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Table of Contents

Editorial

The editors are pleased to present to the reader the current issue of Pécs Journal of International and European Law, published by the Centre for European Research and Education of the Faculty of Law of the University of Pécs.

Our current issue looks at various issues of international and European law which are quite topical or carry great dogmatic importance.

In the Articles section, Ádám Lukonits firstly analyses whether normative rules aimed at democratization can paradoxically result in democratic deficits in light of their actual application and interpretation in practice, focusing on the rules of the nomination and election of the President of the European Commission. Emmanouela Mylonaki provides an overview of how Western Africa has responded to the development of the international law framework of counter-terrorism. Zoltán Papp provides a detailed international law analysis of the Air Defense Identification Zone, devoting special attention to rules and regulations pertaining to areas of airspace that do not fall under national sovereignty. Ágnes Töttős looks at the controversial issue of marriages of convenience as a means of abuse of rights in the EU migration law/citizenship context. Orsolya Szabó gives a brief account of the 2nd Hungarian-Sino International Forum organized in Pécs. As for this issue's article focusing on developments in the Western Balkans, Nives Mazur-Kumric looks at the contested concept of citizenship in Kosovo. Finally, Marija Daka provides a review of the book entitled The Philosophical Foundations of Human Rights edited by Rowan Cruft, S. Matthew Liao, and Massimo Renzo and published in 2015 by Oxford University Press.

We encourage the reader, also on behalf of the editorial board, to consider the PJIEL as a venue for publications. With your contributions, PJIEL aims to remain a trustworthy and up-to-date journal of international and European law. The next formal deadline for submission of articles is 15 March 2016, though submissions are welcomed at any time.

THE EDITORS

Democracy-deficits Caused by Democratizing Legislation in the European Union

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Since the late 1970s, the European Parliament has the most developing competence among the European institution. This in part stems from the Treaty of Lisbon, in which the rules concerning the nomination of the European Commission were altered. Due to the new and ambiguous interpretational frameworks, a great opportunity was given to the European Parliament to enlarge its power. However, the ideal interpretation based on all the relevant legal factors does not result in drastic changes; therefore the realized nomination system in general is appropriate. Only a few amendments are required in the near future, because the uncertain contents can easily result in an overturn at the inter-institutional balance and also can place the European Parliament in a legally unconfirmed position.

Keywords: European Parliament, European Commission, European elections, institutional balance, Spitzenkandidaten

1. Introduction

The European Parliament (EP) is the fastest growing institution within the European Union (EU). The increase derives from two related processes: on one hand, the European legislators – realising the fact that the EU has several democratic and structural deficiencies – has and continues to provide ever-expanding jurisdiction through amendments of the treaties. On the other hand, the EP also strives to strengthen its position through the interpretation of these amendments. This dichotomy foreshadows a contingency. If the European legislators fail to adopt grammatically and logically unambiguous provisions, the EP's legal, but legally unspecified jurisdiction-widening mechanism can prosper and produce interpretations with divisive and questionable content, which can lead to enticing possibilities for the EP to enlarge its power. This essay seeks to address this problem, namely what does the ideal and well-reasoned nomination procedure of the European Commission President look like (the one, which should prevail over the realised and EP-supported interpretation of the *Lisbon novums*)?

2. Legal Uncertainties in the Nomination of the European Commission President

Nowadays, the EP is a fundamental actor in the European policy-making process. Because of the broadening competence of the institution, its impact on European decision-making grows continuously. The Lisbon Treaty also strengthened this tendency. However, the specific provisions on a more democratic EU, a more powerful EP partly resulted in different interpretations. The alterations concerning the nomination of the European Commission members and the EP's role in this procedure (or in other words

the *Lisbon novums*) and the possible interpretations and consequences of these modifications are current and significant examples for this problem.

2.1. Nomination of the European Commission Members after the Lisbon Treaty

The nomination of the Commission members is regulated by the Treaty on European Union (TEU). The legal framework of the procedure was created long before the Lisbon Treaty; however, the Treaty modified the mechanism with such provisions, which guaranteed dominant power for the EP.

Firstly, "taking into account the elections to the European Parliament and after having held the appropriate consultations, the European Council, acting by a qualified majority, shall propose to the European Parliament a candidate for President of the Commission. This candidate shall be elected by the European Parliament by a majority of its component members. If he does not obtain the required majority, the European Council, acting by a qualified majority, shall within one month propose a new candidate who shall be elected by the European Parliament following the same procedure."[1] Secondly, "the Council, by common accord with the President-elect, shall adopt the list of the other persons whom it proposes for appointment as members of the Commission".[2] Thirdly, "the President, the High Representative of the Union for Foreign Affairs and Security Policy and the other members of the Commission shall be subject as a body to a vote of consent by the European Parliament".[3] Finally, "on the basis of this consent, the Commission shall be appointed by the European Council, acting by a qualified majority".[4]

As it was declared in the Treaty, the European Council's nominating activity shall function by taking into account the elections to the EP and after having held the appropriate consultations, as well as the President shall be elected (and not confirmed or declined) by the EP. These provisions gave the EP prominent status, but at the same time they led to an interpretational controversy.

2.2. Possible Interpretations of the Lisbon Novums

The uncertainties in the nomination of the European Commission President derive from the ambiguous phrasing in the TEU about the EP and its role in the nomination process. The expansion of the EP's jurisdiction had happened without the drawing of clear interpretational margins, therefore different readings were born concerning how far the EP's competence reaches in the post-Lisbon nomination system.

Since the European Council is the biggest loser of the EP's right-expansion, it is advisable to focus on the interpretations supported by these institutions. The EP, in relative unity, stated that the *Lisbon novums* necessitate a system where the Commission President must come from the parliamentary groups, namely the group(s) which can produce the required majority for election following the proposal of the European Council. Furthermore, the parliamentary group with the most votes (and strongest legitimacy) must attempt at first to produce the required majority. As a result, the parliamentary groups proposed candidates (*Spitzenkandidaten*)[5] on the basis of willingness and suitability to see them as the President of the

[1] TEU Art. 17(7), OJ 2012 C 326/01.
[2] *Ibid.*
[3] *Ibid.*
[4] *Ibid.*
[5] EP Resolution of 22 November 2012 on the elections to the European Parliament in 2014 (2012/2829(RSP)), http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P7-TA-2012-0462+0+DOC+PDF+V0//EN (25 September 2015).

Commission. On the other side, the European Council showed a divided approach. While some members approved the EP's interpretation, others rejected the fact that the European Council lost its consideration and it must nominate the candidate capable of producing the required majority. They based their concept on the wording of the Treaty, which clearly says that the freedom of nomination of the Commission President is in the hands of the European Council.[6]

The EP's concept resembles most of the national practices, where the competence to shuffle a government is given by the head of the state and belongs to the party leader with the most votes collected during the national elections. If the party leader fails to produce the required majority to get across his or her government, the competence will be passed to the party leader with the second most votes and so on. Therefore, according to the EP's interpretation the European Council (as *quasi* head of the state) must call upon the candidate with the most votes (the last time Jean-Claude Juncker) to measure whether he or she can provide the requested support in the EP. If yes, the European Council is bound to propose the candidate for President of the Commission. As the EP highlighted, this mechanism has several advantages: it creates a more democratic EU (because the European voters have real influence on the functioning of the Commission), it can stimulate the voters' willingness during the European elections (because the stakes during the elections are higher), and it can ease the acceptance of a parliamentary group for the voters (because the mechanism creates faces to the campaign).[7]

The European Council's concept was a response in order to retain its competences. The national leaders underlined that the European Council, acting by a qualified majority, shall propose a candidate to the EP for President of the Commission, which phrase – in conjunction with all the other provisions in the Treaty – cannot be interpreted in such a wide sense that it would mean that the EP has absolute freedom to narrow the European Council's right to propose a president.[8] Therefore, the taking into account of the European elections cannot result in an obligation for the European Council regarding the identity of the candidate. The leaders with other opinions than the EP's – the British, the Swedish, the Dutch and the Hungarian members of the European Council, as well as Angela Merkel and Herman van Rompuy at the beginning – believed that the EP's concept is antidemocratic in many ways: it violates the distribution of competences by the Treaty and creates a latent amendment of the TEU (because it declares that the European Council shall propose a candidate and not the EP, not even indirectly), it represses the aspiration of national leaders to become Commission President (because in the concept the president must emerge from the EP, where there must be a campaign, and if the candidate fails and the voters interpret this failure as a sign of weakness and incompetence, it can make his or her national duties more difficult), and it merges the control between the EP and the Commission (because the president may bring along the will of the EP).[9]

Basically, the question behind this jurisdictional debate is whether after the Lisbon Treaty the EP or the European Council owns the freedom of proposal regarding the Commission President. By grammatical interpretation, neither of the approaches can be rejected due to the ambiguous wording of the Treaty, and by logical interpretation, there are plenty of arguments to refer to on both sides. Furthermore, the EP has never stated that the freedom of proposal belongs to the EP, but it legitimates a situation where the European Council is under serious pressure, because it can choose its candidate from one single person. Regarding the effect, it is equivalent with a system where the candidate is defined by the EP, or more sensibly by the parliamentary groups and European voters. So the grammatical and logical interpretations are unable to

[6] http://brux.blog.hu/2014/05/28/a_vita_mar_regen_nem_junckerrol_folyik (28 April 2014).
[7] *Ibid.*
[8] *Ibid.*
[9] *Ibid.*

settle the controversy, therefore it is advisable to examine the debated provisions systematically, historically and teleologically. Unfortunately, the institutions have never applied these methods.

Regarding the final outcome, the EP's concept came into practice. As a result, the European Council is in now under constant pressure, because it must propose that parliamentary candidate for President of the Commission who holds the most votes and has the ability to produce the required majority to be accepted by the EP.[10] The first step towards this situation was taken in 2012 by the European Council when its members did not raise their voices immediately against the candidate-naming process of the parliamentary groups,[11] and as a result they allowed the parliamentary groups to propagate that the President of the Commission is chosen from the parliamentary candidates by the European voters. After this the declaration of any other argument would suggest inter-institutional crisis and misleading of the European voters.[12] Therefore it is irrelevant that the European Council was right about the EP concerning the rights it exercised during the European elections and thereafter which do not belong to the EP unambiguously – due to their omission, the national leaders virtually handed over the freedom of proposal to the EP which raised several questions on the future of the nomination process.

The most important of all is that whether the system can be altered into a less dividing, more compromised procedure before the European elections in 2019. The refinement is necessary, because the unarguable nomination of Jean-Claude Juncker for the President of the Commission was based considerably on the avoidance of an inter-institutional crisis and antidemocratic impressions.[13] However, any nomination system must rest on a clear legal basis, which has only one interpretation. To reach this, there are two different ways to go: the re-amendment of the TEU which is a long and complex procedure, and the compromised, well-reasoned re-interpretation of the current dubious phrasing. From these alternatives – keeping in mind that the willingness of the member states is divided in most cases – the latter one seems to be more capable to overcome.

But practically, this approach also has its impasse, because the European Council – besides the right to choose from those parliamentary candidates, who are bound to form a coalition[14] by necessity – relinquished its freedom to propose by tacitly accepting the EP's candidate-naming practice in 2012. To seize the remaining opportunity, if two or more parliamentary candidates are bound to form a coalition by necessity, it is advisable to let the European Council decide between the candidates. But if all the required votes are captured by one single parliamentary group, the exigence into which the European Council gets is a legitimate situation, because it is created by the European voters during the European elections. Regardless of these two options, the European Council has to take the consultations with the EP much seriously,[15] because with a motivated and well-prepared European Council President the national leaders may be able to compensate a part of their lost freedom.

[10] EC Conclusions of 26/27 June 2014 (EUCO 79/14), http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/143478.pdf (25 September 2015).

[11] In fact, the former Commission President José Manuel Barroso was even initiative about the parliamentary groups to name candidates [see Barroso's speech on year 2012 at the Parliament (SPEECH/12/596)].

[12] *Ibid* note 6.

[13] *Ibid.*

[14] This coalition has a similar mechanism of functioning as coalitions in the member states, but has different features in every other field (e.g. the united parliamentary candidates strive to reach the presidential position of the Commission, while the candidates in the national coalitions aspire to form a government).

[15] The appropriate consultations are legally undefined yet. It depends on the arrangement of the two institutions according to the Declaration on Article 17(6) and (7) annexed to the TEU, although this declaration is not legally binding (see Declaration on Article 17(6) and (7) annexed to the TEU, OJ 2012 C 326/01).

3. Ideal Interpretation of the Lisbon Novums

The ideal interpretation of the *Lisbon novums* shows how the proper and legally well-founded interpretation of the ambiguous provisions look like. In order to reach this, the first step is to create a systematic, historical and teleological interpretation of the provisions, and after that to sum up the results of each analysis.

3.1. Historical Interpretation of the Lisbon Novums

The historical interpretation strives to identify the ideological considerations, general ideas, and social-political-economic circumstances of the time when the provisions were created.[16] Genetical interpretation also belongs here, which means the examination of preparatory activities, drafts, solutions and indications in order to unfold the legislators' collective intention.[17]

3.1.1. From the Maastricht Treaty to the Draft Constitution

Although some principles of the parliamentary participation in the nomination of Commission President (namely the right of final acceptance and the requirement of binding consultations) appeared in the Maastricht Treaty,[18] considerable provisions did not emerge before the European Convention.

Between 2001 and 2003, the members of the Convent recognized that the EU was under pressure in three different ways: firstly by the member states to unify the EU, secondly from outside of the EU to define its status in the globalizing world, and thirdly in favour of the European citizens to make the integration more democratic, transparent and accessible.[19] The unification of the EU was inevitable because the expression of interests between the smaller and bigger member states was already problematic. The specification on the EU's role in the globalizing world was needed in order to increase the protection of integrational values on international level and to prepare against global terrorism. Finally, the EU's decision-making and functioning altered so much during the previous decades that the citizens were incapable of following the complex and distant mechanisms.[20]

It was obvious: if the integrational structure does not alter fundamentally, it can cause serious damage in the member states. Therefore, the Convent focused on three areas: the alteration of the EU into a more democratic, transparent and effective integration; the effective division of jurisdiction between the EU and its member states; and the re-conception and simplification of the treaties with the possible involvement of the Charter on Fundamental Rights.[21] The functioning of the Convent was not free of controversies, as in January 2003 a rupture evolved between the representatives of the smaller and bigger member states. The representatives of smaller member states believed that the derogation of the Commission's competence (which is based on equal representation) and the strengthening of the European Council and Council of

[16] József Petrétei, *The Fundamental Institutions of Constitutional Democracy*, Dialóg-Campus Publishing, 2009, p. 129.

[17] Petrétei 2009, p. 130.

[18] By this time the EP was allowed to vote on the Commission President, but its decision did not obtain legal binding until the ratification of Amsterdam Treaty (see Francis Jacobs, *The European Parliament's Role in Nominating the Members of the Commission*, http://aei.pitt.edu/6950/1/002956_1.pdf, p. 5.).

[19] Krisztina Vida, *Convent on the Future of Europe*, Hungarian Academy of Sciences Global Economy Research Center, 2002, p. 2.

[20] László Kecskés, *EU Law and Harmonization of Law*, 4th edn., HVG-ORAC Publishing, 2011, p. 168.

[21] Ernő Várnay & Mónika Papp, *The Law of European Union*, CompLex Publishing, 2010, p. 68.

Ministers (which institutions can easily be affected by the bigger member states) hide behind the optimization of the EU and the creation of a common foreign policy image.[22] They based their concept on a British recommendation saying it was advisable to abolish the rotation in the presidency of European Council and to elect a permanent president. As compensation to the Germans in return for their support of the British recommendation, the idea saying the Commission President has to be elected by the EP and not the national leaders was born.[23] Although the British recommendation received wide criticism, the German proposition was more than acceptable for the member states, especially for the smaller ones. They believed that if the EP obtains effective jurisdiction in the election of the Commission President, it can lead to the strengthening of parliamentary groups, European elections and legitimation of the Commission President, as well as to the democratizing of the EU.[24] As a result, the draft constitution formulated the concept saying the President of the Commission is elected by the EP, but the candidate is proposed by the European Council.[25]

3.1.2. From the Draft Constitution to the Lisbon Treaty

In June 2004, the member states approved the Convent's draft constitution, but due the French and Dutch referendums, it could never come into effect, thus the legislators started to negotiate on a reformatory treaty instead.[26]

The reconsidered draft treaty set the same objectives as the draft constitution: the realization of a sustainable, effective and fair EU, which serves primarily the interests of the citizens.[27] Although several phrases from the draft constitution (mainly those which considered the EU as an entity more similar to a federal union and the EU documents as constitutional norms) were removed, but the provisions on the Commission President's nomination were carried over to the Lisbon Treaty.

After all, it is clearly visible that the ambiguous phrasing in the Lisbon Treaty originates from the formulation of the draft constitution. Therefore, during the examination of the time when the provisions were created we have to take into account the circumstances of 2003, the Convent's term, and the reason why the drafter of the Lisbon Treaty did not modify these provisions. In 2003, the enlargement and democratization of the EU, the personification of a common foreign policy, the elimination of smaller member states' worries, the boosting of European elections, the better appreciation of European citizens and the stimulation of European economy were the main goals to achieve. It was logical to strengthen the EP's position because this move consolidates, democratizes and legitimizes in one step. Although the tempo of this strengthening was debated, its justification was beyond any doubt, even during the formation of the Lisbon Treaty, since many of these problems were still relevant and unsolved at that time.

[22] Györgyi Kocsis, *Post Enough: Controversies at the EU's Constitutional Assembly*, February 2003, HVG, No. 1, p. 17.

[23] Kocsis 2003, p. 18.

[24] However, it was clear that if the EP could elect the President of the Commission, it might lead to the loss of that's independency from the political groups. Nevertheless, it was the supporting approach which gained wider recognition among the member states and European institutions (see Paul P. Craig, *Institutions, Power and Institutional Balance*, in Paul Craig & Grainne de Burca (Eds.), The Evolution of EU Law, Oxford University Press, 2011, p. 79.).

[25] Draft Treaty Establishing a Constitution for Europe Art. 26(1), OJ 2003 C 169.

[26] Mónika Csöndes & László Kecskés, *The Lisbon Treaty Has Been Ratified*, 2008, Európai Jog, No. 1, pp. 3-4.

[27] Presidential Conclusions on the European Council Session at 21-22 June 2007 (11177/07 CONCL 2), https://www.ecb.europa.eu/ecb/legal/pdf/94932cor1.pdf (26 September 2015).

3.2. Systematic Interpretation of the Lisbon nvums

The systematic interpretation strives to determine the functional correspondence between a specific provision and the entire legal system.[28] Since the legal uncertainties were generated by the requirement of taking into account the elections to the Parliament, the systematic interpretation has to answer the following questions: what does EU law consider as 'taking into account' and how do the provisions on the competences of the European Council and the EP relate to each other. To give a coherent explanation, the interpretation has to cover the specific Lisbon provisions, the TEU and the Treaty on the Functioning of the European Union (TFEU), as well as the protocols, annexes and declarations attached to these treaties, and also the general principles of EU law.

3.2.1. Interpretation of the Phrase 'taking into account'

The phrase about having to respect of European elections causes the most difficulties. It raises two questions: what does the European Council have to take into account as European elections and what do the EU legal norms consider as taking into account?

The definition of elections chronologically consists of three stages: the pre-election activities *(e.g.* the campaign), the election itself, and the stage after the elections (the result of the elections and its consequences). The European Council, while selecting its candidate, must consider all three stages (because each of them can generate dubious conditions), and every other circumstance which relates to the elections and reveals itself for the European Council after the elections. Regarding the other parts of the *Lisbon novums* (*e.g*. the one which states that the EP has the right to elect the Commission President, as well as the one which declares that the EP has the authority to approve the Commission as a body), the concept on a comprehensive and wide definition of elections to the EP seems to be acceptable.[29]

The phrase 'taking into account' appears 49 times in the TEU and TFEU. The 3rd paragraph of Article 6 (1) of TEU is a notable example, which states that "the rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions".[30] In every other case the phrase means keeping in mind, deliberation, using in decision-making. Therefore, there are two different stages of taking into account: the traditional one which covers observation, and the intensive one which presumes a more extensive activity.

In the protocols, annexes and declarations attached to the treaties the abovementioned phrase appears 34 times. Article 15 of the Protocol on the Statute of the Court of Justice of the European Union states that "the duration of the judicial vacations shall be determined by the Court of Justice with due regard to the needs of its business",[31] and the Declaration on Articles 48 and 79 of the TFEU declares that "in the event that a draft legislative act based on Article 82 (2) would affect important aspects of the social security

[28] Petrétei 2009, p. 128.

[29] The German and Spanish versions of the Lisbon Treaty prescribe the respect of 'das Ergebnis', 'el resultado', thus the result of the elections. However, the difference is irrelevant, because the EU law does not apply the rule of hierarchy on the official languages.

[30] Another attributed version of the phrase appears in the Article 13 of TFEU, which declares that "in formulating and implementing the Union's agriculture, fisheries, transport (…) the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals" (see TEU Art. 6(1) and TFEU Art. 13., OJ 2012 C 326/01). Still, the full regard rather implies to the inclusivity of taking into account, than its intensity.

