the idea of separation of powers, or to dismiss and replace it with some other principle. He concludes that the separation of powers has problems, but we need to evaluate this idea in relation to its possible alternatives. In such a light it still sounds promising.

Keywords: Separation of powers; state functions; tripartite separation of powers; formalism; functionalism; political theory.

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