[31] Protocol on the Statute of the Court of Justice of the European Union Art. 15, OJ 2012 C 326/01.

system of a Member State (…) or would affect the financial balance of that system as set out in the second paragraph of Article 48, the interests of that Member State will be duly taken into account".[32] All the other phrases are traditional ones, therefore, the abovementioned dichotomy is a character of these documents as well. Moreover, the other fundamental documents (*e.g.* the treaties of accesion) show the same result, with approximately the same dichotomy.

According to Article 2 of the TEU "the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights".[33] Thus, the democracy holds a prominent status among the European values. At first glance, this means that the ambiguous provisions should be interpreted in favour of the EP. However, the EP differs from the national parliaments, and one of the basic specialities of the EU is that the member states (mainly through their governments) and the citizens (basically through the EP) simultaneously exist in the system.[34] By following this logic, the "absolutization" of the EP can easily lead to the devaluation of the national parliaments and governments, which is unfair having regard to the fact that EU is an integration community and not a federal state, and the member states are still the masters of the treaties.

3.2.2. Interpretation of the Provisions on the competences of the EP and the European Council

Contrary to the interpretation of 'taking into account', the interpretation of these competence-provisions does not go beyond the provisions in the TEU and TFEU.

It is advisable to note that at the beginning the EP did not hold any legislative competence, considering that its single role was to express the public opinion. Partly because of this, nowadays the EP is not the only actor of European legislation,[35] however, the Lisbon Treaty widely expanded its rights. Another right is that the EP and the Council of Ministers jointly establish the EU's annual budget, but it is the EP who has the right to give a discharge to the Commission in respect of the implementation of the budget.[36] As it was mentioned above, the EP has the rights to elect and accept a candidate in the nomination process of the Commission President. During the nomination of the European Court of Auditors (ECA) members, it is inevitable to ask for an EP opinion.[37] The EP plays an important role in the disputation of certain submissions and reports.[38] Finally, the EP has consultative functions in the Common Foreign and Security Policy and it can establish committees of inquiry on assumed violations of the EU law if the Court of Justice does not proceed in the case.[39]

The European Council determines the general directions and priorities, strategic interests and goals of the EU in order to foster its development and evolution. In connection with the EP, the European Council defines the EP's combination and exercises its above mentioned rights in the nomination of the Commission President. The European Council decides on whether a member state seriously breached European values,

[32] Declaration on Articles 48 and 79 of the TFEU, OJ 2012 C 326/01.

[33] TEU Art. 2, OJ 2012 C 326/01.

[34] Várnay & Papp 2010, p. 188.

[35] The EP and the Council adopt regulations, directives and directions together (see Várnay & Papp 2010, p. 115.).

[36] Though, on the recommendation of the Council (see TFEU art. 314 and 319(1), OJ 2012 C 326/01.).

[37] TFEU art. 286(2), OJ 2012 C 326/01.

[38] Relatively new methods of discussion are the EP hearings, which were popular during this year's Commission President election, and the EP's self-initiated reports.

[39] Várnay & Papp 2010, pp. 115-116.

it is entitled to determine conditions for the states aiming to join the EU, as well as defining the guidelines in the negotiation with the member states with the will to quit the EU.[40]

To sum up, the provisions on the competence of the EP were made to guarantee the direct involvement of citizens in the functioning and monitoring of European decision-making. On the contrary, the provisions on the European Council aim to grant I the power to determine the general directions, priorities and goals of the EU. Regarding the fact that the Commission's main role is to ensure and oversee the application of EU law, it is logical that the EP has dominant rights in relation with the Commission (see the rights to elect and accept a candidate), and the European Council does not (see the rights to propose and formally appoint a candidate), because the EP completes primarily legal (legislative, inquiring etc.) tasks, as against the European Council who performs mostly political duties. However, the composition of the EP is defined by the European Council and in practice every institution has a political character.

3.3. Teleological Interpretation of the Lisbon novums

Teleological interpretation aims to identify the purpose of a certain provision.[41] The Court of Justice declared that to decide whether the Treaty of Rome establishing a European Economic Community has direct effect in the member states or not, the nature, general structure and wording of the certain, questionable provision has to be revealed.[42] Therefore, the teleological interpretation has to focus on the nature of a certain provision, with due regard to its structure and wording.

Regarding the structure, the parts of Article 17(7) TEU give an important role to the EP in the nomination procedure (see the results of systematic interpretation). Considering the wording, the TEU provides the EP with rights to elect and accept , which are powerful entitlements. Consequently, the creators of the Lisbon Novums intended to give effective power to the EP, which means the provisions were born in the nature of involvement in the nomination procedure.

4. Synthesis of the Interpretational Conclusions

Before synthetizing the conclusions, the Preamble of the TEU has to be mentioned. Any preamble has legally binding content, which should be taken into account during the interpretation and implementation of the treaties.[43] The Preamble of the TEU declares that the member states "resolved to continue the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity."[44] Therefore, the requirement of keeping the citizens as closely to the European decision-making as possible has to be respected in the synthesis.[45]

It is hard to debate that the *Spitzenkandidaten-system* has democratizing effect, since it creates a connection between the European Commission and the European citizens. However, it is not clear whether the system

[40] The list is non-exhaustive (see Várnay & Papp 2010, pp. 94-95.).

[41] Petrétei 2009, p. 130.

[42] Gunnar Beck, *The Legal Reasoning of the Court of Justice of the EU*, Hart Publishing, 2012, p. 208.

[43] Using the analogy developed in the case *Les Verts* (the Court of Justice referred to the fundamental treaties as constitutional charters, see Case 294/83, *'Les Verts' v. European Parliament*, [1986] ECR 1339, at para. 23.) see Petrétei 2009, p. 93.

[44] TEU Preamble, OJ 2012 C 326/01.

[45] This requirement appears in the Article 1 of the TEU as well (see TEU Preamble and Art. 1, OJ 2012 C 326/01).

will increase the Commission President's legitimation significantly or not, because if the participation in the European elections remains limited, the acceptance by the society will be limited too. However, since the parliamentary groups campaign with the faces of their candidates, it will be easier for the European citizens to sympathize with a parliamentary group.

The system may repress the aspirations of the national leaders to become Commission President, but if the definition of EP elections is comprehensive and wide, it is nearly impossible for the Commission President to come from elsewhere than the EP. Furthermore, the TEU granted powerful entitlements to the EP in the nomination procedure, but left the interpretation of taking into account open-ended. The phrase has two different forms in the EU norms, from which the traditional one is the more frequent. It may imply that the *Lisbon novums* prescribe a simple consideration, but due to the extreme difference between the numbers it is questionable whether the differentiation was deliberate by the legislators. The other part of the systematic interpretation shows that it is the EP, and not the European Council who has dominant rights in connection with the Commission.

During the drafting of the *Lisbon novums*, the EU was intent on dealing with certain social, economic and political problems. These problems and the solutions given by the Convent were still current and useful in 2007, therefore, the Lisbon Treaty took over most of the draft constitution's provisions.

Finally, the teleological interpretation showed that the *Lisbon novums* were created to guarantee powerful and effective jurisdiction for the EP in the nomination procedure.

To sum up, the interpretational consequences as a whole transform the EP into the centre of the nomination process. Therefore, the realized system appears to be a legally verifiable procedure, with one correction on the European Council's right to choose between the candidates in a parliamentary coalition.[46] Even if citizen participation in EP elections remains limited, a candidate coming from the EP (whether he or she is a member of the EP or not) has more legitimacy than a candidate simply appointed by the European Council. This also brings more proficiency to the European Commission, regarding the President must come from an institution with various legal tasks, than if he or she would be appointed by an institution with mainly political duties.

5. Concluding Remarks

The *Spitzenkandidaten-problem* is complex: it is a current and fundamental challenge for the EU, with strong impact on the European institutions, the deepening of the EU, the demand for democracy, the respect of diversity while unifying the EU and so on. The purpose of this essay is to warn the European legislators to formulate the provisions with due attention and precision. On the other hand, the method of creating an ideal interpretation may be useful for those implementing the law in order to reach a legally well-reasoned and comprehensive interpretation (if there will be more unambiguous provisions in the future). Furthermore, it strives to summarize the milestones of the debate and tries to introduce a possible alteration before the EP elections in 2019 to make the system more effective in serving its purpose.

[46] In this case the EP and the European citizens are so divided that they cannot unite and guarantee the required votes to one candidate. Therefore, there must be an intervention from outside the EP, which must come from the European Council (regarding the Treaty does not mention any other actor in the nomination process with active rights).

An Overview of the Western African Response to the International Counter-terrorism Legal Framework

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Terrorism is a phenomenon treating peace and security worldwide and is not a new phenomenon affecting many countries in West Africa. As such it affects the interests of the international community, calling not only for international action but also for the response of African States. The response of Western African States to the existing international counter-terrorism legal framework is the subject matter of the present article. It is not the aim of the article to provide a detailed account of African States responses but to provide an overview of the reaction of West Africa to the existing counter terrorism framework evident through UN action. In order to provide such an overview the article presents the existing international legal framework before it outlines the response of West African States to this framework.

Keywords: West African States, Terrorism, Counter-Terrorism, Legal Framework,, UN action

1. Introduction

Historically terrorism is not a new phenomenon and since its emergence it has called for the attention of the individual states affected by its lethal force. In fact acts of terrorism by non-state actors have triggered the adoption of a number of national instruments towards eliminating the threat. Especially from the 1960's onwards when the phenomenon appeared to have acquired a new international dimension – expanding beyond the borders of one state and affecting the interests of the international community – it has been internationally appreciated that a uniform legal framework is necessary in order to deal effectively with the threat of terrorism. Despite the fact that states experience terrorism differently in terms of victims and overall impact, it is now a reality that no state is immune from the threat, which ranges from victimisation as well as fear. Likewise, terrorism poses a security challenge also for Africa as evident by the African struggle not only against domestic[1] but also international terrorism. The 1998 Kenya embassy bombing and attacks against UN buildings in Algeria and Nigeria[2] are two indicative examples of the dramatic occurrence of terrorism in African soil.

At an international level the internationalisation of terrorism led to the adoption of international measures to combat it. The subsequent treaties that followed criminalized in thematic style the various offences contained therein and elevated them to crimes of international relevance. The model of that era could be best described as an inter-state cooperation suppressionist model as the thematic treaties of that era were

1 See relatively M. Crenshaw (Ed.), *Terrorism in Africa*, New York, GK Hall and Co, 1994.

2 See: Solomon, H, *Terrorism and Counter-Terrorism in Africa*, Palgrave Macmillan, 2015.

premised on a suppressionist approach, which was also endorsed by General Assembly resolutions of the time. Notably, all the anti-terrorism conventions adopt a suppressionist approach despite the traces of some preventive action. The purpose of the present article is to access the extent to which African states are ratifying international instruments and emphasize the importance of such a process. The extent to which African states had ratified existing UN conventions it is a positive step forward. However, it cannot guarantee a holistic appreciation of the fight against terrorism process.

This article is divided in to two sections: the first one outlines the international legal framework while the second examines the position of Western African states in relation to it. It is beyond the scope of the article to provide an extensive presentation of all the instruments related to terrorism but it will make reference to the most important ones while reflecting on their ratification by African states. The objective of the work is to reinforce the case for the use of the UN counter terrorism strategy by West African States as a strategy that addresses not only suppression but also prevention of terrorism. Despite the fact that there are limited terrorism incidents in Western Africa it has been argued that West Africa exhibits a number of characteristics that make it vulnerable to terrorism.[3] The mere fact that the region is yet to recover from a number of conflicts which had affected its development over the years, has encouraged the birth of transnational organised criminal activity. The latter can be exploited by terrorist groups who are looking to finance their activities.

2. The International Legal Framework against International Terrorism

2.1 Gradual Evolution of International Counter-terrorism Models Developed to Deal with Particular Manifestations of Terrorism[4]

Starting from the least ambitious threshold of the conventions regulating hijacking in the 1960's and 1970's, the 1990's finds the international community forming and adopting new instruments, dealing with more specialized forms of terrorism with increasingly advanced language. The United Nations General Assembly has played an important role in addressing some of the more specific manifestations of international terrorism, such as airline hijacking, unlawful seizure of aircraft and hostage taking, by adopting resolutions and conventions that require states to criminalize these acts. International cooperation between states for the suppression of international terrorism was manifested by a series of agreements dealing with a crime that threatens not only human life and safety, but also the existence of every civilized society.[5] An analysis of the subject matter of the international instruments dealing with terrorism reveals that they encompass

[3] See relatively; Yoroms, G, *Counter terrorism Measures in West Africa*, found at Understanding Terrorism in Africa:Building Bridges and Overcoming the Gaps, ed Wafula Okumu and Anneli Borth (Pretoria: Institute for Security Studiesm 2008,

[4] R. Falk, *Rediscovering international law after September 11th*, 16 Temple International & Comparative Law Journal, 2002, pp. 359-69. See also: D. Zelman, *Recent developments in international law: anti-terrorism legislation - part two: the impact and consequences*, 11 Journal of Transnational Law & Policy, 2002, pp. 421-441.

[5] See: N. Joyner, *Aerial hijacking as an international crime, Oceana Publications*, 1974; E. McWhinney, *Aerial piracy and international terrorism: The illegal diversion of aircraft in international law*, Kluwer, 1987; A. Evans, *Aircraft hijacking: its causes and cure*, 63 AJIL, 1969, p. 695.; *Aerial hijacking: what is to be done*, 66 AJIL 1972, p. 819*; J. Moore, Towards legal restraints on international terrorism* 67 AJIL 1973, p. 88.

different manifestations of violence upon civil aviation,[6] civil maritime navigation and sea based platforms,[7] as well as attacks upon persons including hostages, diplomats and other internationally protected persons.[8]

Among the most notable elements of the relevant conventions is the absence of universal jurisdiction in respect of the offences prescribed therein. For example, the provisions of the Tokyo Convention[9] provide for jurisdiction on a variety of bases, such as the registration of the aircraft, the nationality of the personnel harmed, but none of these amounts to universal jurisdiction. The necessity to suppress acts of hostage taking led to the adoption of the 1979 Convention against the Taking of Hostages. The latter Convention recognizes the grave nature of the offence[10] and obliges member states to define it as an extraditable offence under their domestic laws.[11] The Tokyo Convention makes no provision regarding the handling of hostage situations but requires member states to take all appropriate measures[12] to ease the situation and secure the release of the hostages.[13] It is evident that both in the case of civil aviation and hostage taking the emphasis is not on the protection of the victims once these are caught in the middle of a particular incident; rather, cooperation focuses more on the criminal justice dimension thus adopting a suppressionist model. The basic model followed by the international anti-terrorism instruments[14] is the following: a type of terrorist activity of particular concern at the time is identified; states are obliged to criminalize the conduct and impose penalties. Thus, the pre-September 11 model was utilizing international law to declare that certain acts should be criminalized in the domestic law of each signatory state. As it becomes evident from the above the overall success of the existing conventions rely on the levels of ratification by member states.

In 1996, the General Assembly established the *Ad Hoc* Committee, on the basis of resolution 51/210, with the aim of developing the international legal armoury against nuclear terrorism and terrorist bombings.[15] The *Ad Hoc* Committee has since elaborated the Terrorist Bombings and Terrorist Financing Conventions

6 1963 Tokyo Convention on Offences and Certain Other Acts Committed on Board Aircraft, 704 UNTS 219; 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 860 UNTS 105; 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 974 UNTS 177; 1988 Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, which extents and supplements the Montreal Convention on Air Safety, ICAO Doc.9518 (24 Feb. 1988).

7 1988 Rome Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (10 Mar. 1988) and the Protocol of the same date for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, IMO Doc. Sua/Conf/15.Rev.1 (1998).

8 1973 Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, 1035 UNTS 167; 1979 International Convention Against the Taking of Hostages, UN Doc. A/Res/34/146 (1979). For a detailed analysis of the Convention see: L. Bloomfield, G. FitzGerald, Crimes against internationally protected persons: prevention and punishment. An analysis of the UN Convention, Praeger, 1975. See also: K. Rozakis, Terrorism and the internationally protected persons in the light of the ILC's Draft Articles, 23 ICLQ (1974), p. 32.

9 In particular, the convention requires **s**tates parties to take such measures as are necessary to establish their jurisdiction over crimes committed on board aircraft registered by them. See Art. 3. Other provisions concern such matters as taking offenders into custody, restoring control of the aircraft to the commander and continuation of the aircraft's journey. Arts. 6-15.

10 Art. 2.

11 Art. 10 (1).

12 The current official practice of states is to refuse to yield to terrorist demands although this is not always the case in practice. See: US Counter-Terrorism Policy Statement in J. Paust**,** International criminal law: cases and materials (Carolina Academic Press, 1996), p. 1176.

13 Art. 3 (2).

[14] A du Plessis Sambei & M. Polaine, *Counter-terrorism law and practice: An international handbook*, Oxford: Oxford University Press, 2009.

15 G.A. Res. 51/210 (17 Dec. 1996) para. 9.

and with its mandate having been renewed annually by the Assembly[16], followed by the elaboration of two other agreements: one on nuclear terrorism[17] and a comprehensive convention on terrorism.[18] Particular dimensions of ideological violence such as terrorist bombings, terrorist financing, traffic in arms, exchange of information concerning persons or organisations suspected of terrorist-linked activities, disruption of global communications networks and technical cooperation in training for counter-terrorism, were subjects not covered by the twelve existing conventions on international terrorism. The International Convention for the Suppression of Terrorist Bombings (Terrorist Bombings Convention)[19] and the International Convention for the Suppression of the Financing of Terrorism (Terrorist Financing Convention)[20] both are interstate in character, they adopt a much less-consensus based approach that it's other interstate counterpart. One of the innovative[21] elements of these conventions was that they treat the offences prescribed therein as a non-political offence for the purpose of extradition. The legal effect of this provision is that a normal defence that would be available to a fugitive offender to plead that an act was committed under political motivation is denied in the case of extradition proceedings relating to a terrorist bombing. The provision recognises that where there is recourse to indiscriminate violence against civilians, then the offender is not entitled to the protection provided by the laws governing extradition. We can therefore detect that the main theme underlying the Financing of Terrorism Convention is the abandonment of particular safeguards otherwise granted to the accused under domestic law and prior anti-terrorist conventions.

When the Terrorist Bombings Convention was adopted in early 1998 international law-makers had not yet witnessed the devastating effects of the US Embassy bombings of Tanzania and Kenya, or the 9/11 attacks, nor the later bombing sprees in Indonesia, Morocco and Spain – between 2002 – 2003. Other sporadic incidents, however, and particularly the failed attempt to destroy the World Trade Centre in 1993 had given some insights to security specialists of what was to follow. Otherwise, the adoption of the 1998 Terrorist Bombings Convention is questionable from a political perspective, since as most incidents were of domestic origin and effect, many countries did not wish to make applicable the international laws of armed conflict to bombing incidents perpetrated by separatist or other national liberation movements, with a view to depriving them of any claims to self-determination. This was the UK's position throughout the IRA campaign, where transnational elements were recognised only where UK secret agents were involved in clandestine operations to thwart bombing operations originating abroad,[22] or where extradition proceedings were concerned. This policy perspective also helps explain why the Terrorist Bombings Convention was poorly ratified up until the events of 9/11.

16 Under the terms of G.A. Res. 55/158 (12 Dec. 2000) it was decided that the Ad Hoc Committee continue its mandate, at least during the fifty-sixth session, within the framework of a Working Group of the Sixth Committee.

17 UN Doc A/C6/53/l4, Annex I, 1998, Draft Article 4.

18 For the text of the draft comprehensive convention, see Report of the Ad Hoc Committee, Sixth sess. (28 Jan. – 1 Feb. 2002), UNGAOR 57th sess., UN Doc. A/57/37/Supp. No. 37 (2002).

[19] Drafted on the 15th December 1997 and signed on the 12th January 1998.

20 Drafted on the 9th December 1999 and signed on the 10th January 2000.

21 This is the first case that the political offence exception was excluded in a convention negotiated in the United Nations.

22 McCann *v* UK (1996), 21 EHRR (1997**)**.

2.2 The Financing of Terrorism Conventions as Evidence of Less Context Specific Interstate Model

At the global level one of the cornerstones of the struggle against terrorism was the International Convention for the Suppression of the Financing of Terrorism. This convention cannot be put in the same category as all the other UN Conventions, because it does not deal with specific manifestations of terrorism. In December 1999 the UN General Assembly adopted the International Convention for the Suppression of the Financing of Terrorism[23] after negotiations that commenced in 1996[24] and which, unlike previous anti-terrorist conventions, does not focus on any one particular manifestation of terrorism (hijacking, bombing etc.), but is instead aimed at those individuals that: "By any means, directly or indirectly, unlawfully and wilfully, (provide) or (collect) funds with the intention that they should be used to commit terrorist acts."[25]

While notionally covered by the accomplice liability provisions of the various existing sectoral anti-terrorism treaties, the issue of the material support provided by these networks was considered to be of such importance in the fight against terrorism that it warranted its own treaty. The treaty, which was in part modelled on the Terrorist Bombings Convention, includes the now 'standard' anti-terrorism provisions evident in previous treaties, but also contains new provisions specific to the financing of terrorism with a view to providing states with the capability to counter these vast networks which commonly cross two or more international boundaries. For example, provision is made for the possibility of the criminal liability of legal persons,[26] as well as for the freezing and seizure of funds[27] and the prohibition of reliance on bank secrecy laws as a ground for declining mutual legal assistance.[28]

The mentioned Terrorist Financing Convention was particularly welcome as it recognised that the financing of terrorism is a matter of grave concern to the international community and required states to adopt regulatory measures. Article 2 defines an act as constituting a specific terrorist offence if it either constitutes a specific offence within the scope of one of the nine UN Conventions listed in the treaty annex that addresses various types of terrorism, or any other act intended to cause death or serious bodily injury to a civilian or to any other person not taking part in hostilities involving armed conflict, when the purpose of such act was to intimidate a population or to compel a government or international organisation to do or refrain from doing an act.

Furthermore, Article 8 of the Convention requires every signatory state to take appropriate measures, in accordance with national laws, for the detention and freezing of any funds allocated for terrorist offences.[29] Article 11 requires states to render the offences prescribed in the Terrorist Financing Convention

23 39 ILM (2000), 270; see: V. Morris & A. Pronto, The work of the sixth Committee at the fifty-fourth session of the UN General Assembly, 94 AJIL (2000), p.582; see also: EC Council Recommendation of 9 Dec. 1999 on Co-operation in Combating the Financing of Terrorist Groups (O.J. C 373, 23/121999).

24 The Convention was adopted following a French proposal. See: Working Document Submitted by France on the Draft International Convention for the Suppression of Financing of Terrorism, UN GAOR, 54th sess., Supp. No.37, UN Doc. A/54/37, Annex II (1999), p.14.

25 Art. 2 (1), It is also an offence to participate, to organize, to direct, to act in a common purpose [Art.2 (5)] or to attempt [Art. 2(4)] any of the offences describe in Art. 2 (1). See also: Report of the Ad Hoc Committee established by GA Res. 51/210 (1996), UN GAOR 54th Session, UN Doc. A/54/37/Supp. No.37 (5 May 1999), p.3.

26 Art. 5.

27 Art. 8.

28 Art. 12.

29 The UK Terrorism Act 2000 and the Anti-Terrorism, Crime and Security Act 2001 provide for a comprehensive statutory scheme to deal with terrorist property. More specifically, sections 15(3), 15(4), 17 (a), 17(b).

extraditable and to assume jurisdiction over such offences by making them punishable with appropriate penalties.[30] Moreover, the mentioned Convention removes the political offence exception by obliging contracting states to ensure that criminal acts within its scope are under no circumstances justifiable by considering of a political, ideological, racial, ethnic, religious or other nature.[31] The Terrorist Financing Convention entered into force on 10 April 2002 after the required 21 states – out of the 129 signatories - had deposited their instruments of ratification with the United Nations. It should be stressed that although only a few countries, such as the UK, ratified the Terrorist Financing Convention prior to 9/11, the vast majority of states expressed no desire to do so. The UK adopted secondary legislation to implement the Convention that prohibits any person from making "any funds or financial services available directly or indirectly to or for the benefit of a listed terrorist or organisation controlled by terrorists."[32] Ironically, the USA was not itself prepared to ratify the 1999 Convention and it was only after the events of 9/11 that it spearheaded a campaign to enshrine terrorist financing within an internationally binding legal framework. The principal reason behind the inhibition of states to ratify this Convention is obviously the possibility that private financial systems will be scrutinised by international bodies and sensitive information would have to be divulged to foreign investigative bodies. Such lack of trust and adherence to the unilateral internal approach did not survive long. The parallel existence of an interstate suppressionist model through the adoption of the Terrorist Financing Convention failed to subdue the unilateral internal model – through which states dealt with terrorist financing through control of their own financial systems.

2.3 Residual Forms of Interstate Cooperation Post September 11

In the aftermath of the Bali bombing attack, the Security Council reminded the member states of their obligation to cooperate among themselves and the Council itself on the basis of Resolution 1373.[33] The same was repeated in verbatim language in subsequent resolutions.[34] In all these resolutions, the Council inserted a preamble phrase that deserves particular mention. Thus, Resolution 1438 notes that the Council is "determined to combat terrorism in accordance with its responsibilities under the UN Charter."[35] Since, in the words of the Council, even domestic terrorist bombings are a threat to international peace and security, the Council views its potential role as encompassing both domestic and international terrorism.

The significant difference between the cooperation provisions of the 1998 Terrorist Bombings Convention and those contained in Resolution 1373 is that the former establishes an interstate approach, whereas the latter creates two new regimes:

a) interstate cooperation between particular states that would under other circumstances be unwilling to exchange information or succumb to each other's demands for mutual legal assistance, and;

b) cooperation between a state and the Council itself.

The first of these regimes may be problematic in practice, but it was certainly intended as the creation of an obligation towards countries that would otherwise not become parties to the 1998 Terrorist Bombings

30 See sec. 63 of the UK Terrorism Act 2000.

31 Article 6.

32 See: SI No 3365 (Mar.2001). UK law imposes further restrictions on terrorist financing in the Anti-terrorism Crime and Security Act 2001, amending the Terrorism Act 2000.

33 S.C. Res. 1438 (15 Oct. 2002).

34 S.C. Res. 1440 (24 Oct. 2002); S.C. Res. 1465 (13 Feb. 2003); S.C. Res. 1530 (11 March 2003).

35 S.C. Res. 1438 (14 Oct.2002), found at www.un.org/Docs (accessed October 2015).

Convention and which would never enter into bilateral relations with countries allied to the USA. Although from a practical point of view it is very difficult to monitor their efforts in exchanging information and other intelligence – it also defeats the purpose of the obligation – it may be invoked against such unwilling countries in the future as constituting a material breach of an obligation.

The adoption of Resolution 1373,[36] which is in effect a 'mini convention' on terrorist financing and terrorist bombings, changed the international legal landscape. All states are now under a strict and monitored obligation to prevent terrorist attacks, including by early warning systems and exchange of information cooperation; afford greater assistance to each other; find ways of accelerating and intensifying exchange of information regarding explosives and sensitive materials, including weapons of mass destruction. Resolution 1373 also called on states to become parties to the 1998 Terrorist Bombings Convention. An examination of recent Security Council resolutions dealing with the issue of terrorist bombings suggests a divergence from the Terrorist Bombings Convention. Whereas, this Convention is inapplicable where there does not exist an international element, in the cases of the 2002 Chechen hostage crisis in Moscow,[37] the February 2003 Bogotá bombing blast[38] and the Madrid train bombing incident,[39] the Council relying on its prior Resolution 1373,[40] characterised these incidents as threats to international peace and security and urged states to adhere to their obligations to cooperate on the basis of Resolution 1373.[41] All these incidents took place within one country and were committed by groups indigenous to these countries and would not normally have come under the scope of the Terrorist Bombings Convention. Since Resolution 1373 is binding on all states on account of Article 25 UN Charter, the jurisdictional and cooperative obligations established under the Resolution 1373 take precedence over obligations stemming from the Terrorist Bombings Convention. This again is defendable on the basis of Article 103 of the UN Charter, whereby obligations accruing from the UN Charter supersede all other obligations that a state may have assumed. This observation, moreover, reinforces the unilateral internal model and brings it closer to a form of universal jurisdiction. It also seems to unilaterally dispel the inhibitions inherent in the 1998 Terrorist Bombings Convention whereby states preferred to deal on their own with internal bombings.

Turning our attention to the UN counter terrorism strategy adopted in 2006 and its application to the sub-region we can trace the elements of a comprehensive strategy which emphasises 'the imperative for respecting human rights and promoting the rule of law as a sine qua non to the successful combating of terrorism.[42] The latter has been a positive step forward as it highlights the need to combine development with counter terrorism efforts. This is particularly relevant to the case of West African States where there weak development encourages the birth of criminal organisations able to acquire an ideological agenda which itself can lead to the formulation of terrorist groups.

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36 See: *Second Progress Report on terrorism and human rights*, UN Doc. E/CN.4/Sub.2/2002/35 of 17 July 2002, para. 25-29.

37 S.C. Res. 1440 (24 Oct. 2002).

38 S.C. Res. 1465 (13 Feb. 2003).

39 S.C. Res. 1530 (11 March 2004). Although it later transpired that Al-Qaeda was responsible for the attack, the Council relied on the statements of the Spanish government and named ETA as being the culprit.

40 Rosand, E., Security Council Resolution 1373, the Counter-Terrorism Committee and the fight against terrorism, 97 AJIL (2003), p. 333.

41 From a practical point of view, what S.C. Res. 1373 cannot do is dictate the various procedures that are customarily attuned on the basis of bilateral or multilateral agreements, such as extradition (including the aut dedere principle) and mutual legal assistance, but it can demand for the lifting of bank secrecy as this has not traditionally been left to interstate settlement.

42 See: Bukun – Olu Onemola, Statement on behalf of Nigeria to the UN Sixth Committee, New York, 7th October 2009, found at www.globalcenter.org (accessed October 2015).

3. West African Response to the International Legal Framework

Turning our attention to the African states and the ratification of the universal instruments outlined above, one can point out that the levels of ratification are not consistent as there are indeed variations between states. It appears that all African Arab League states have adopted specific anti-terrorism legislation which not only criminalizes terrorism but it also covers incitement,[43] while all states are now parties to the Terrorist Financing Convention. On the other hand East and Western Africa appears to have variations amongst the states ratifying the universal instruments[44]. The relevant to terrorism in Africa literature suggests that the phenomenon is very prominent in the region.[45] In fact the geographical position of Africa becomes often an easy passage for the movement of terrorists or allows for the training and organisation of terrorist operations. Likewise the phenomenon acquires not only a national but also an international dimension. A detailed categorization of African countries reactions was presented by Kegoro who indicated the three categories within which African states ratification and legislative progress falls. According to him countries such as Uganda, Gambia and South Africa have implemented the requirements of UN Resolution 1373 by enacting supplementary legislation in the absence of relevant one within their jurisdiction. In the second category fall states such as Egypt, Tunisia whose pre-existing relevant legislation implied that there was not a need for the adoption of further legislative measures at a national level. More problematic appears to be the case of Kenya and Namimbia as both failed to implement the resolution in their respective legislation.[46] Of course one cannot argue that ratification itself can achieve victory over terrorism but it is definitely the first step indicating the willingness of states to take national action and cooperate with each other in order to collectively fight the phenomenon. The fact that African states have ratified the universal framework indicates a strong determination and a commitment to the international community of the views on the issue of terrorism. Irrespectively of the driving force behind such determination we can not overlook the reality that African States positively respond by taking action towards the adoption of the international legal framework. Kegoro suggests that "the debate on counter-terrorism legislation in pursuance of the UN resolution (1373) now questions the necessity for such legislation in the first place. The assumption that (counter-terrorism legislation) will reduce the threat of terrorism is severely undermined by situations where such legislation exists but is not invoked. It is simplistic to assume that countries that have in place specific counter-terrorism legislation are worse off from a human rights point of view than those that do not."[47]

However, one cannot overlook the importance of ratification as it is not only an indication of the determination of the state to fight terrorism but it is the vehicle by which international cooperation may be materialised. Therefore, the ratification of the existing UN conventions –presented in the first section –

[43] Ford J., *Beyond the 'war on terror': A study of criminal justice responses to terrorism in the Maghreb*, Pretoria: Institute for Security Studies, 2009, pp. 81-82.

[44] Yoroms G., Counter-terrorism measures in west Africa, in W Okumu & A Botha (eds), Understanding Terrorism in Africa: building bridges and overcoming the gaps, Pretoria: Institute for Security Studies, 2008, pp.90-97.

[45] Le Sage A., *Terrorism threats and vulnerabilities in Africa*, in A Le Sage (ed), *African counterterrorism cooperation: Assessing regional and subregional initiatives*, Washington DC: NDU Press/Potomac Books,2007; Also see: Yoroms G., *Defining and* mapping threats of terrorism in Africa; S Makinda, History and root causes of terrorism in Africa; Cilliers J., Terrorism and Africa, African Security Review 12(4) (2003), pp. 91-103.

[46] Kegoro G., The effects of counter-terrorism measures on human rights: the experience of East African countries, *Understanding Terrorism in Africa: In search for an African Voice*, Pretoria: Institute for Security Studies (ISS), 2007, p. 56.

[47] *Ibid.*

creates a mechanism for international cooperation by making direct reference to extradition and mutual legal assistance. In the absence of a universal definition on terrorism, ratification may also be an indication of the ratifying state towards a common understanding of the threat. If fact it is a common shared argument that states define terrorism according to their own interests both internally and externally. This has been traditionally creating obstacles in the cooperation of states as in the absence of common understanding.

Following the US reaction to the 9/11 and the gradual abandonment of the '*war on terror*' doctrine it seems that the international community is acknowledging the criminal scope of terrorism which results in serious form of human rights violation. From an African perspective, therefore, terrorism must be prevented and terrorists overcome not only for principled and security-related reasons, but because the bulk of Africa's people require governmental and international attention to a range of other problems and possibilities.[48]

As it has been determined in the first section of the article the contemporary counter terrorism model is a suppressive one which exhibits both an internal and external dimension. However, the strong emphasis of the international instruments has resulted in neglecting issues of prevention. Of course legal responses to terrorism are necessary yet they do not constitute an absolute cure for the problem. The inherent limitations of any legal framework do not imply that ratification of continental and global instruments remains important. As it has been argued law and fidelity to the rule of law are part of the wider strategy to overcome terrorism in the long term.[49] The fight against terrorism cannot be won via ratification which establishes a forum of stability and certainty in combating terrorism as it provides the foundation upon which international agreements are made and national strategies are developed in accordance to international standards.[50]

4. Conclusion

From the 1960's political violence began manifesting itself beyond national frontiers and threatened the security of civil aviation. The introduction of this international element alone shifted the counter-terrorism approach from a fully unilateral domestic to an interstate cooperation model. Since the early 1960s, much of the physical conduct comprising terrorist acts has been criminalized in numerous sectoral anti-terrorism treaties. Each contracting party is under the duty to cooperate in and give assistance to the repression of terrorism, the apprehension and punishment or extradition of alleged perpetrators of terrorism acts. The effectiveness of specific anti-terrorism conventions is questionable since the enforcement of the existing instruments depends much on the political willingness of states parties to support the international cooperation in criminal matters. Often the exceptions provided under the political offence exception, have allowed terrorists to find safe heavens. However, the adoption of the Terrorist Bombings Convention and the Terrorist Financing Convention is an evidence of the determination of the international community to deal with the phenomenon of international terrorism.

48 J. Ford, *Beyond the War on Terror*, Institute for Security Studies, Pretoria, 2009, p. 2.

49 E. Rosand, *Enhancing counterterrorism cooperation in southern Africa*, African Security Review 17(2) (2008), 43-60.

50 B. Bowden & H. Charlesworth & J. Farrall, *The role of international law in rebuilding postconflict societies: Great expectations*, Cambridge: Cambridge University Press, 2009.

Resolutions of the General Assembly since the 1970s, and of the Commission on Human Rights since the 1990s,[51] have stated that international terrorism may threaten international peace and security, friendly relations among states, international cooperation, state security, or UN principles and purposes. The preambles to the 1999 Terrorist Financing Convention take a similar position, while various regional instruments also highlight the threat to international peace and security presented by terrorism.[52] Fortunately, an obstacle sustained in the past and relating to the '*political offence*' exception to terrorist offences, has gradually been removed from contemporary treaties, while its application in the traditional anti-terrorist conventions has lost favour among signatories.[53] The anti-terrorism conventions do create a very useful and strict legal regime, and post 9/11 some 80 states have become party to all of them. Africa has responded to terrorism by ratifying international instruments which makes the country part of the wider

An examination of the various forms of action and cooperation contained in the UN anti-terrorism conventions indicates the formation of cooperative or unilateral models and delineates their precise content and spartial duration. The adoption of the Terrorist Bombing Convention and the Terrorist Financing Convention represented a more effective rendition of the suppressionist model against terrorism as both of them contain an expanded, wide range of obligations on member states. It became evident during the course of the article that there is now a strong legal framework capable of addressing the modern manifestations of terrorism. Therefore, what is mostly needed in the fight against terrorism is not the development of new norms but the enforcement and consistent application of the existing international norms by all states including Africa.

51 UNComHR Res. 1995/43, 1996/47, 1997/42, 1998/47, 1999/27, 2000/30, 2001/37, 2002/35, 2003/37, UNSubComHR Res. 1994/18, 1996/20, 1997/39, see also 1993 Vienna Declaration and Programme of Action, UN Doc A/CONF.157/24.

52 Inter-American Convention, Special Summit of the Americas, Declaration of Nuevo León, Mexico, 13 Jan. 2004; OAS Convention; ASEAN, Declaration on Joint Action to Counter Terrorism, Brunei Darussalam, 5 Nov. 2001, OSCE, Bucharest Plan of Action for Combating Terrorism, 4 Dec. 2001, MC (9).DEC/1, Decision on Combating Terrorism (MC (9).DEC/1); EU Commission Proposal, Explanatory Memorandum, op cit, 3, 8.

53 Arts. 5, 9, 11, 1998 Terrorist Bombing Convention, 37 *ILM* (1998), 247; and Arts. 6, 7, 11, 2000 Terrorist Financing Convention, 39 *ILM* (2000), 270.

Air Defense Identification Zone (ADIZ) in the light of Public International Law

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The Air Defense Identification Zone (ADIZ) is established to serve the national security interests of the state. Maintaining ADIZ becomes fundamentally relevant from the perspective of international law when such a zone extends into airspace suprajacent to international waters. Materially, two considerations are most relevant in terms of ADIZ conforming to international law, both potentially creating a conflict with ADIZ rules: Contracting Parties to the Chicago Convention on International Civil Aviation have delegated rule-making powers to enact rules of the air with a view to safeguarding the safety of air traffic in international airspace to the ICAO Council. Furthermore, in international airspace the state of registry generally enjoys exclusive jurisdiction with respect to the aircraft carrying its national mark. In this paper ADIZ will be deemed as exercising jurisdiction over extraterritorial acts by the state maintaining ADIZ; hence, the prescriptive and enforcement distinction adds an additional layer to the analysis of the international legal context of ADIZ. The response to as to how ADIZ fits in the international legal framework may differ depending on whether one seeks to identify permissive rules of international law related to the maintenance of ADIZ in international airspace or the non-existence of prohibitive rules sufficient to justify conformance with international law.

Keywords: ADIZ, air law, law of the sea, Chicago Convention on International Civil Aviation, jurisdiction, use of force, international customary law, civil aircraft, state of registry

1. By way of Introduction

This paper endeavors to highlight some of the manifold international law aspects of the Air Defense Identification Zone (ADIZ), which become increasingly challenging when ADIZ is extended to international airspace falling outside of national sovereignty. The overall objective is to find out where ADIZ fits in the international public law framework. To this end, an attempt is made to identify relevant permissive or prohibitive rules of international law in terms of states' powers to establish ADIZ in international airspace. This paper does not, however, pretend to provide an all-encompassing and comprehensive assessment of international public law in the course of identifying such permissive and prohibitive rules. Such an undertaking would go beyond the scope of the present effort.

The focus of this paper is on the international law framework regulating civil aviation in times of peace – with special emphasis on the rules and regulations pertaining to the airspace over international sea that are not the subject of national sovereignty.

ADIZ will be qualified as exercising state jurisdiction – with respect to which, a distinction will be drawn between prescriptive jurisdiction and jurisdiction to enforce. This paper does not endeavor to comprehensively address jurisdiction, hence only jurisdiction based on the Chicago Convention, namely territorial jurisdiction and quasi-territorial jurisdiction, are assessed. Other international air law instruments containing rules of jurisdiction are not addressed, such as for example criminal jurisdiction over offences committed on board an aircraft or jurisdictional regime of the Montreal Convention for the unification of certain rules for international carriage by air. Other potentially relevant grounds for extraterritorial jurisdiction not closely related to air law – such as the protective or security principle of the state established in international criminal law or the effects doctrine developed in competition law – are not the subject of this paper.

The specific legal regime applicable in times of armed conflict – and the special rules pertaining to state aircraft, including military aircraft – is not addressed. At the outset a short definition to ADIZ is provided, followed by a concise overview of conventional sources of international air law; in addition to law of the sea, as applicable to ADIZ. In the first instance Article 11, Article 12 and Annex 2, Annex 6 and Annex 11 of the Chicago Convention on International Civil Aviation signed in 1944 is the subject of examination, whereas in the second the paper takes a closer look at the status of airspace over the contiguous zone and the exclusive economic zone (EEZ), codified in the United Nations Convention on the Law of the Sea adopted in 1982. The customary international law context and self-defense aspects will also be touched upon. Finally before drawing conclusions a handful of international practices comparable to ADIZ shall be briefly highlighted.

2. Definition and Historical Background

2.1. Definition

According to Annex 15 to the Convention on International Civil Aviation the definition of ADIZ (Air Defense Identification Zone) reads as follows: "Special designated airspace of defined dimensions within which aircraft are required to comply with special identification and/or reporting procedures additional to those related to the provision of air traffic services (ATS)."[1]

The definition of ADIZ provided by applicable U.S. regulations specifies the rationale for the adoption of such special rules in the following manner (emphasis added by author): *"Air defense identification zone* (ADIZ) means an area of airspace over land or water in which the ready identification, location, and control of all aircraft (except for Department of Defense and law enforcement aircraft) is required *in the interest of national security*."[2]

The views expressed by the author in this paper are personal and do not necessarily reflect the views of his employer.

[1] Annex 15 to the Convention on International Civil Aviation: Aeronautical Information Services Fourteenth Edition July 2013 Contents of Aeronautical Information Publication p. 1-2.

[2] Electronic Code of Federal Regulations Title 14: Aeronautics and Space PART 99 – Security Control of Air Traffic § 99.3.

http://www.ecfr.gov/cgi-bin/text-idx?SID=47ea22ffe1bbd086f961a0ea69e03aa3&node=sp14.2.99.a&rgn=div6 (last retrieved: 10 September 2015) (Electronic Code of U.S. Federal Regulations 2015).

ADIZ is designated *unilaterally* by a state with the declared purpose of safeguarding national security interests and/or other purposes such as *e.g.* ensuring the establishment of reasonable conditions of entry into territory[3] of the state that established ADIZ. It should be noted that security considerations of a state are distinct from the well-established and longstanding objective of safeguarding the safety of civil aviation. ADIZ is either established in airspace where a state has complete and exclusive sovereignty or *outside of such airspace* where no state has complete and exclusive sovereignty. However, some recent examples also included partially overlapping ADIZs and in some cases ADIZ was established in the airspace over islands, the legal status of which is disputed (see later, East China Sea ADIZ). The latter development led to an interpretation that ADIZ may also be used to substantiate territorial claims over disputed areas.[4] Through ADIZ states impose reporting and other type of obligations on pilots/operators of aircraft entering such zones. Non-conformance with ADIZ rules results in prompt retaliatory action[5], including the interception or forced landing of an aircraft violating ADIZ rules (by military aircraft of the state declaring the ADIZ).

State practice pertaining to ADIZ is rather mixed. It may be categorized in different ways according to its:

a) time duration (temporary or permanent);

b) personal scope (applied solely to civil aircraft or to civil and military aircraft alike);

c) material scope (covering only "inbound" flights to the state having established ADIZ or all flights entering ADIZ regardless of their final destination);

d) territorial scope (covering airspace falling under national sovereignty or international airspace).

2.2. The U.S. and the East China Sea ADIZ

Given the fact that the practice of the United States and that of China concerning ADIZ have been drawing much international attention, and also considering U.S. ADIZ rules seem to be fairly elaborated and accessible to the public, the two respective state practices are introduced in the following paragraphs in more detail.

The U.S. rules prescribe that a person who operates an aircraft entering an ADIZ and/or the pilot must a) have a functioning two-way radio, with the pilot maintaining continuous auditory watch on the appropriate frequency; b) file a flight plan; c) ensure that the aircraft is equipped with a radar transponder that is operational throughout the flight d) continuously provide their position e) instructions given to the pilot must be observed f) special security instructions must be complied with.[6] The U.S. ADIZ solely applies to

[3] The Commander's Handbook on the law of naval Operations, NWP 1-14M, Edition July 2007, p. 2-13, *para* 2.7.2.3 http://permanent.access.gpo.gov/gpo56195/1-14M_(Jul_2007)_(NWP).pdf (last retrieved: 10 September 2015) (Commander's Handbook). Also other declared objectives of U.S. ADIZ include national defense considerations and stopping the transportation of illegal drugs by aircraft. Federal Register/Vol. 66, No 189/Friday September 28, 2001/Rules and regulations p. 49818 http://www.gpo.gov/fdsys/pkg/FR-2001-09-28/pdf/FR-2001-09-28.pdf (last retrieved: 10 September 2015).

[4] Christopher K. Lamont, *Conflict in the Skies: The Law of Air Defence Identification Zones*, Air & Space Law 39, no. 3, 2014, p. 202.

[5] Air Traffic Services Planning Manual ATSPM Doc. 9426 First (Provisional) Edition 1984 *para* 3.3.4 p. I-2-3-4.

[6] Electronic Code of U.S. Federal Regulations 2015 Title 14: Aeronautics and Space PART 99 – Security Control of Air Traffic.

in-bound and out-bound air traffic and air traffic in the U.S.[7] It is composed of the following geographical components: a) Contiguous ADIZ, b) Alaska ADIZ, c) Guam ADIZ, d) Hawaii ADIZ[8] (jointly referred to as: *U.S. ADIZ*). It is noteworthy that U.S. ADIZ rules also apply to all flights (VFR and IFR alike) and to uncontrolled airspace, in addition to controlled airspace.[9] The rules cover all aircraft, both civil and military – although certain obligations solely pertain to civil aircraft.[10] Based on information available on the internet[11], the East China Sea Air Defense Identification Zone of the People's Republic of China (hereinafter: *East China Sea ADIZ*) established in November 2013 applies to all traffic entering the zone regardless of their destination. In this regard it should be recalled that Canadian ADIZ (CADIZ) also covers all aircraft flying in such zone.[12] Military aircraft are also subject to East China Sea ADIZ rules. In addition to radio, flight plan, and radar requirements the East China Sea ADIZ also prescribes nationality identification requirements.

The East China Sea ADIZ extends to 300 miles beyond territorial waters,[13] whereas in respect of the United States the ADIZs extend seaward of American coastline in the range of 300 to 400 nautical miles.[14] In both cases non-compliance with ADIZ rules and regulations may result in interception of the "violator aircraft"[15]. In the *East China Sea ADIZ* China's armed forces will adopt "defensive emergency measures" to respond to non-cooperating aircraft.[16]

It is notable that originally ADIZ rules were established by the U.S. Secretary of Commerce in 1950 based on a mandate received from President Truman issued in the form of an executive order.[17] The President

[7] *Ibid* Title 14 Part 99. §99.1 (a).

[8] *Ibid* Title 14. Part 99. §99.41 to §99.49.

[9] *Ibid* Title 14. Part 99.15 (a) (2).

[10] *Ibid* Title 14. Part 99. §99.1 sets out that the subpart prescribes rules for operating *all* aircraft (except for Department of Defense and law enforcement aircraft) in, or into, within, or out of United States through an ADIZ. In 99.9§ radio requirements solely apply to persons operating a civil aircraft into ADIZ.

[11] Announcement of the Aircraft Identification Rules for the East China Sea Air Defense Identification Zone of P.R.C. http://news.xinhuanet.com/english/china/2013-11/23/c_132911634.htm (last retrieved: 10 September 2015) (East China Sea ADIZ Announcement).

[12] Canadian Aviation Regulations Consolidation, SOR/96-433, 2015, pp. 585-586. http://laws-lois.justice.gc.ca/PDF/SOR-96-433.pdf (last retrieved: 10 September 2015).

[13] Lamont 2014, p. 188.

[14] Peter A. Dutton, *Caelum Liberum: Air Defense Identification Zones outside Sovereign Airspace*, American Journal of International Law, 2009, Vol. 103, p. 698.

[15] For US interception procedures see US Federal Aviation Administration (FAA): January 8, 2015 Aeronautical Information Manual (AIM) Chapter 5 section 6: National Security and Interception Procedures It should be noted that the cited AIM document does not expressly state that failure to observe ADIZ rules in international airspace results in interception of aircraft. ADIZ and CADIZ rules used to contain an explicit reference to interception. This is no longer the case. However currently ADIZ rules and interception rules are dealt with under one common section of the (U.S.) AIM. Since interception serves inter alia the purpose of identifying an aircraft (AIM p. 5-6-2.), aircraft non-complying with ADIZ rules presumably risk interception. https://www.faa.gov/air_traffic/publications/media/aim_w_chgs_1-2_dtd_1-8-15.pdf (last retrieved: 10 September 2015).

[16] East China Sea ADIZ Announcement 2013, point 4.

[17] Elizabeth Cuadra, *Air Defense Identification Zones: Creeping Jurisdiction in the Airspace*, Virginia Journal of International Law, Vol. 18, 1977, pp. 492-493.

used his powers based upon the Civil Aeronautics Act of 1938, as amended in 1950, mandating the President whenever he determines such action to be required in the interest of national security to direct the Secretary of Commerce to exercise powers, duties, and responsibilities granted in the Act to the extent, in the manner and for such periods of time as the President considers necessary.[18] Subsequently in 1958 the title of this statutory provision was renamed "Geographical Extension of Jurisdiction", while currently it reads "Relationship to other laws".[19] It would seem that the said provision makes possible under certain conditions the extension of the application of certain sections of the civil aviation code to areas outside the United States. This may imply that the sanctions regime applicable in relation to a violation of ADIZ rules in the airspace over the United States[20] is also enforced in respect of breaches of ADIZ rules occurring abroad. It is of interest in this regard that the ADIZ regulations used to spell out expressly that, in addition to penalties otherwise provided for (in the act), any person violating ADIZ (security) provisions shall be subject to a fine of not exceeding 10,000 USD or to imprisonment not exceeding one year.[21] However, the current ADIZ regulations do not contain such a provision. Publicly available information suggests that violations of special security instructions are solely related to national airspace (D.C. ADIZ).[22] In sum, the U.S. sanctions regime applicable in the case of non-compliance with ADIZ rules pertaining to international airspace is far from being obvious, a further in-depth study would be required to shed light on this matter.

No information was available to the author of this paper on the enforcement regime of the East China Sea ADIZ save interception measures that are initiated against aircraft disregarding ADIZ procedures, as highlighted above in this sub-section.

As regards official justifications for maintaining ADIZ, China argues that the establishment of ADIZ was necessary to protect its state sovereignty and territorial and airspace security,[23] whereas the current official U.S. position seems to underline the idea that ADIZ rules constitute reasonable conditions for entry into territorial airspace.[24]

[18] Sec 1201 and Sec 1203 of Title XII- Security Provisions http://www.airgyle.com/wp-content/uploads/64-Stat.-825-Act-of-Sept.-9-1950-S-3995.pdf (last retrieved: 10 September 2015).

[19] Public Law 85-726 – Aug 23, 1958 Sec 1110. Geographical Extension of Jurisdiction; Current legislation in force 49. U.S. Code § 40120 – Relationship to other laws.

[20] See, *e.g.* 49 U.S. CODE § 46307: Violation of national defense airspace. Violations of security provisions established pursuant to the said Act (49 U.S. Code) are punishable by payment of fine and/or imprisonment.

[21] John Taylor Murchison, *The Contiguous Airspace Zone in International Law*, Thesis Presented to the Faculty of Graduate Studies McGill University for the Degree of LLM, 1955 Appendix II regulations of the Administrator Part 620 – Effective January 15, 1953 Security of Air Traffic, p.3., para §620.18.; McGill digitool library http://digitool.library.mcgill.ca/R/?func=dbin-jump-full&object_id=110036&local_base=GEN01-MCG02 (last retrieved: 10 September 2015).

[22] US Federal Aviation Administration FAA Compliance and Enforcement Program Order 2150.3B CHG, 2015, pp.H-6-H-7. http://www.faa.gov/documentLibrary/media/Order/2150.3B_W-Chg_8.pdf (last retrieved: 10 September 2015).

[23] Statement by Chinese Defense Ministry spokesman on ADIZ dated December 3, 2013 http://www.fmprc.gov.cn/ce/cebe/eng/zt/dhfksbq13/t1109762.htm (last retrieved: 10 September 2015) (Statement of Chinese Defense Ministry Spokesman).

[24] Andrew S. Williams, *The Interception of civil Aircraft Over the High Seas in the Global War on Terror*, Air Force Law Review, Vol. 73, 2007 p. 96. and Commander's Handbook 2007 p. 2-13 *para* 2.7.2.3.

2.3. Historical Background

The United States was the first to adopt ADIZ, extending airspace over high seas in 1950; to be later followed by Canada in 1951 (CADIZ).[25] The ADIZ established by the United States (and Canada) in the 1950s was the forerunner of and model for the spread of ADIZ in the Cold War era. Initially, the bipolar world ADIZ was conceived to protect against (nuclear) attacks carried out by long range enemy bombers.[26] As military technology evolved, the launching of long-range nuclear missiles became feasible from other platforms, hence the originally identified threat from aircraft gradually receded. The tragic events of September 11, 2001 and the emergence of new security threats, however, reinvigorated the said practice in the United States. To date, ADIZ remains a topical and, in some instances, widely discussed issue; as highlighted by the international reaction to the establishment of the East China Sea Air Defense Identification Zone in November 2013. The creation of the latter ADIZ drew criticism due to the fact that it overlaps with the respective ADIZs of Japan and South Korea[27], in addition to it covering the airspace over the Senkaku/Diaoyu islands – which are claimed by Japan, China, and Taiwan – and the airspace over the Ieodo/Suyan reef – claimed in turn by both South Korea and China.[28]

Canada, India, Japan, Pakistan, Norway, United Kingdom, China, South Korea, Taiwan, and the United States are some examples of countries currently maintaining air defense identification zones.[29]

3. Different Approaches in International Law to the Freedom of a State to Exercise Powers Outside its Territory

In the Lotus case presented before the Permanent Court of Justice[30] the adjudication of a case concerned competing criminal jurisdictions of states with respect a ship collision that occurred on the high seas. In its judgment delivered in 1927, the Court made some general remarks on the characteristics of international law, in particular on the limits of states' freedom to exercise their powers abroad. The Court was of the view that in inter-state relations restrictions upon the independence of states cannot be presumed. In the same vein, international law *does not prohibit* a state from exercising (prescriptive) jurisdiction in its own territory *in respect of any case* which relates to acts that have taken place abroad. According to the findings of the Court, the states' corresponding discretion is solely limited by *prohibitive rules* of international law. As regards exercising *enforcement powers*, it cannot be exercised by a state outside its territory except by virtue of a *permissive rule* derived from international custom or from a convention. In short, in the Lotus case the Permanent Court of International Justice affirmed, in effect, the universal scope of territorial

[25] Cuadra 1977, pp. 492-493.

[26] *Ibid* p. 496.

[27] Lowell Bautista and Julio Amador III, *Complicating the Complex: China's ADIZ*, research online University of Wollongong, 2013, p. 3. http://ro.uow.edu.au/cgi/viewcontent.cgi?article=2036&context=lhapapers (last retrieved: 10 September 2015).

[28] Lamont 2014, p. 188.

[29] Bautista-Amador III 2013, p. 2.

[30] Affaire du «Lotus», Recueil des arrêts, publications de la cour permanente de justice internationale Série A – No 10, Le 7 septembre 1927, pp. 18-20. .http://www.icj-cij.org/pcij/serie_A/A_10/30_Lotus_Arret.pdf (last retrieved: 10 September 2015).

prescriptive jurisdiction and the overriding character of territorial enforcement jurisdiction.[31] If we accept the above line of reasoning, two relevant conclusions arise from the perspective of ADIZ:

a) States are free to prescribe ADIZ rules, unless prohibited by international law.
b) States are free to enforce ADIZ rules in their territory. However, a permissive rule is required if they were to enforce ADIZ rules outside of their territory.

The findings of the Permanent Court of Justice described above are far from being unchallenged due to their philosophical approach in treating states as possessing very wide powers of jurisdiction that can only be limited by the rule of international law prohibiting the action concerned. It was also detailed that the emphasis actually lies the other way round.[32] Thus a different interpretation of states' freedom to exercise their prescriptive powers should also be considered feasible, one that may be described from the perspective of ADIZ as follows:

a) States are free to prescribe ADIZ if a permissive rule of international law exists to that effect.
b) With respect to enforcement powers, the assertion is the same as above. Namely, the permissive rule of international law is necessary.

In this paper effort will be made to examine the international legal foundations of ADIZ by relying upon both interpretations described above.

4. Aspects of International Air Law (Chicago Convention)

4.1. General Remarks

In this chapter the Convention on International Civil Aviation (hereinafter: Chicago Convention) adopted in 1944[33] is analyzed from the perspective of ADIZ. The term "international airspace" or airspace over high seas will be used to describe airspace areas not subject to national sovereignty, while airspace falling under the exclusive and complete sovereignty of a state will be called "national airspace." For the purpose of this paper any reference to high seas and to airspace over the high seas (or to international airspace) is deemed to encompass both the Exclusive Economic Zone and the airspace over the Exclusive Economic Zone. For a more detailed analysis and justification for assimilating EEZ to High Seas in this paper see the section on aspects of the law of the sea.

The Chicago Convention codified customary international law on state sovereignty over airspace.[34] Article 1 of the Convention recognizes that every state (not only contracting states) have complete and exclusive sovereignty over the airspace above its territory. According to Article 2 the territory of the state shall be

[31] Bin Cheng, *The extraterrestrial application of International Law*, Current Legal Problems, Stevens & Sons, London, 1965, pp. 136-138, p. 140.

[32] Malcolm. N. SHAW QC, *International Law* Sixth Edition Cambridge University Press 2012, p. 656.

[33] 1944 Convention on International Civil Aviation ICAO Doc 7300/9, Ninth Edition 2006 http://www.icao.int/publications/Documents/7300_cons.pdf (last retrieved: 10 September 2015).

[34] *Case concerning military and paramilitary activities in and against Nicaragua (Nicaragua v. United States of America)* Merits Judgment of 27 June 1986, I.C.J. Reports 1986, p. 14, *para* 212.

deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such a state. The *Chicago Convention* proceeds from *territorial jurisdiction* in national airspace.[35] The territorial jurisdiction principle basically confers powers on the territorial state, which is the state subjacent to airspace, to enact and enforce relevant (national) rules. The former powers are also known as "jurisdiction to prescribe" (*prescriptive jurisdiction* or *jurisfaction*), while the latter "jurisdiction to enforce" (*jurisdiction to enforce* or *jurisaction*).[36] Of course such prerogatives are to be exercised in compliance with the Chicago Convention to ensure that rules are inter alia globally uniform to the extent possible, and that the principle of non-discrimination is observed. Air law also recognizes the notion of personal jurisdiction as well as a special form of jurisdiction, the so-called *quasi territorial jurisdiction* (comprising *jurisfaction* and *jurisaction* alike) – which is the sum of the total powers of state, not only in respect of ships and aircraft registered in that state, but also to all persons and things on board aircraft.[37] Prescriptive jurisdiction is concurrent most of the time, as different states may simultaneously enact laws based on different types of state jurisdiction. In the absence of a treaty or other consensual arrangement whenever conflict arises, the territorial jurisdiction to enforce overrules quasi-territorial and personal jurisdiction to enforce; while quasi-territorial jurisdiction overrides personal jurisdiction.[38]

Of particular relevance to our subject matter is that *no state may validly purport to subject* high seas (and suprajacent airspace) *to its sovereignty* nor to its territorial jurisdiction. Nonetheless, quasi-territorial jurisdiction may have relevance in respect of flights carried out in airspace over the high seas in that, in general, the law of the state in which the aircraft is registered will be applicable to such flights.[39] A section on the law of the sea deals with this aspect in more detail. In the airspace over the high seas an aircraft is generally *subject to the exclusive jurisdiction of the state of registry.*[40] The establishment of ADIZ that extends over airspace suprajacent to the high seas, and the interception of foreign aircraft perceived as a threat to national security, raises important legal questions concerning the *freedom of aviation* and the *exclusive jurisdiction of the state of registry*.[41]

4.2. Exercise of Jurisdiction

Jurisdiction concerns the power of the state under international law to regulate or otherwise impact upon people, property, and circumstances. It is a central feature of state sovereignty, for it is an exercise of authority that may alter, create or terminate legal relationships and obligations. The recognized authorities of the state, as determined by the legal system of that state, perform certain functions permitted to them which affect the life around them in various ways. While the relative exercise of powers by the legislative, executive, and judicial organs of government is a matter for the municipal legal and political system, the extraterritorial jurisdiction will depend on the rules of international law.[42] If there is a cardinal principle

[35] I.H.Ph. Diederiks-Verschoor, *An Introduction to Air Law*, Wolters Kluwer, The Netherlands, 2012, p. 14.

[36] Cheng 1965, pp. 136-138.

[37] *Ibid* p. 135.

[38] *Ibid* p. 140.

[39] Diederiks-Verschoor 2012, p. 14.

[40] Nicholas Grief, *Public International Law in the Airspace of the High Seas*, Martinus Nijhoff Publishers Dordrecht/Boston/London, 1994, pp. 77-95.

[41] *Ibid* p.5.

[42] Shaw 2012, pp. 645, 647.

emerging as to the existence of extraterritorial jurisdiction, it is that of a genuine connection between the subject-matter of jurisdiction and the territorial base, or the reasonable interests of the state in question.[43]

4.3. ADIZ as Exercise of Prescriptive Jurisdiction (and Possibly of Enforcement Jurisdiction)

The author of this paper submits that ADIZ rules may be deemed an *exercise of prescriptive jurisdiction*, due to the fact that, as highlighted earlier in the introductory section, ADIZ being a set of permanent rules of a binding nature adopted by a state.[44] It is promulgated in national aeronautical publications (AIP) and, in some cases, in national regulations.[45] The state maintaining ADIZ is in a position to control the activities of aircraft in international airspace through prescribing certain procedures. ADIZ rules are binding on all persons operating/piloting an aircraft in a designated area of airspace. In cases of non-conformance, special enforcement measures may be applied, usually in the form of interception. Therefore, ADIZ may also amount to *enforcement jurisdiction*. The executive branch is responsible for prescribing and enforcing ADIZ rules. Usually national defense authorities are appointed to administer the operation of ADIZ.[46] Content-wise ADIZ rules *resemble rules of the air* – the latter being of a binding nature, to guarantee the safety of civil aviation. For more on aspects of the rules of the air see the section in the Annexes of the Chicago Convention. Another specificity of ADIZ is that in the majority of cases such rules may qualify as having *an extra-territorial element*, for they are applicable – and in case of non-compliance also (partly or fully) enforceable – in international airspace.

4.4. ADIZ and SARPs (Annexes to the Chicago Convention)

4.4.1. General Observations

If ADIZ is tantamount to the exercise of jurisdiction, the next logical question would be to *classify* ADIZ rules under the Chicago Convention, namely according to International Standards and Recommended Practices (SARPs) adopted in the form of Annexes to the said Convention. In accordance with Article 37 of the Chicago Convention, Contracting Parties undertook to collaborate in securing the *highest practicable degree* of uniformity in regulations, standards, procedures, and organization with respect to International Standards and Recommended Practices. In general, a state has the possibility to file differences to Standards

[43] James Crawford SC, FBA, *Bownlie's Principles of Public International Law*, Oxford University Press, 2012, p. 457.

[44] Kay Hailbronner, *Freedom of the Air and the Convention on the Law of The Sea*, American Journal of International Law, Vol. 77, 1983, p. 517. Hailbronner writes that enforcement measures and imposition of regulations that provide for flight rules and possible prosecution of pilots amount to an extension of coastal state's jurisdiction. Any claim of control over foreign aircraft on a permanent basis is opposed to the principle according to which no state may validly purport to subject any part of the high seas to its sovereignty. Cuadra refers to ADIZ as unilateral claims of limited sovereignty in the airspace over the high seas. See Cuadra 1977, p. 485.

[45] U.S. ADIZ and CADIZ rules are published as part of (federal) regulations. Examples of AIP publication include Republic of Korea ENR 5.2-5 and ENR 5.2-6. http://ais.casa.go.kr/AIP.ASP?GUBUNCODE=2&GubunName=ENR (last retrieved: 10 September 2015).

[46] In the East China Sea ADIZ the Ministry of Defense, whereas in U.S. ADIZ FAA and the Ministry of Defense are the administrative organs.

it considers impractical to comply with. When a state has not filed any differences to a Standard, such Standard must be regarded as binding upon that state.[47] In the same vein, if Differences are filed, the Standard is non-binding upon the said state, inasmuch as the differing state practice was duly notified to ICAO. Recommended practices are of a non-binding nature. It must be recalled that the precise legal status of Annexes remain ambiguous, as they do not necessarily represent "hard law", nor possess the legal force equal to that of the Chicago Convention. Nonetheless, there exists a powerful motivation for states wishing to fully participate in international air transport to comply with such procedures as closely as possible.[48]

Since ADIZ procedures request operators of aircraft/pilots to comply with certain obligations pertaining to the operation of an aircraft in flight, the Standards and Recommended Practices of the rules of the air (Annex 2) come very close to ADIZ rules. In terms of their substance, overlaps between ADIZ rules and Annex 2 include flight plans, position reports, communications between ATS units and aircraft.[49] Annex 6 on the operation of aircraft is also pertinent to ADIZ, as the said Annex sets out transponder and radio requirements.[50] Annex 11 on Air traffic Services setting out obligations for states with regards to the provision of air traffic services should also be mentioned.[51] Annex 15 on Aeronautical Information Services warrants some comment due to the fact that it provides a definition of ADIZ. In the view of this paper's author, defining ADIZ in an Annex does not automatically create a basis in international law (*e.g.* a foundation in customary international law) to create ADIZ in international airspace. Rather, the said definition seems to be more a mere recognition by ICAO of existing state practice that may have safety implications for air traffic. Obligations were therefore put in place which ensure that ADIZ procedures be duly published in a standard format available to aircraft operators/pilots for the sake of air traffic safety.[52] Finally, Annex 17 on security should be briefly touched upon. The *special security instruction* issued in the interest of national security[53] in U.S. ADIZ is apparently directly dictated by national security considerations of a State and as such does not seem to fall within the purview of Annex 17 on security, which has a different perspective: that of safeguarding international civil aviation against acts of unlawful interference.

4.4.2. Annex 2, Annex 6, and Annex 11 of the Chicago Convention

The most relevant Annexes mentioned above (*Annex 2*, *Annex 6*, *Annex 11*) vary in terms of their application in international airspace. As regards Annex 2, ICAO is the sole legislator and hence states are not permitted to file any differences thereto (see subsection dedicated to Article 12 of the Chicago

[47] Niels van Antwerpen, *Cross-Border Provision of Air Navigation Services with Specific Reference to Europe, Safeguarding Transparent Lines of Responsibility and Liability*, Wolter Kluwer Law & Business, The Netherlands, 2008, p. 31.

[48] Michael Milde, *International air law and ICAO,* Second Edition 2012, Eleven International Publishing, pp. 63, 175.

[49] Annex 2 to the Convention on Civil Aviation Rules of the Air Tenth Edition 2005. pp. 3-7., 3-8, 3-9, 3-11, 3-12.

[50] Annex 6 to the Convention on Civil Aviation: Operation of Aircraft Part I International Commercial Air Ttransport-Aeroplanes Ninth Edition, July 2010. See *e.g.* Chapter 7 Aeroplane communication and Navigation Equipment.

[51] Annex 11 to the Convention on Civil Aviation Air Traffic Services Thirteenth edition 2001, p. 2-1 2.1.2.

[52] Annex 15 to the Convention on International Civil Aviation: Aeronautical Information Services Fourteenth Edition, July 2013, Contents of Aeronautical Information Publication ENR 5.2. p. APP 1-27.

[53] Electronic Code of U.S. Federal US regulations 2015, §99.7.

Convention). In respect of Annex 6, the state of registry of the aircraft is primarily authorized to enact the relevant rules and regulations, and accordingly such a State may deviate from ICAO's Standards and Recommended Practices.[54] Annex 11 is a special case because, presumably out of safety considerations, the contracting state accepting responsibility for the provision of air traffic services over high seas may apply the Standards and Recommended Practices in a manner consistent with that adopted for airspace under its jurisdiction.[55] Thus no conflict seems to arise as regards Annex 11, as the state maintaining ADIZ is permitted to apply its relevant rules and regulations to the airspace above the high seas. Nonetheless, in cases of geographically overlapping ADIZs (*e.g.* in East China Sea), the so-called single unit of control principle may be violated.[56] This principle ensures that for the sake of the safety of civil aviation at any given moment the aircraft is under the control of only one single ATS unit giving instructions to the aircraft.

In sum the *question arises* as to whether the adoption of ADIZ procedures are in fact in conformity with the prescriptive *jurisdiction of ICAO Council with regard to* Annex 2 on the rules of the air and that of the s*tate of registry* with regard to Annex 6 on the operation of the aircraft. In the event that, as some scholars suggest[57], Annex 6 is also deemed to form part of the uniform rules applicable to the airspace over the high seas as adopted by ICAO Council in accordance with Article 12, then it is sufficient to assess whether the ADIZ rules are in conformance with the rule-making powers of the ICAO Council as established under Article 12 of the Chicago Convention. However, before comprehensively analyzing Article 12, another relevant provision of the Chicago Convention, namely Article 11, will be examined.

4.5. Article 11 of the Chicago Convention on the Applicability of Air Regulations

Article 11 of the Chicago Convention deserves our attention, as this provision defines national rule-making powers as to the arrival at, departure from, and transit through the national airspace of civil aircraft. It sets out that subject to the provisions of the Convention, the laws and regulations of a contracting state as to the admission to or departure from its territory of aircraft engaged in international air navigation and/or the operation and navigation of such aircraft while within its territory applies to aircraft of all contracting states *without distinction* of nationality. Article 11 also prescribes that the above national rules shall be complied with by all/any aircraft *upon entering* or *departing from* or *while within the territory* of the state having adopted those rules. This Article is all the more pertinent to our subject as the U.S. justification for maintaining ADIZ in international airspace (ADIZ as a condition of entry into the U.S. national airspace) apparently builds on Article 11, which allows contracting states to enact laws and regulations relating to the admission to and departure from their territory.[58] It was also submitted that Article 11 recognizes the national laws and regulations of a contracting state for aircraft entering or leaving national airspace, and that such laws are also to be applied upon entering or departing from national airspace, thus in international

[54] Hailbronner AJIL 1983, p. 509. Hailbronner mentions by way of example airworthiness, equipment, and training of the crew jointly referred to as operational standards, which are not qualified as the rules of the air and hence fall under the prescriptive jurisprudence of the state of registry. Thus it is safe to conclude that Annex 6 also falls under this category. See also Diederiks-Verschoor 2012, p. 14. Diederiks-Verschoor affirms that in general the law of the state in which the aircraft is registered will be applicable during its flight above the High Seas.

[55] Annex 11 to the Convention on Civil Aviation Air Traffic Services Thirteenth edition 2001. p. 2-1.

[56] Stefan A. Kaiser, *The legal status of Air Defense Identification Zones: Tensions over the East China Sea*, Zeitscrift für Luft- und Weltraumrecht, 4/2014, pp. 536, 543.

[57] Abeyratne, Ruwantissa, *Air Navigation Law*, Springer, 2012, p. 27.

[58] Grief 1994, pp. 150, 154.

airspace. As a consequence Article 11 expressly permits national identification procedures that bind aircraft in international airspace, provided they are entering or departing from national airspace. Article 11 is related to a quasi-contractual condition linked to the intended entry of national airspace.[59]

In the author's view, Article 11 has the following potential implications for ADIZ. Firstly, to make Article 11 applicable, it shall be presumed that ADIZ rules fall under the category of laws and regulations pertaining to the *operation and navigation of aircraft*. If the phrase "subject to provisions of this Convention" as contained Article 11 is read in conjunction with Article 1 confirming national sovereignty in airspace, then the conclusion could be drawn that *the territorial (prescriptive) jurisdiction of contracting states* is proclaimed by the above mentioned Article. In the absence of an explicit prohibitive rule, national rules enacted in accordance with Article 11 (provided they are non-discriminative) *may relate to acts which have taken place abroad*, as the said Article does not prohibit such legislation. Of course the risk is that concurrent or competing prescriptive jurisdiction may arise, as other states may also enact rules over the same airspace. The question as to whether Article 12 is (also) a prohibitive rule overruling Article 11 shall be addressed in the next sub-section. If we work under the assumption that *a permissive rule of international law was necessary to justify* the adoption of any national relating to acts taking place abroad, then the author of this paper believes that *Article 11 does not provide the required permissive rule*. It simply does not prohibit the enactment of national rules in relation to acts taking place abroad, without actually providing explicit legal grounds for regulating acts/events occurring abroad. Therefore, in view of the author of this paper, the said Article is simply neutral as regards the prescriptive jurisdiction of states.

Instead of Article 11 the special legal status of airspace over high seas seems to offer grounds for jurisdiction, albeit limited ones. In the absence of territorial sovereignty in the airspace above the high seas *quasi-territorial jurisdiction* empowers the states to prescribe rules *applicable to aircraft of their national registry*. A broader jurisdiction would require another permissive rule of international law.

The state of play regarding the *jurisdiction to enforce* can be assessed as follows: given the fact that aircraft are called upon under Article 11 to only comply with the national rules *upon entry* or *departing* or *while within territory* of a given state this Article contains no specific permissive rule for States *to enforce* ADIZ *outside* of their national airspace. Nonetheless, it is of relevance that since there is no territorial sovereignty in the airspace over the high seas, the state of ADIZ may exercise *enforcement jurisdiction* in such airspace. In the absence of territorial enforcement powers *quasi-territorial jurisdiction* may be applied, which means that the state maintaining ADIZ may *enforce* its *national rules* against *aircraft of its national registry*.

Finally, it is noteworthy to mention that the bilateral (or multiparty) air service agreements granting special permissions for the operation of scheduled international air service pursuant to Article 6 of the Chicago Convention usually contain an article similar to that of Article 11 of the Chicago Convention.[60] The agreements this author is aware of do not, however, go beyond Article 11, implying that states were not prepared to create an international basis of law for ADIZ on a bilateral basis in their bilateral (or multilateral) air service agreements.

[59] Kaiser 2014, pp. 530, 535.

[60] See, *e.g.* Article 7 of EU-US Air Transport Agreement signed on 25 and 30 April 2007 OJ 2007 L134, Vol. 50, 25 May 2007, p.4.

In sum, Article 11 does not prohibit the exercise of prescriptive jurisdiction of a state to enact ADIZ rules applicable to international airspace. If, however, we wanted to identify permissive rules for maintaining ADIZ Article 11 does not qualify as such rule. The *quasi-territorial* prescriptive and *quasi-territorial enforcement jurisdiction*, nonetheless, provides a limited set of powers for the State maintaining ADIZ.

In the next section an attempt is made to find out whether other provision(s) of the Chicago Convention, in particular Article 12, prohibits the enactment and/or enforcement of ADIZ rules.

4.6. Article 12 of the Chicago Convention: on the Rules of the Air Constituting Prohibitive Rules?

In accordance with Article 12, contracting states are obliged to keep their own national regulations uniform, to the greatest extent possible, with the Annexes established from time-to-time under the Convention. In addition, contracting states are also expected to implement and enforce *(jurisaction)* Standards and Recommended Practices contained in the Annexes, and to ensure in this connection prosecution of violations of applicable regulations and the control and supervision (safety oversight)[61] of aviation activities carried out in their territory or carried out by aircraft flying their nationality mark.

With regard to ADIZ, of particular interest is that Article 12 also prescribes that rules in force over the high seas with respect to the flight and maneuver of aircraft shall be established under the Chicago Convention, implying that such rules are to be adopted jointly by states under the auspices of the Chicago Convention. Each contracting state shall ensure that all persons violating these rules shall be prosecuted. This means in practice that the ICAO Council is the sole quasi-legislator in respect of rules of the air over the high seas. It is a unique feature in international law-making that an executive body of an international organization can legislate by a two-thirds majority vote for all contracting states.[62] Annex 2 in force constitutes rules pertaining to the flight and maneuver of aircraft over high seas within the meaning of Article 12 of the Convention.[63] Annex 2 contains only Standards (no Recommendations) with respect to airspace above the high seas and states shall not file any differences from such rules with reference to Article 38 of the Chicago Convention These rules and traffic control measures, which in effect represent restrictions on the absolute freedom of flight, are designed to insure the safety of all aircraft over the high seas. They are applied without any difficulty by all the states parties to the Chicago Convention.[64] In comparison, ADIZ procedures are in fact designed to serve national security interests of individual states.

The question may arise as to what extent rule-making prerogatives (prescriptive jurisdiction) of a state are compatible with the above described legislative powers of the ICAO Council. In other words, is Article 12

[61] ICAO Doc 9734 AN/959 Safety Oversight Manual Second Edition, 2006, pp. 1-1, 2-1, 2-2.

[62] Michael Milde, *Interception of Civil Aircraft vs. Misuse of Civil Aviation* (*Background of Amendment 27 to Annex 2)*, Annals of Air and Space Law, 1986, p. 106.

[63] Annex 2 to the Convention on Civil Aviation Rules of the Air, Tenth Edition, 2005, Applicability pp. (v) and 2-1.

[64] United Nations Conference on the Law of the Sea, Geneva Switzerland 24 February to 27 April 1958, The Law of the Air and the Draft Articles Concerning the Law of the Sea Adopted by the International Law Commission at its Eighth Session, A6CONF.13/4 38, 1958, p. 69. http://legal.un.org/diplomaticconferences/lawofthesea-1958/docs/english/vol_I/7_A-CONF-13-4_PrepDocs_vol_I_e.pdf (last retrieved: 10 September 2015) (ILC Law of Air and Draft Articles concerning Law of the Sea).

a prohibitive rule of international law barring contracting parties from prescribing (and enforcing) ADIZ rules with respect to the airspace above the high seas?

If Article 12 is interpreted strictly, text based, and exclusively – in the sense that no entity other than ICAO Council is entitled to enact rules of the air to the airspace above high seas – then the mere fact that ADIZ procedures are established on a national basis may be questionable, regardless of their actual purpose and/or content.[65] In the same vein, the last sentence of Article 12 laying down an obligation for states "to insure the prosecution of all persons violating the regulations applicable" could be interpreted to the effect that states are to enforce the uniform rules of the air as adopted by the ICAO Council. This could mean that both prescriptive and enforcement jurisdiction relating to ADIZ in airspace over high seas runs contrary to international public law. If, however, we assume that contracting states of the Convention may adopt rules over the high seas for purposes other than safety (*e.g.* national security), then ADIZ rules are lawful inasmuch as they are not at variance content-wise with the uniform rules adopted by ICAO Council in accordance with Article 12 of the Chicago Convention.[66]

5. The Law of the Sea Perspective on ADIZ

5.1. General observations

ADIZs are usually established in airspace suprajacent to vast areas of the sea. Therefore, the United Nations Convention on the Law of the Sea adopted in 1982 (hereinafter: UNCLOS),[67] which enjoys almost universal acceptance[68], should be the starting point for any legal analyses of this matter. UNCLOS aimed not only at codifying customary law but also contributed to the progressive development of the relevant field of law.[69] It should be noted at the outset that UNCLOS – which entered into force in 1994, that is almost fifty years after the Chicago Convention came into effect – also *codified certain rules relating to aircraft and air traffic*. The Preamble of UNCLOS affirms that matters not regulated by the said Convention continue to be governed by the rules and principles of general international law, which includes international air law.[70] UNCLOS also declares that [see Article 311 (2)] it shall not alter rights and obligations of states parties which arise from other agreements *compatible* with UNCLOS and which do not affect the enjoyment by

[65] Ivan L. Head, *ADIZ, International Law, and Contiguous Airspace*, Alberta Law Review, 1964, pp. 185-186. Head opines that one state does not have the power within itself to enact regulations effective over the high seas. This in itself appears to be the answer to any question concerning the legality of ADIZ or CADIZ, unless these zones are confined to the space over territorial waters.

[66] G. Nathan Calkins Jr., *The Contiguous Air Space Zone in international law by John Taylor Murchison Book review*, Journal of air Law & Commerce, Vol. 24, 1957, p. 373. Calkins argues that security rules would be compatible with obligations under the Chicago Convention, so long as the rules for the security control of air traffic do not conflict with the international rules of the road (rules of the air) laid down in the Convention.

[67] 1982 Multilateral Convention on the Law of the Sea No. 31363 UN Treaty Series Volume 1833 I-31363 (UNCLOS 1982).

[68] As of January 2015 the number of ratifications stood at 167. http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm (last retrieved: 10 September 2015).

[69] UNCLOS 1982, Preamble no. 7.

[70] Michael Milde, *United Nations Convention on the Law of the Sea – Possible Implications for International Air Law*, Annals of Air & Space Law, Vol. VIII, 1983, p. 181.

other states parties of their rights or performance of their obligations under UNCLOS. Since the Chicago Convention has not been amended in the light of UNCLOS, different interpretation of certain provisions of the former convention being the sole action deemed necessary,[71] it may be concluded that the Chicago Convention is compatible with UNCLOS. After having examined the Chicago Convention in the previous section of this paper, the question may arise whether UNCLOS contains permissive or prohibitive rules which may be directly applicable or analogously applied to air law, and in particular to ADIZ.

The notion of *contiguous zone* and that of *exclusive economic zone (EEZ)* will be examined in more detail for they are not only adjacent to territorial sea, but also ADIZs are usually geographically located above such a sea area and, last but not least, in both instances the coastal state enjoys certain prerogatives under the law of the sea. Continental shelf was excluded from the above list as UNCLOS clearly prescribes that the rights of the coastal state over the continental shelf do not affect the legal status of the superjacent waters or of the air space above those waters.[72]

The status of airspace over high seas is only assessed very briefly, as the relevant rules are fairly well established. First, it is worthwhile recalling that the Chicago Convention contains no explicit provision confirming the freedom of overflight over the high seas. This was probably not deemed necessary in the light of the provisions clearly defining which airspace falls under the complete and exclusive jurisdiction of a state. The freedom of overflight over high seas, a principle of customary international law, was first codified by the Convention on High Seas, adopted in 1958.[73] The very same Convention also declared the invalidity of sovereignty over the high seas. It follows from the latter principle that the high seas and airspace there above are beyond the jurisdiction of any state.[74] The above mentioned principles are also enshrined in UNCLOS, in Article 87 and 89 respectively.

5.2. Legal Status of the Contiguous Zone

According to UNCLOS, the contiguous zone may extend to a maximum of 24 nautical miles from the baselines from which territorial sea is measured. Territorial sea extends to 12 nautical miles from baseline. In the contiguous zone the coastal state may exercise control which is necessary to prevent and punish infringement of its *customs*, *fiscal*, *immigration* or *sanitary* laws (committed) *within its territory*. This seemingly exhaustive list *does not* contain *security* or national security laws (UNCLOS Article 33). It may be argued that immigration is closely connected to national security. However, a possible counter argument is that position reporting and other obligations imposed on operators of aircraft/pilots do not substitute for

[71] *Ibid* p. 200 and ICAO Secretariat Study on United Nations Convention Law of the Sea - implications, if any for the Chicago Convention Doc. no LC/26-WP/5-1, *para* 19.6. on p.260 (ICAO Study on Chicago Convention and UNCLOS)

https://books.google.hu/books?id=SF623exBCNAC&pg=PA243&lpg=PA243&dq=ICAO+doc+LC/26-WP/5-1+United+nations+Convention+on+the+law+of+the+sea+implications+if+any&source=bl&ots=LeZJ27CoU_&sig=0fgsXmtkEFvjjZUvEG6OCo3ImFg&hl=hu&sa=X&ei=42AJVbreDIXfaNz_gpAJ&ved=0CDsQ6AEwBg#v=onepage&q=ICAO%20doc%20LC%2F26-WP%2F5-1%20United%20nations%20Convention%20on%20the%20law%20of%20the%20sea%20implications%20if%20any&f=false (last retrieved: 10 September 2015).

[72] UNCLOS 1982, Article 78.1.

[73] ILC Law of Air and Draft Articles concerning Law of the Sea 1958, p. 67., *paras* 25-26.

[74] ICAO Study on Chicago Convention and UNCLOS 1987, p. 257.

immigration legislation that applies to air passengers. The so-called passenger name record (PNR) program is addressed in this paper in the section introducing comparable international practices. The International Law Commission (ILC) submitted arguments as to why *no special security/defense related rights* were enshrined in respect of the contiguous zone in the Convention on the Territorial Sea and Contiguous Zone adopted in 1958. The arguments in question – which remain valid as of today, as UNCLOS strongly builds on the language of the relevant provision of the Convention on the Territorial Sea and Contiguous Zone (1958) – are as follows: firstly, it would have permitted abuses (of such right); secondly, it was not necessary in light of the right to self-defense. It was clear that a state had an *inherent right* to take certain *protective measures* against *imminent* and *direct threat* to its security both within the contiguous zone and (even) outside it. In this regard the International Law Commission referred to the general principles of international law and the Charter of the United Nations.[75]

5.3. The Exclusive Economic Zone

5.3.1. Definition and Description of the Relevant Legal Regime

The Exclusive Economic Zone (EEZ) is one of the significant innovations of UNCLOS, a tangible result of the progressive development of international law and, last but not least, it is qualified as a sui generis legal regime.[76] EEZ tried to strike a balance between coastal states' claims for sovereignty on the one hand and interests of other states, principally that of maritime powers, on the other – the latter seeking to preserve former high seas freedoms in the new EEZ as well. No doubt that this balancing act partly explains why as of today diverging interpretations still emerge in respect of EEZ.[77]

The EEZ is adjacent to territorial sea and shall not extend beyond 200 nautical miles from the baselines from which the breadth of territorial sea is measured. Article 56 in Part V of UNCLOS sets out the special rights of the coastal state in the exclusive economic zone, which can be divided into three main categories: a) *sovereign rights* with respect to exploiting, conserving, and managing *natural resources* of the waters subjacent to seabed and of the seabed and its subsoil, and with regard to other activities for the *economic*

[75] The Continental Shelf and related subjects by Mr. J.P.A François Special Rapporteur Doc. A/CN.4/60 (French only), Extract from the Yearbook of the International Law Commission, 1953 Vol II, pp. 35, 45. http://legal.un.org/docs/?path=./ilc/publications/yearbooks/english/ilc_1953_v2.pdf&lang=E (last retrieved: 10 September 2015).

Law of the Sea – Regime of the High Seas A/CN.4/97 Corr.1 Add 1-3. Extract from the Yearbook of the International Law Commission Vol II., 1956, pp. 5-6. http://legal.un.org/ilc/publications/yearbooks/english/ilc_1956_v2.pdf (last retrieved: 15 September 2015).

Articles Concerning the law of the Sea with commentaries International Law Commission, 1956, p. 295. http://legal.un.org/ilc/texts/instruments/english/commentaries/8_1_8_2_1956.pdf (last retrieved: 15 September 2015).

[76] Robert Beckman and Tara Davenport, *The EEZ Regime: Reflections after 30 years*, LOSI Conference papers 2012, p. 6. http://www.law.berkeley.edu/files/Beckman-Davenport-final.pdf (last retrieved: 10 September 2015).

[77] One contentious issue regarding airspace over EEZ is the permissibility of military activities in such zones (*e.g.* military exercises). The long-standing US position has been that freedoms of high seas, including carrying out military activities apply in their entirety in EEZ and in the superjacent airspace. According to the opposing Chinese interpretation the EEZ regime is more restrictive, meaning that military activities in EEZ may be prohibited by the coastal state. US position: Commander's Handbook 2007, pp 2-9. 2-10. Chinese position: Dr. Ren Xiaofeng, Senior Colonel Cheng Xizhong, *A Chinese Perspective*, Marine Policy, Vol. 29, 2005, p. 142.

exploitation of and *exploration* of the zone; b) *jurisdiction* with regard to *establishment* and use of *artificial islands*, *installations* and *structures*; with regard to *marine scientific research*; in respect of *protection of maritime environment; and,* c) *other rights* (and duties) provided for in UNCLOS (*e.g.* hot pursuit). The coastal state shall exercise its rights and perform its duties by having due regard for the rights and duties of other states and shall act in a manner compatible with the provisions of UNCLOS. Aircraft and air traffic are not mentioned in Article 56, nor does the word *security or (national) security* appear in the text of Article 56. Due to the fact that this Article defines the most prominent rights of a coastal state that shall be respected by non-coastal states, it should not be interpreted in an open-ended manner, but rather narrowly. Therefore, in cases where the coastal state was to exercise any jurisdiction in the airspace over EEZ, *such jurisdiction* shall be *based on the activities enlisted in Article 56.* Such activities comprise the economic exploitation of the zone in question or the establishment and use of artificial islands and structures in such a zone, or research and environmental protection of the zone. *ADIZ rules do not fall into any of these categories.*

Another key Article is Article 58. In fact, Article 58 sets out rights and duties of states other than the coastal state in EEZ *declares that in the EEZ all states enjoy the freedom of high seas* enshrined in Article 87; comprising freedom of overflight and other internationally lawful uses of the sea related to the former freedom. Article 58 also declares that states shall have due regard for the rights and obligations of the coastal state when exercising their rights and performing their duties under UNCLOS in the EEZ; and shall comply with the laws and regulations of the coastal state *adopted in accordance with UNCLOS* and other rules of international law, in so far as they are not incompatible with Part V (EEZ) of the Convention.

Furthermore, of interest is Article 59, as it creates a legal basis for the resolution of conflicts between a coastal state and other states regarding the attribution of (additional) rights and jurisdiction in the EEZ. In the light of the complexity and inherent sensitivity of the matter at hand, it is questionable, however, whether such a special mechanism is the most appropriate and acceptable procedure to extend to the coastal states' prescriptive and enforcement jurisdiction to prevent a breach of, or punish an infringement of, its national security laws.

The confirmation in Article 58 of UNCLOS of the *freedom of overflight* in EEZ is highly relevant to ADIZ, as in most of the cases the application of ADIZ rules is extended to aircraft in overflight over high seas and EEZ. The coastal state is not authorized to adopt laws and regulations restricting the freedom of overflight of the aircraft of other states. The coastal state is *not granted* by UNCLOS any *right or jurisdiction over the airspace* above the EEZ in respect of the freedom of overflight and *enjoys no regulatory power with respect to flights over EEZ.*[78] The coastal state's jurisdiction *does not* extend to operational rules (such as, *e.g.* airworthiness, equipment, training of crew etc.) in the airspace over EEZ, as they are not connected with the coastal state's economic rights.[79] The operational rules as adopted by the state of registry of the aircraft are applicable to such aircraft flying over the EEZ; similarly to flights above the high seas (*quasi-territorial jurisdiction*). It should be noted that proposals were made to the effect that, for the sake of greater certainty in air law, EEZ should be deemed to have the same legal status as the high seas and any reference to high seas in international air law instruments should also be deemed to encompass EEZ.[80] Accordingly,

[78] ICAO Study on Chicago Convention and UNCLOS 1987, pp. 255-256, paras 11.8 and 11.12.

[79] Kay Hailbronner, *The legal regime of the airspace above the exclusive economic zone*; Air and Space Law Vol. VIII, number 1, 1983, p. 36.

[80] Milde 1983, p. 200.

the Rules of the Air as adopted by the ICAO Council in accordance with Article 12 of the Chicago Convention are also applicable to the airspace over EEZ. It is important to note that in a more recently published book the author confirmed that the EEZ concept continues to encompass the rights and freedoms traditionally exercised by states in the airspace over high seas; such as, the freedom of overflight.[81] For these reasons, for the purpose of this paper, any reference to the high seas and the suprajacent airspace also covers EEZ and the suprajacent airspace.

5.3.2. Conclusions regarding EEZ and Contiguous Zone

Notwithstanding the fact that the coastal state enjoys a broader set of rights in EEZ as compared to the high seas, UNCLOS apparently do not recognize – neither in the contiguous zone, nor in EEZ the security interests of coastal state – as either a sovereign right(s) or as grounds for (prescriptive and/or enforcement) jurisdiction. It would seem that instead, the general rules of international law pertaining to the use of force and/or self-defense are supposed to cater for national security needs of states parties.

If we work under the assumption that the ADIZ rules are tantamount to exercising prescriptive jurisdiction, then neither the contiguous zone nor the special legal regime of EEZ provide a permissive rule substantiating the maintenance of an ADIZ. However, from a different perspective, it is recurrently argued that ADIZ do not infringe upon the freedom of overflight according to international law.[82] The latter claim presumably serves to demonstrate that international law of the sea does not prohibit the establishment of ADIZ. In other words, according to this argumentation, ADIZ was lawful in the absence of a prohibitive rule of international law.

6. Self-defense

6.1. The Relevance of Self-defense

In the nineteen-fifties ADIZ was justified among others under the principle of necessity and so-called self-preservation.[83] The former argument was meant to describe the set of circumstances compelling a state to commit an "unusual" act, falling outside international law, but which could nevertheless be excused by virtue of such exceptional circumstances. The latter concept involved taking preventive measures to preserve the nation against ever increasing threats stemming from technical advances in the military field. These included building up a set of circumstances that would make an attack impossible. Taking such measures would not require the imminence of danger, since they were taken prior to the point in time when an attack would have occurred or become imminent. In addition, the prerogatives enjoyed by the coastal state in a contiguous zone under the law of the sea were to be adapted to address challenges originating from aviation, a new medium of transport.[84] In the wake of the September 11 2001 attacks, the above reasoning regained prominence as demonstrated by inter alia the reinvigoration of ADIZ procedures in the

[81] Gbenga Oduntan, *Sovereignty and Jurisdiction in the Airspace and Outer Space Criteria for Spatial Delimitation*, Routledge 2012. p. 137.

[82] Statement of Chinese Defense Ministry Spokesman 2013.

[83] Murchison 1958, pp. 84-97.

[84] MURCHISON, 1958. pp. 73-75. 78- 85, pp.107-108, pp. 115-116.

U.S.[85] The general right of self-defense also emerged more recently in the literature as a possible legal basis for ADIZ,[86] and the principle of anticipatory self-defense was invoked to that effect.[87]

For the purpose of this paper, it is sufficient to state that self-defense serves to legitimize use of force by a state to repel an armed attack by another state. It follows that in the context of ADIZ some questions may arise as to whether non-compliance with ADIZ in international airspace creates/constitutes (per se) an actual armed attack against the state maintaining ADIZ. If so, does the said armed attack justify the use of force by the state maintaining ADIZ for the purposes of self-defense?[88] In the author's view, the unilaterally declared ADIZ rules do not overrule the rules of international law pertaining to the use of force. In spite of its possible imperfections Article 3bis of the Chicago Convention remains an important achievement in terms of regulating the use of force against civil aircraft in flight. The said Article prohibits resorting to the use of weapons against civilian aircraft, which is considered declaratory of customary law.[89] In accordance with the last sentence of the above Article of the Chicago Convention, however, the prohibition on the use of force should be read in conjunction with Article 51 of the UN Charter codifying the inherent right of individual and the collective self-defense of states. In addition, presumably the customary law existing alongside Article 51 of UN Charter should be taken into consideration; in particular, the principles of necessity and proportionality. Thus, the international law pertaining to the use of force in self-defense is fully applicable in the event that ADIZ rules are violated by civil aircraft.

6.2. State of Necessity

And finally the concept of necessity should be addressed briefly. A plea of necessity as embodied in Article 25 of the Draft Articles on the Responsibility of states for Internationally Wrongful Acts is a ground to preclude wrongfulness of an act by a state. It is, however, not intended to cover conduct which is in principle regulated by a primary obligation of the state.[90] This is of a particular importance inter alia in relation to the rules relating to the use of force in international relations that are deemed as primary obligations. In this connection, the consideration of necessity may only be taken into consideration in the context of the

[85] Stephen M. Maj. Shrewsbury, *September 11th and the Single European Sky – Developing Concepts of Airspace Sovereignty*, the Department of the Air Force, 14. Aug 2002. http://www.google.hu/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB8QFjAA&url=http%3A%2F%2Fwww.dtic.mil%2Fcgi-bin%2FGetTRDoc%3FAD%3DADA405091&ei=ISclVd6oFoSsPZergIgB&usg=AFQjCNEV2QlhgpRAPX4OLFzzVaBKIyFqcg (last retrieved 10 September 2015) p. 47.

[86] P.P.C Haanappel, *The Law and Policy of Air Space and Outer Space*, Kluwer Law International, The Hague/London/New York, 2003, p. 19.

[87] Jae Woon Lee, *Tension on the Air: The Air Defense identification Zones on the East China Sea*, Journal of East Asia and International Law, Vol 7. Issue 1, 2014, p. 278.

[88] Shrewsbury 2002, p. 34. "The more important issue is whether the United States has a right to destroy a civil aircraft that ignores ADIZ requirements and eventually enters US airspace. It is difficult to imagine any circumstance that would warrant the destruction of a foreign aircraft on a US ADIZ outside of U.S. national airspace." Related footnote in the text reads: "Use of force against an aircraft carrying a known weapon of mass destruction may be such a case under the doctrine of anticipatory self-defense." p. 34, n. 138.

[89] Milde1986, pp. 125-126.

[90] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001. pp. 31 and 84 *para* 4(a) and *para* (21). http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (last retrieved: 10 September 2015).

formulation and interpretation of the primary obligation, such as the conventional and customary rules on use of force and/or self-defense.

6.3. Concluding Remarks regarding Self-defense

Apparently, ADIZ rules do not have primacy over the rules of international law on the use of force by a state. The relationship between the two set of norms is rather the inverse, in that the use of force against an aircraft violating ADIZ rules shall comply with the relevant rules of international law.

7. Customary International Law

7.1. State Practice Concerning ADIZ

While some four decades ago it was predominantly argued that ADIZ had not yet constituted customary international law,[91] nowadays *some scholars* not only take note of the existence of relevant state practice, but also *recognize* the right to declare ADIZ as presumably *a norm of customary international law* or at least a concept legitimized by state practice.[92] This is naturally not to suggest that the existence of a (customary) basis in international law for ADIZ is currently accepted unanimously.[93] According to one author the presumed emergence of customary law regarding ADIZ is based on state's practice not objecting to such unilateral claims.[94] In this regard, it should be noted that persistent objections have been made by the United States in respect of ADIZ procedures applied to foreign aircraft not intending to enter national

[91] Cuadra 1977, pp. 485, 505,507 Cuadra argues that the global spread of ADIZ appeared to be „customary international law in the making." Hailbronner AJIL 1983 pp 518-519. According to Hailbronner it is very doubtful whether claims to extended jurisdiction for security purposes have been approved by a considerable number of states. On the other hand a prominent example of expressing supporting for ADIZ in the 1950's is Murchison 1958.

[92] J Ashley Roach, *Air Defence Identification Zones*, Max Planck Encyclopedia of Public International Law [MPEPIL], 2012, p. 3, para 5C., Dutton by citing Leslie C. Green, *The Contemporary Law of Armed Conflict*, Manchester University Press, 1993 p. 175. Dutton 2009, p. 707., n. 105., Commander's Handbook 2007, p. 2-13, para 2.7.2.3., Michel Bourbonniere and Louis Haeck, *Military Aircraft and international law: Chicago opus 3*, Journal of Air Law and Commerce, 2001. p. 954. According to Bourbonniere and Haeck ADIZ is necessary to the proper defence of states, and such zones have been legitimized by state practice.

Abeyratne holds that despite the fact that there is no overwhelming evidence from either scholastic or legislative perspective that lends legal legitimacy to ADIZs, such a concept has never been challenged as being inconsistent with existing law. According to him the justification for ADIZ lied theoretically speaking in the precautionary principle which asserts that the absence of empirical or scientific evidence should not preclude states from taking action to prevent a harm before it occurs. Abeyratne 2012, pp 12, 18.

[93] Oduntan argues that ADIZ constitute a limitation on the rights of other sovereign states to common and equal use of airspace over the high seas. The fact that there have been heavy protests against these formulations is good enough reason to hold that the institution of such zones cannot be successfully justified as arising from customary international law. Oduntan 2012, pp. 144, 147.

Jae Woon Lee asserts that it was premature to regard ADIZ as customary law yet, since the scope of ADIZ's differ from state to state, and the number of states that have established them is small. He notes, however, that ADIZ can be said to be in the process of "consolidation" as a customary international law. Lee 2014, p. 278.

Kaiser writes that ADIZ practice is not consistent. There is neither consistent state practice, nor a clear opinion *iuris.* Kaiser 2014, p. 537.

[94] Roach 2012, p. 3 *para* 5.

airspace. In this vein, the U.S. protested against the proclamation in November 2013 of the East China Sea ADIZ. Also Asian states, including Japan and South Korea, expressed objections.[95] This wave of condemnation was probably due to the fact that airspace over disputed maritime territories was included within the above ADIZ. In the Cold War era instances of protest was made by states, including the Soviet Union, against ADIZ established by France in the 1950s in the high seas off the coast of Algeria.[96] States other than the state maintaining ADIZ would probably be faced with a difficult situation testing their "limits", if and when ADIZ procedures were actually enforced by foreign military aircraft against their nationally registered civil aircraft flying in international airspace.

7.2. Proposal to Make a Study Assessing Relevant State Practice

The author of this paper is of the view that in light of the widely diverging positions as to the customary law character of ADIZ it would be desirable to *conduct* a comprehensive and impartial *study* to assess whether relevant state practice was indeed extensive and uniform, as well as to examine the existence of the subjective element of such practice (*opinion juris*). ICAO would be well placed to conduct such a study. To achieve a higher level of legal certainty, a more ambitious option than a study would be to seek the codification of ADIZ rules, or at least that of the basic criteria that should be met in terms of its establishment and operation.

The International Law Commission (ILC) has alluded to the possibility that the emergence of a new rule of customary law may modify a treaty, depending on the particular circumstances and the intentions of the parties to the treaty.[97] ILC also recognized that a treaty may codify rules of customary international law. Thus ILC has often referred to treaties as possible evidence of the existence of a customary rule.[98] The International Court of Justice in the *North Sea Continental Shelf* case recognized that treaty rules may be regarded as reflecting, or as crystallizing, received (or at least emergent) rules of customary international law.[99] It follows from the above that the codification of a minimum set of "core" ADIZ rules would not only create treaty rules, but may well reflect or crystallize received or at least emergent rules of customary international law.

[95] Commander's Handbook 2007, 2.7.2.3 on p. 2-13. (US position). For US and regional reactions to South China Sea ADIZ see Lamont 2014, p. 188.

[96] Dutton 2009, p. 700. It is to note that a Soviet airplane carrying then president Brezhnev was forced to comply with ADIZ procedures, which prompted Soviet protest.

[97] Formation and evidence of customary international law. Elements in the previous work of the International Law Commission that could be particularly relevant to the topic: Memorandum of the Secretariat A/CN.4/659. International Law Commission, Sixty-fifth Session, Geneva 5 May – 7 June and 8 July – 9 August 2013, p. 34, Observation 27. http://legal.un.org/docs/?symbol=A/CN.4/659 (last retrieved: 10 September 2015.

[98] *Ibid*, p. 33.

[99] *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)* ICJ Judgment of 20 February 1969, North Sea Continental Shelf, Judgment, I.C.J. Reports 1969, p.3, *para* 63.

7.3. Concluding Remarks on State Practice Regarding ADIZ

In sum, in the absence of the permissive conventional rule of international law concerning the creation and maintenance of ADIZ, customary international law may provide such a permissive legal basis if the relevant conduct of states leads to the formation of a new rule of customary law.

8. Some International Practices Comparable to ADIZ

8.1. General Observations

Before drawing conclusions some comparable examples to ADIZ having extraterritorial elements will be examined in this section. The international treaty's legal basis, the dependence on voluntary co-operation, and its limited time duration are the most prominent characteristics which distinguish the practices below enumerated from ADIZ.

8.2. Prohibited, Restricted, and Danger Areas in International Airspace

States cannot restrict or prohibit access to areas over the high seas. On the other hand, the establishment of *danger areas* is not strictly limited to airspace over national territory and might in principle take place over the high seas within the Flight Information Region (FIR) for which the Contracting Party of the Chicago Convention is responsible for the provision of air traffic services. It needs to be ensured, however, that such areas be of a reasonable dimension and *not be permanent* so as not to interfere with the freedom of overflight.[100] Apparently, the time factor (limited duration) constitutes a key aspect of acceptability of the establishment of danger zones in airspace over high seas. It is to note that, save for very few exceptions, ADIZ procedures are of an unlimited duration.

8.3. Provision of Air Traffic Services over the High Seas or Other Areas where no Sovereign Rights are Exercised

The Air Traffic Services Planning Manual of ICAO[101] recalls that the provision of (air traffic) services over the high seas are established in accordance with regional air navigation agreements, whereby the totality of interested states entrust a state or states with the provision of air navigation services and other services in a specified portion of such airspace. The assumption of such delegated authority does not imply that this state is then entitled to impose its specific rules and provisions in such airspace at its own discretion. In fact conditions therein are governed by applicable ICAO provisions and *specific national provisions may only be applied* to the extent that these are *essential to permit* the state the efficient *discharge of the*

[100] European Air Navigation Planning Group (EANPG) Flexible use of airspace (FUA) Task force Third Meeting Paris, 10 to 11 February 2009) FUA TF/3 – IP/03 16 January 2009, p.2., *para* 2.3. http://www.icao.int/EURNAT/Other%20Meetings%20Seminars%20and%20Workshops/FUA%20Task%20Force/FUA%20TF%203/FUA-TF3%20IP03%20-%20UN%20and%20ICAO.pdf (last retrieved: 10 September 2015).

[101] Air Traffic Services Planning Manual ATSPM Doc. 9426 First (Provisional) Edition, 1984, pp. I-2-1-2. and I-2-I-3, *para* 1.3.3.

responsibilities it has assumed under the terms of the regional air navigation agreement. The applicability of "national" Annex 11 may be extended to such airspace as described in the section on the Annexes of the Chicago Convention. The question arises whether ADIZ rules are in fact essential for discharging air traffic services in the airspace over the high seas. This question is even more pertinent if the state maintaining ADIZ does not provide ATS services in the airspace where ADIZ is applicable (*e.g.*, overlapping ADIZs over the East China Sea).

8.4. The Extension of the EU Emissions Trading Scheme to Aviation

Of interest is the judgment of the Court of Justice of the European Union in case C-366/10 concerning the validity of EU Directive 2008/101/EC adopted in the framework of *EU Emissions Trading Scheme (ETS)*. The said Directive extended the applicability of EU ETS rules to flights performed outside the national airspace of EU member states, provided that the flight arrived to or departed from airports in EU member states.[102] In the above judgment the ECJ argued that the EU regulation was *not* in violation of international law (*e.g.* freedom of overflight over high seas), because the provisions thereof were *solely* applied to operators of aircraft *when their aircraft was physically in the territory of an EU member state*.[103] The requirement foreseeing that portions of flights in international airspace and in territorial airspace of third states were taken into consideration for the calculation of allowances to be surrendered by operators of aircraft was deemed to fall *within the territorial jurisdiction* of the EU. The ECJ upheld the validity of the above EU directive implying the exercise of EU jurisdiction of an extraterritorial character, which prompted international opposition.[104]

The rationale of the ETS scheme is different from that of ADIZ, as the former serves the purposes of global environmental protection, while the latter is a security measure. The EU legislation covered activities performed in international airspace and in airspace of third states, but was supposed to be enforced exclusively in respect of aircraft which actually landed at or departed from the airport of an EU member state. In contrast, ADIZ procedures do not apply to activities in the airspace of a third state and they may be enforced at an earlier stage than ETS; namely, already against aircraft flying in international airspace. Finally, notwithstanding the fact that the ECJ upheld the validity of the above Directive, the Commission decided to submit an amended version for approval by the Council and European Parliament. Thus the legislation currently in force solely applies to flights performed between aerodromes in the European Economic Area.[105] In sum, ADIZ seem to go beyond the scope of application of the above EU Directive,

[102] Case 366/10 Air Transport Association of America and others vs. Secretary of State for Energy and Climate Change Judgment of the Court of Justice of the European Union of 21 December 2011 [2011] ECR I-13755 *paras.* 124-129.

[103] *Ibid*, *paras.* 125-126.

[104] Commission Staff Working Document 16.10.2013 SWD (2013) 430 Final Impact assessment accompanying the document Proposal for a Directive of the European Parliament and of the Council amending directive 2003/87/EC establishing a scheme for greenhouse gas emission allowances trading within the Community, in view of the implementation by 2020 of an international agreement applying a single global market-based measure to international aviation emissions. p.4. http://ec.europa.eu/clima/policies/transport/aviation/docs/swd_2013_430_en.pdf (last retrieved 10 September 2015).

[105] European Parliament and Council Regulation 421/2014 OJ L 129 amending Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading within the Community, in view of the implementation by 2020 of an international agreement applying a single global market-based measure to international aviation emissions.

because ADIZ rules are, additionally, enforceable in international airspace. Were ADIZ rules only applicable to aircraft upon or after entering territorial airspace, concerns similar to the ones expressed concerning the legality of above EU Directive may arise.

8.5. The Proliferation Security Initiative (PSI)

The Proliferation Security Initiative is a multinational response to challenges posed by the threat of proliferation of weapons of mass destruction (WMD).[106] The participants of this voluntary initiative have committed themselves to the so-called Interdiction Principles. In comparing PSI to ADIZ two observations can be made. Firstly, principle (5) of the Interdiction Principles related to aircraft stop short of introducing special measures against aircraft flying in international airspace. Secondly, PSI heavily builds on the voluntary co-operation with the state of nationality of aircraft and that of ships,[107] whereas ADIZ is a unilaterally declared set of binding procedures applicable to all aircraft entering a designated zone, regardless of their national registration mark.

8.6. U.S. Passenger Name Record Program and Customs and Border Protection (CBP) Preclearance Process

Passenger Name Record (PNR) is information provided by passengers during the reservation and booking of tickets and when checking in on flights.[108] The EU has signed *bilateral agreements* with the United States, Canada, and Australia to enable and facilitate the exchange of information. The purposes for which related data may be sent to the U.S. Department of U.S. Homeland Security are prevention, detection, investigation, and prosecution of terrorist offences and related crimes and other transnational crimes. As regards the legal basis of PNR, it is worth pointing out that relevant data is provided *in accordance with an international agreement* that is reviewed periodically. For the sake of comparison, *no* conventional international law basis exists for ADIZ.

Customs and Border Protection (CBP) Preclearance Process provides for the U.S. border inspection and clearance of commercial air passengers and their goods at locations in foreign countries.[109] Through preclearance, the same immigration, customs, and agriculture inspections of international air passengers performed on arrival in the United States can instead be completed before departure at foreign airports. The United States and the host Government are *concluding an agreement* to establish preclearance operations that also seems to imply that the express consent of the respective host government was a precondition for Preclearance Process. Apparently, notwithstanding the fact that both above mentioned procedures (PNR and CBP) constitute a condition of entry into the United States, the procedures in question nonetheless rests on the basis of conventional international law.

[106] Statement of Interdiction Principles (5) http://www.psi-online.info/ (last retrieved: 10 September 2015).

[107] Williams 2007, pp. 87-89.

[108] http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/police-cooperation/passenger-name-record/index_en.htm (last retrieved: 10 September 2015).

[109] https://help.cbp.gov/app/answers/detail/a_id/1640/~/cbp-preclearance and http://www.cbp.gov/sites/default/files/documents/Final%20Preclearance%20Guidance_092014.pdf p. 2. (last retrieved: 10 September 2015).

8.7. U.S. Container Security Initiative (CSI), Customs-Trade Partnership against Terrorism (C-TPAT), 24-hour Advance Vessel Manifest Rule

CSI addresses the threat to border security and global trade posed by the potential terrorist use of a maritime container by deploying multidisciplinary (U.S.) teams to foreign seaports.110 Under the legislation in force, the Secretary of Homeland Security is mandated to enter into negotiations with the government of each foreign nation in which a seaport is designated under the Container Security Initiative to ensure full compliance with the requirements under the Container Security Initiative.111 The C-TPAT is a voluntary government-business initiative to build cooperative relationships that strengthen and improve overall international supply chain and U.S. border security.112

In accordance with the 24-hour advance vessel manifest rule, the U.S. Customs and Border Protection (CBP) must receive an electronic cargo declaration from any vessel wishing to enter the United States 24 hours before the actual cargo is laden aboard a vessel at a foreign port. Any master of vessel who fails to provide manifest information risks civil penalties and liquidated damages.113 The EU maintains a similar pre-notification customs procedure.114 By way of comparison it is noteworthy that the 24-hour rule is limited to advance information notification. It is comparable by and large to the requirement to submit a flight plan prior to departure of an international flight indicating the aircraft's planned route. ADIZ goes beyond simple advance notification by prescribing and enforcing rules for operating an aircraft in a predesignated international airspace zone where the rules of the air adopted by the ICAO Council in accordance with Article 12 of the Chicago Convention are applicable.115

9. Conclusions

Apparently, ADIZ is a form of state jurisdiction exercised over extraterritorial acts, a set of rules applicable to operators and/or pilots of aircraft flying in national, as well as international, airspace. Content-wise, it has a lot in common with the binding (ICAO) rules of the air established for safeguarding the safety of international civil aviation (Annex 2 to the Chicago Convention on the rules of the air). ADIZ is not "above" international law, in that it does not substitute or overrule international law, be it the law of the air, the law of the sea or rules related to the use of force. Thus ADIZ extending to international airspace has to be interpreted in the light of international law.

This paper argues that Article 11 of the Chicago Convention on the applicability of air regulations does not prohibit the exercise of prescriptive jurisdiction of a state to enact ADIZ rules applicable to international

[110] http://www.cbp.gov/sites/default/files/documents/csi_brochure_2011_3.pdf (last retrieved: 10 September 2015).

[111] 6. U.S. Code § 945 (d) negotiations https://www.law.cornell.edu/uscode/text/6/945 (last retrieved: 10 September 2015).

[112] http://www.cbp.gov/sites/default/files/documents/Glossary%20of%20Terms.pdf (last retrieved: 10 September 2015).

[113] 19 CFR 4.7 Inward foreign manifest; production on demand; contents and form; advance filing of cargo declaration. https://www.law.cornell.edu/cfr/text/19/4.7 (last retrieved: 10 September 2015).

[114] Entry Summary Declaration (ENS) For more information see http://ec.europa.eu/ecip/help/faq/ens1_en.htm (last retrieved: 10 September 2015).

[115] Kaiser 2014, p. 530. Kaiser asks why states designate an airspace zone rather than solely fixing reporting points. pp. 530, 542.

airspace. If, however, we wanted to identify permissive rules for maintaining ADIZ Article 11 does not qualify as such rule. The assessment of the legal status of airspace over contiguous zone and the exclusive economic zone yields the conclusion that neither of the two constructs provides a permissive rule substantiating the maintenance of an ADIZ. It is, however, recurrently argued that ADIZ is lawful since it does not infringe upon the freedom of overflight, and the law of the sea does not prohibit the establishment of ADIZ. It is shown in the paper that ADIZ rules do not have primacy over the rules of international law on the use of force by a state.

As contracting states to the Chicago Convention delegated to the ICAO Council the adoption of uniform rules of the air (Annex 2) with respect to the airspace over the high seas, Article 12 of the Convention is of special interest. As regards prescriptive jurisdiction, the fact of maintaining ADIZ rules may be at variance with Article 12 of the Chicago Convention if the said Article is interpreted to the effect that the ICAO Council has an exclusive mandate to adopt rules of air over the high seas for the sole purpose of safeguarding the safety of civil aviation. ADIZ rules in force in the airspace extending above high seas may also compete with the jurisdiction of a foreign state of registry relating to the operation of the aircraft (Annex 6) carrying the latter's national mark. If concerns regarding Article 12 (Annex 2) and Annex 6 are not deemed well founded, and the relevant findings of Lotus judgment are accepted (in that, in the absence of prohibitive rules, states are free to prescribe rules on events taking place abroad), then ADIZ created in international airspace is permitted under international law. If issues related to Article 12 and Annex 6 can be put aside and permissive rules of international law need to be identified to render ADIZ consistent with international law, then – in view of the author of this paper – currently quasi-territorial jurisdiction seems to provide the legal basis for prescriptive and enforcement powers. This jurisdiction is, in fact, limited to civil aircraft carrying the national mark of the state maintaining ADIZ.

The comparison of ADIZ with relevant international mechanisms and/or programs reveals some elements that weakens the case for ADIZ: a) ADIZ lacks a specific conventional international law basis b) ADIZ is a unilateral measure, not a voluntary co-operation program c) normally ADIZ is of an indefinite duration d) ADIZ is more than a simple advance notification procedure.

Yet, it would be difficult to ignore the continued existence of state practice, albeit not consistently related to ADIZ. State practice, if considered to be customary international law, may provide a permissive rule of international law, both for prescriptive, as well as enforcement jurisdiction on ADIZ. The customary international law justification of ADIZ is not accepted universally as of today. Some scholars argue, however, that such state practice may signal the possible emergence of a rule of customary law legitimizing ADIZ as applied to in-bound civil aircraft intending to enter national airspace of the state maintaining ADIZ.[116] Whilst recognizing the challenges in setting overambitious objectives, the codification of a set of minimum core ADIZ rules with which all stakeholders can live would promise manifold advantages. Such codification would not only enhance legal clarity through creating conventional law (treaty norms), but may well also serve to reflect or crystallize existing or emergent rules of customary international law relative to ADIZ.[117] Alternatively, a less ambitious goal would be to conduct a comprehensive study under

[116] Roach 2012, p. 3, para 5.

[117] Cuadra 1977, p. 486. Cuadra advocated codification for different reasons. Notably she pointed out that it was preferred that such results are achieved by the deliberation of the community of nations, instead of occurring due to collective neglect or inattention.

the auspices of ICAO to describe and assess the current state of play regarding state practice pertaining to ADIZ.

The Fight against Marriages of Convenience in the EU and in Hungary

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The aim of this study is to reveal the tendencies of the most typical form of abuse linked to free movement of EU citizens and their family members, namely marriages of convenience, through the lenses of Hungarian practice. Hoping that knowing more about these tendencies and getting more prepared for fighting against such abuses can help to achieve even more complete free movement, the tools of this fight, especially the most recent Handbook of the EU are introduced and analysed in the study.

Keywords: free movement, abuse, marriage of convenience, Handbook

1. Introduction

Originally the aim of the right to free movement was to facilitate the fulfilment of the purpose of the European Community, namely reaching a completely free market. Accordingly, initially we could only speak about the free movement of workers. In the '70s, however, the then called European Court of Justice gradually started to interpret the right to free movement broadly resulting in setting out the basis for the general right of residence for all EU citizens. "In recent years, due to the interpretation activities the European Court of Justice the tension somewhat seems to be dissolved that arises from the fact that at the beginning integration was basically of economic nature, and therefore Community institutions looked at citizens of other Member States primarily through the lenses of business processes, and this for a long time had not changed even as a result of the introduction of EU citizenship." [1] Today, however, the free movement of persons embodies one of the fundamental freedoms of the internal market, which is an area without internal borders in which freedom of movement is ensured in accordance with the provisions of the Treaty. [2]

The Free Movement Directive[3] (2004/38/EC) summarized and re-regulated the already existing EU law and the principles established by the Court of Justice of the EU,[4] and created a single directive of rules applicable for the entry and residence of EU citizens and their family members staying on the territory of another Member State for various purposes, including the declaration of the right and conditions of

[1] Laura Gyeney, *Aki a bölcsőt ringatja, avagy az uniós polgárságú gyermeket nevelő, harmadik állambeli személy státusza a közösségi jogfejlődés fényében*, In: Iustum Aequum Salutare II. 2006/1–2., p. 113.

[2] Directive 2004/38/EC, Preamble (2).

[3] Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance)
OJ L 158, 30.4.2004, pp. 77 – 123.

[4] Tamás Wetzel, *A bevándorlás kérdése Magyarországon*, Publikon Kiadó, Budapest 2011, p. 102.

permanent residence. The freedom of movement and right of residence on the one hand is therefore entitled to those EU citizens who move to or stay in a Member State of which they are not nationals, but the Free Movement Directive also applies to third-country family members who are accompanying or joining the Union citizen.[5] The purpose of the Directive is to facilitate the exercise of fundamental and individual right to freedom of movement and residence within the territory of the Member States.[6]

„EU citizens on the move who genuinely rely on EU law are fully protected by EU rules. However, as in any area of law, there will be cases where individuals may seek to abuse freedom of movement, in an effort to bypass national immigration rules. Abuse of the right to free movement undermines this fundamental right for EU citizens. Effectively tackling such abuse is therefore essential to upholding this right."[7] With this in mind, the aim of this study is to reveal the tendencies of the most typical form of abuse, namely marriages of convenience that undermines the good reputation of free movement. Hoping that knowing more about these tendencies and getting more prepared for fighting against such abuses can help achieve even more complete free movement, the tools of this fight, especially the most recent relevant Handbook of the EU are introduced and analysed in the next sections.

2. Tendencies of Abuses related to the Right to Free Movement[8]

The abuse of rights related to free movement and residence can take several forms. In a broad sense even the phenomenon of the so-called "benefit tourism" belongs to this, when the primary purpose of an EU citizen and his/her family member is to receive social security benefits in other Member States. The Economist in November 2014 reported that "in the debate over immigration, accusations of benefits tourism are rife. (…) Britain has been talking of quotas on immigrants from the rest of the European Union. Germany is toying with setting a six-month maximum stay for jobseekers."[9] Nevertheless, the real size of this phenomenon is much argued and is many times seen overemphasized. Although, this question is also dealt with at an EU level and even the CJEU has made a ruling in the Dano case,[10] and has helped the Member States by confirming that "a Member State must therefore have the possibility, pursuant to Article 7 of Directive 2004/38, of refusing to grant social benefits to economically inactive Union citizens who exercise their right to freedom of movement solely in order to obtain another Member State's social assistance although they do not have sufficient resources to claim a right of residence."[11]

[5] Directive 2004/38/EC Article 3(1).

[6] Judgment of the Court (Third Chamber) of 5 May 2011 (reference for a preliminary ruling from the Supreme Court of the United Kingdom (United Kingdom)) — Shirley McCarthy v Secretary of State for the Home Department, Case C-434/09, Point 28.

[7] Communication from the Commission to the European Parliament and the Council, Helping national authorities fight abuses of the right to free movement: Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens, COM(2014)0604 final, Point I.

[8] Tendencies presented in this study rely on the information gathered by the Hungarian Ministry of Interior for the European Commission's expert group on the Free Movement Directive, also presented at the conference in Győr, 20 May 2015, organized by the Hungarian Law Enforcement Association on secondary movements.

[9] http://www.economist.com/news/europe/21632571-european-court-justice-lets-governments-restrict-migrant-benefits-benefits-tourism-not-ok (accessed on 1 October 2015).

[10] Judgment of the Court (Grand Chamber) of 11 November 2014., Elisabeta Dano and Florin Dano v Jobcenter Leipzig. Case C-333/13.

[11] Point 78 of the Dano case, C-333/13.

This study, on the other hand, intends to tackle the issue of abuses exclusively from an aliens policing point of view, according to which two types of abuses can be identified: firstly the marriages of convenience and the similar phenomenon of partnership of convenience, secondly the false declaration of parenthood. While the first set of abuses results in an unreal marriage and partnership, the second set creates unreal parent-child relations, nevertheless in case of both types of abuses the primary purpose is to gain the right to free movement and residence based on family relationships of convenience. Given the fact that the most typical and most frequently detected embodiment of abuse is the marriage of convenience, the creation and application of which shows more and more frequently the involvement of organized criminal groups, the study focuses mainly on this form of abuse even among those immigration related abuses. In the meantime, it is worth highlighting that the identification and analysis of issues of abuses concerning family reunification has also been extensively dealt with by many researches, among others in the framework of the European Migration Network.[12]

Abuses are detected most frequently within the area of relationship of convenience. Third-country national family members of both EEA nationals as well as Hungarian nationals are involved in such abuses. Although we are aware of the fact that the family reunification of Hungarian nationals with their third-country national family members falls outside of the scope of Directive 2004/38/EC, nevertheless, as most of the abuses are detected in such relationships, and the methodology of them can be very similar to relationships falling within the scope of the Directive 2004/38/EC, furthermore such relationships can provide basis for applying for residence rights in other EU Member States.

Hungary has detected abuses concerning relationship of convenience already at the first visa application. Such tendencies are typical of Hungarian citizens, mainly women (at older age, many times with children), who make acquaintances during a holiday that in a short time end with concluding marriage. Many of such marriages are concluded in Egypt, Tunis, Algeria, Nigeria, Pakistan, according to the local religious (mainly Muslim) regulations. While in the countries listed above it is usual that, unless the marriage was concluded during the women's first visit, the women soon travel personally once again to the country of their fiancé for concluding the marriage, in other Arabic countries, such as in Libya, Syria, Afghanistan, the marriage is concluded without the personal presence of the bride, they are usually substituted by certain objects (*e.g.* knife or ash tray). Hungarian authorities have also experienced cases when the partners had got to know each other through the internet, and their personal meeting only took place a long after it, furthermore many times marriage was concluded at the first meeting. Generally speaking it can be stated that in most of such cases the spouses have basically no knowledge about each other concerning their personal characteristics, lives and present circumstances.

The immigration authorities also experienced the above explained patterns when adjudicating in applications for residence card allowing the holder to stay for a period exceeding three months. Marriages of convenience are still the most typical among relationships of convenience. There are still strong efforts by those who are staying in Hungary illegally, or have abused the right to asylum several times, or otherwise are unable to legalize their stays to have their stay legalized by fraudulently gaining the right to free movement and residence. Applicants connected with such abuses are most typically from African countries, such as Nigeria, Tunisia, Algeria and Egypt, who usually had met their spouses through the internet or during vacation. In most of the cases such third-country nationals state that they had arrived to Hungary through an internal Schengen border – most typically through Austria, Italy or Spain – and sometimes it is

[12] See the national reports and the synthesis report on the misuse of family reunification carried out by the European Migration network: http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/studies/results/family-reunification/index_en.htm (accessed on 1 October 2015).

observed that their passport contains no stamp contrary to the fact that it was issued in their country of origin.

It constitutes a big problem that during the concluding of the marriage in Hungary or when registering the marriage in the Hungarian registry, the procedures do not always include the thorough check of the authenticity of the relevant documents. In fact, many times such marriages are concluded by third-country nationals, who hide or claim the loss of their personal documents during their alien policing or criminal procedures, while they are able to show all the relevant documents when concluding the marriage, without having returned to their country of origin in order to get such documents. Based on the experiences of the authorities concerned, the conclusion of such marriages many times shows an organized nature: the Hungarian citizen spouses, many times women, are from the same county, or even from the same family, moreover the clients are represented by the same lawyer(s).

Hungary is not only affected by cases in which gaining Hungarian residence right is the aim, but with the help of Hungarian citizens concluding marriages of convenience with third-country nationals, a right of residence is applied for in other EU Member States. A series of such cases was detected in Hungary in 2013, and hundreds of cases have been revealed in which Serbian citizen men and Hungarian citizen women concluded marriages in Serbia and then both the men and women were transported mainly to German cities to apply for a residence card for the husbands with the assistance of the Hungarian wives. The great series of abuse was coordinated by an organized group of persons, and the committing of the abuses also showed a high level of organization, as interpretation, accommodation and transport to Serbia and to Germany were all provided by the criminal group.

Hungary has also detected a rising tendency in abuses related to partnerships of convenience. Most typically citizens of Kosovo, Syria and Nigeria applied for residence cards as partners of Hungarian citizens or persons dependent on Hungarian citizens, by holding an order issued by a notary public on verifying the related parties' statements. It was also observed that applicants in such cases had been trying to legalize their stay in Hungary for years in procedures of legal migration or asylum. Such applications end with a rejection as the national provisions of Hungary only extend the right to free movement for partners if they are registered according to the Act that provides the effect of the partnership generally be equivalent with marriage, and this is a possibility only provided in case of same sex couples.

It is also important to mention that related to this issue a case of an application for residence card as a partner of a Hungarian citizen by a Kosovar citizen was brought before the Court of Justice of the EU for preliminary ruling (Cocaj case, C-459/14). The request for a preliminary ruling from the Metropolitan Public Administration and Employment Court (Hungary) lodged on 3 October 2014 in the case of Fadil Cocaj *vs.* Office of Immigration and Nationality (hereinafter referred to as OIN) was focusing on the nature and the form of national registration that leads to the acknowledging a partner a family member under the Free Movement Directive: "In what manner, in what form and before which authority must the registration referred to in Article 2(2)(b) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 take place? If the registration has to be effected through an authority, what formal and substantive criteria must that authority fulfil in the Member State in question?" Finally, the request for preliminary ruling was withdrawn and therefore practitioners and researchers still need to wait for another case in order to have a ruling of the CJEU on such provisions, as well.

Although it is not the primary focus of the present study, tendencies related to false declaration of paternity is also worth to mention as the OIN has also detected cases when the third-country nationals apply for a residence card as a parent of a minor Hungarian citizen. Based on the circumstances revealed in such cases the applicant father usually does not live with the minor child, does not provide financial support or only

provides it during the application procedure. The third-country national applicant does not know anything about the personal circumstances of the child (*e.g.* characteristic features, illnesses, conditions of birth, the general routine of the child, etc.). The statement of the parents usually indicates that the child was born from an occasional relationship without marriage; the parents cannot answer the questions concerning the other party, either. The parents have never lived together, and they many times have contradicting answers concerning the father's correspondence with the child (*e.g.* its frequency, the time and place of meeting). In such cases it is very difficult to prove the lack of effective exercise of the right of custody, nevertheless the on the spot checks as well as interviewing the third-country national applicant and the mother of the child can lead to proving the fact that the fully effective paternal acknowledgment had only been made in order to gain the right of residence.

3. The Reaction on behalf of the EU and Hungary

3.1. The EU Handbook on Fighting Marriages of Convenience

In the Communication of 25 November 2013 *"Free movement of EU citizens and their families: Five actions to make a difference"*,[13] the Commission clarified EU citizens' rights and obligations under EU rules on free movement and set out five actions to help national authorities effectively apply those rules on the ground. The Communication recalled that EU law contains a series of robust safeguards allowing Member States to fight abuse. One of the concrete actions to help authorities implement these safeguards to their full potential was the preparation, together with Member States, of a handbook on addressing marriages of convenience.

Nevertheless, it was not a completely new idea at EU level.[14] At its meeting of 26–-27 April 2012, the Justice and Home Affairs Council approved the Roadmap on *"EU action on migratory pressures - A Strategic Response"*, which refers to marriages of convenience as a means of facilitating illegal entry and residence of non-EU nationals in the EU. The Roadmap lists several actions to be undertaken by the Commission and/or the Member States with a view to improving the understanding of abuse of free movement rights by non-EU nationals and organised crime aiming to facilitate illegal immigration. One of these actions is the preparation of "a handbook on marriages of convenience, including indicative criteria to assist in the identification of sham marriages".

In response to the request by Member States mentioned above and in close cooperation with them, the Commission services have therefore prepared a "Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens" (hereinafter referred to as Handbook). The Handbook accompanies this Communication as a Staff Working Document.[15] The Handbook is neither legally binding nor exhaustive; furthermore, it is without prejudice to existing EU law and its future development as well as to the authoritative interpretation of EU

[13] COM(2013) 837 final – http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013DC0837&rid=1 (accessed on 1 October 2015).

[14] Indeed, the first document prepared at EU level related to the fight against marriages of convenience was Council Resolution of 4 December 1997 on measures to be adopted on the combating of marriages of convenience, Official Journal C 382 , 16/12/1997 P. 0001 – 0002. On the brief evaluation of the birth and content of this document see Laura Gyeney, Legális bevándorlás az Európai Unióba, különös tekintettel a családi élet tiszteletben tartásának jogára, Pázmány Press, Budapest 2014, pp. 183-184

[15] Handbook on addressing the issue of alleged marriages of convenience between EU citizens and non-EU nationals in the context of EU law on free movement of EU citizens, SWD(2014) 284 final.

law given by the Court of Justice of the EU. "Its purpose is to help national authorities effectively tackle individual cases of abuse in the form of marriages of convenience while not compromising the fundamental goal of safeguarding and facilitating free movement of EU citizens and their family members using EU law in a *bona fide* way." [16]

Nevertheless, some Member States expressed their critical comments during the preparation of the document[17] as they thought the Handbook would not necessarily serve concrete operative interests, instead it has a more legal point of view tackling the issue of marriages of convenience, and the dominant aim of the document is to set out the limitations of national actions against abuses rather than focusing on how the states could effectively act against marriages of convenience in practice. Consequently, these critiques generate the interest of studying the main elements of the document with a view to providing practical help to EU Member States as it is a valid expectation from a Handbook.

The guidance provided by the Handbook (Section 2) is focused on marriages of convenience within the meaning of Directive 2004/38/EC[18] as marriages contracted for the sole purpose of enjoying the right of free movement and residence under the Directive that someone would not have otherwise. The Handbook presents in detail the meaning of the constitutive elements of these notions and provides further indications on how to distinguish between genuine marriages and marriages of convenience: it describes the main traits of different forms of i) genuine marriages which are sometimes incorrectly considered as marriages of convenience *(e.g. arranged, proxy or consular marriages)* and ii) non-genuine marriages *(e.g. marriages of convenience, by deception, forced or bogus marriages)* and refers to the EU rules which apply in case the marriages of convenience include elements of trafficking in human beings.[19]

One might think that compared to the challenges of collecting the necessary proofs for a marriages of convenience such nuances between the different forms of marriages is of less importance, nevertheless the multicultural aspects of marriages necessitate that the authority carrying out any investigation related to suspected cases is aware of the cultural differences and does not take the 'European' – mostly romantic love-based – nature of a valid and also real marriage for granted. The Handbook can therefore serve as a solid guidance for officers on how to evaluate the elements of a case and the marriage involved individually and in its whole.

For instance it is a very enlightening statement of the Handbook that marriages of convenience are always valid marriages, as they were concluded keeping all the formal conditions of a marriage according to the applicable law at the time and place of the partucular marriage. Proxy marriages therefore constitute a major challange for the immigration authorities as they might be valid, but the purpose of the parties, being geographically apart from each other when marrying, still remains an issue to be found out. The rising number of proxy challanges and consequently the growing work and responsibility of the authorities related to this issue is also shown by the fact that the European Migration Network also collected the national practices on accepting proxy marriages according to national laws with the help of an ad-hoc query.

[16] Handbook, Section I., pp. 2-3.

[17] Own observation of the writer, having been a member of the relevant expert group.

[18] Recital 28 of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, OJ L 158, p. 77.

[19] Directive 2011/36/EU of the European Parliament and of the Council, of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims – http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:101:0001:0011:EN:PDF. (accessed on 1 October 2015).

Article 35 of the Directive allows Member States to adopt the necessary measures to refuse, terminate or withdraw any right conferred by the Directive in the case of abuse of rights or fraud, such as marriages of convenience. Section 3 of the Handbook, even before getting to the acual measures and the opreational guidelines, contains an overall presentation of the rules that national authorities must take into account when taking measures to prevent or tackle abuse, in particular the EU rules on free movement and fundamental rights, and illustrates what these rules mean in practice. This section "aims to draw the attention of national authorities to the fact that any formal decision taken by national authorities in relation to marriages of convenience has to comply with a number of procedural safeguards."[20]

Section 3 therefore intends to highlight and keep the authorities far from any excessive measures at every single phase of a realted procedure. It sets out that "an investigation into a marriage can only take place where there are reasonable doubts about its genuineness. Whilst, however, such reasonable doubts are sufficient as grounds for launching an investigation, once an investigation has taken place and has led to the conclusion that the marriage is of convenience, rights under free movement rules can be refused only where this is duly established by the national authorities concerned, in compliance with the relevant evidential standard."[21]

Taken into account the length of the elaboration on such issues (17 pages) as well as the fact that the Handbook positions this Section before the actual measures, the fear of the European Commission that EU Member States would go beyond the legal limits on their fight against abuses is clearly reflected and dominant in the document. As a result, the reader waiting for recommendations on actual operational measures needs to show patience till page 32 is reached.

As for operational measures, the so-called life-cycle approach is used: "The best way to structure hints of abuse is to divide them into several groups corresponding to inherent stages of *"the life cycle"* of marriages of convenience. Some hints may be relevant in more than one stage but – *to avoid repetition* – they are placed in the most relevant part."[22] The identified stages according which hints of abuse are structured are the following: before the spouses meet for the first time, pre-marriage phase, the wedding, applying for a visa or a residence permit, residence on the host Member State, and finally the end of the marriage.

This life-cycle approach clearly draws the attention to the fact that abuse can and should be detected at the earliest possible stage and therefore it is not only the exclusive responsibility of the immigration authorities to reveal any forms of abuse, but several authorities and other participants should be able to detect and then signal such abuses. "At national level, many national authorities come in contact with couples who may or may not be married of convenience. Their active involvement and awareness may play the crucial role in detecting and tackling abusive marriages of convenience. Main public players involved in detection or investigation of marriages of convenience are: embassies and consulates; border guards; Police and law enforcement agencies; national immigration authorities issuing residence documents; other national authorities responsible for other benefits that may be targeted by abusers (*e.g.* welfare authorities); registrars and other officials; public prosecutors; national courts and intelligence agencies. Given the complexity of the issue and the practical difficulties related to the whole process of decision-taking, EU countries must, if they aspire to tackle marriages of convenience in an effective and dissuasive manner, provide, at national level, for robust and holistic policies addressing marriages of convenience and specifying the roles of different national players and their tasks."[23]

[20] Handbook, Section 3, p.16.

[21] Handbook, Section 3.2, p. 28.

[22] Handbook, Section 4.4, p. 36.

[23] Handbook, Section 4.7, pp. 46-47.

"Marriages of convenience are a complex phenomenon which can be tackled with the use of various investigation and law enforcement techniques and tools."[24] Section 4.5 addresses in general terms investigation techniques and tools which are particularly relevant to marriages of convenience between mobile EU citizens and non-EU spouses; however these can also be relevant for other types of marriages of convenience. The Handbook highlights that "in all cases, reinforced cross-border cooperation and sharing of best practices in this area between competent national authorities, in particular within the framework of the EU policy cycle for organised and serious international crime, can significantly contribute to effectively tackling this form of abuse."[25]

Consequently, a separate Section (Section 4.7) is devoted to the issue and forms of cross-border co-operation in tackling marriages of convenience, in which the importance of Europol and Eurojust is introduced. It also highlights one specific tool or method that has already proved to be effective in fighting against cross-border crimes, the setting up of Joint Investigation Teams (JITs). "JITs are suitable and useful tools for effective investigation and prosecution of cases related to trafficking in human beings and can offer solutions for addressing the lack of national financial resources needed to proceed with the investigations. The EU agencies also participate in a supportive role and can provide necessary funding to the national authorities involved to cover the costs of joint investigations. Cross-border co-operation may help to overcome significant differences between the national legal systems, for example to seek the best venue for prosecution to resolve a conflict of jurisdiction where two or more EU Member States can have grounds for prosecution. JITs can also include temporary exchange of liaison officers to assist in debriefing of own nationals involved in the abuse."[26] Europol also issued a Joint Investigation Teams Manual[27] in 2011 with the aim of informing practitioners about the legal basis and requirements for setting up a JIT and providing advice on when a JIT can be usefully employed.

3.2. The Fight against Abuse in Hungary[28]

In Hungary the most frequently used method to detect relationships of convenience is the parallel interviewing of the parties. The most conspicuous characteristics of such relationships are the following: the parties got to know each other on the internet or during a vacation; the lack of common language of communication; a major age difference; the third-country national party is usually undereducated and has a questionable financial and insecure existential situation; the third-country national is completely lacking travel references, and the parties envision the family reunification exclusively on the territory of Hungary. In many cases the third-country national applicants have never visited Hungary, the Schengen area or have not even left their own country before. The interviews many times reveal that the parties do not even know the most basic information about each other; their answers given to the same questions differ to a great extent.

Apart from the parallel interviews, the Office of Immigration and Nationality can get in touch with further family members or make on the spot checks, or even a complete so-called environmental study can be

[24] Handbook, Section 4.5, p. 41.

[25] Handbook, Section 4.5, p. 41.

[26] Handbook, Section 4.6, p. 46.

[27] Joint Investigation Teams Manual, The Council of the EU, 15790/1/11, https://www.europol.europa.eu/content/page/joint-investigation-teams-989 (accessed on 1 October 2015).

[28] Fight against abuses presented in this study rely on the information gathered by the Hungarian Ministry of Interior for the European Commission's expert group on the Free Movement Directive, also presented at the conference in Győr, 20 May 2015, organized by the Hungarian Law Enforcement Association on secondary movements.

conducted, which can provide further essential information for evaluating the authenticity of the relationship. In case of on the spot checks, the parties are usually not informed in advance in order not to make them able to influence the outcome of the check (the home could be decorated or they could get prepared for the on the spot interview). In private homes such checks can primarily be carried out between 8 a.m. and 8 p.m. During the on the spot check, it is usually observed who lives in the flat/house habitually, and what signs refer to the permanent presence of certain persons in the flat/house. Photos are taken about photos, personal belongings, clothes, shoes, and bathroom items. Minutes are prepared on the spot about observations and interviews made and a copy of it is given to the concerned parties. The OIN officials also try to collect information about the environment of the parties *e.g.* by interviewing the neighbours, and also make efforts to ascertain whether the information provided during the interview is real.

Particularly in cases of registered partners' databases, such as the database on the personal data and address or the immigration database, are also used for receiving information on whether the officially registered address of the third-country national family member and that of the Hungarian/EEA national are the same.

It is also important that legal measures should be supporting the effective sanctioning of a revealed abuse. In Hungary Section 14(2) of Act I of 2007 on the Entry and Residence of Persons having the Right to Free Movement and Residence sets out the following: "The right of residence of a family member who is a third-country national shall terminate also if the family relationship was established for the purpose of obtaining the right of residence." Furthermore, in the cases of marriages concluded with Hungarian nationals, a special legal requirement set out in Section 24(2) of Government Decree 113/2007 intends to provide a preliminary filter for marriages of convenience, as the marriage certificate in this case can only be accepted to prove the family relationship if the marriage concluded abroad have been registered in Hungary, as well.

As for the effective sanctioning of relationships of convenience, it should be highlighted that the new Hungarian Criminal Code (Act C of 2012) having entered into force on 1 July 2013 contains a new crime, namely the "abuse by establishing family relations": "355. § A person above the age of 18, who, for financial gain, establishes a family relationship or takes a full force paternity statement only for the issuance of residence documents, if no more serious crime is realized, shall be punished with two years of imprisonment." Based on this, in marriages of convenience concluded between Serbian citizen men and Hungarian citizen women, people were accused in relation with the series of abuses mentioned above.

International cooperation necessarily had to take place during the investigation of the series of Hungarian-Serbian marriages of convenience, and therefore the Hungarian police authorities got in touch with the competent German authorities in order to get to know which of the Kosovar citizens had applied for or received residence documents in Germany. The cooperation with the Serbian partners has been made easier by the police liaison officer of Hungary in Belgrade, who can provide help in order to get the marriage certificates and the background information concerning the Serbian husbands.

4. Conclusions

Data submitted by Member States on recently identified marriages of convenience between non-EU nationals and EU citizens exercising their right to free movement within the EU shows that this phenomenon exists but varies significantly between Member States.[29] Nevertheless, it concerns all the Member States and therefore facilitating the effective national responses to the abuses was clearly an area for the EU to act. The simple existence of the EU Handbook on fighting against marriages of convenience

29 Communication "Free movement of EU citizens and their families: Five actions to make a difference", Section 3.1.

is therefore symbolic and reflects the EU's support in Member States to actively act against abuses in order to be able to uphold the provisional system of free movement in the meantime.

The content of the Handbook, on the other hand, might not be a real practical tool to be used when planning an actual operation, but can definitely serve as a good methodological background as well as a source of information for stakeholders in this fight who are not yet familiar so much with the phenomenon of marriages of convenience. The holistic approach it facilitates and the life-cycle approach it uses to identify the hints and tools at every stage can also urge Member States to evaluate their state of play in this regard. As for Hungary, it can be conlcuded that the immigration officers as well as the Police carrying out investigation in these abuses are familiar with the practicalities of the detection of and the fight against such abuses, yet improvements at preliminary stages, as well as involvement of further stakeholders in this fight can still be improved, just as prevention measures should be facilitated.

One issue that the Handbook also highlights is the inevitable need for international cooperation in the fight against the series of abuses most recently detected throughout Europe. As migrants more and more realize that instead of risking their lives to illegally get into the territory of the EU a less risky and even less costly way is to enter into a marriage of convenience, as the international organized crime groups more and more realize the opportunities in organizing such marriages, and as long as poverty and other vulnerability factors can actually push EU citizens to contribute to such abuses, authorities should be prepared to be able to, on the one hand, detect marriages of convenience, and on the other hand, effectively invesigate the organized groups that are behind them.

A comparative study[30] on family reunification policies in six Member States also states that an inreasing attention to possible fraudulent marriages can be observed. "This attention is frequently evident during the assessment of the first application, when the family relationship has to be identified."[31] "The way the possible fraudulent character of the marriage is assessed also shows similarities; conducting interviews with both spouses simultaneously, house calls at the sponsor's home and seeking information from third parties."[32]

The effective reaction to the problem of marriages of convenience may also have an impact on the issue of the so-called "brexit", that is the possible exit of the United Kingdom of the EU. In his letter[33] to Donald Tusk on 10 November 2015 David Cameron formally set out his demands in a letter to the president of the European Council Donald Tusk saying four objectives lie at the heart of the UK's renegotiations. The point of restricting on migration also put an ephasis on fightig sham marriages: "We also need to crack down on the abuse of free movement, an issue on which I have found wide support in my discussions with colleagues. This includes tougher and longer re-entry bans for fraudsters and people who collude in sham marriages. It means addressing the fact that it is easier for an EU citizen to bring a non-EU spouse to Britain than it is for a British citizen to do the same. It means stronger powers to deport criminals and stop them coming back, as well as preventing entry in the first place. And it means addressing ECJ judgments that have widened the scope of free movement in a way that has made it more difficult to tackle this kind of abuse."

In the meantime, let me suggest not to suspect abuse so eagerly regarding third-country nationals who choose legal migration channels. In my opinion, in the middle of the migration situation of the EU dominated by the irregularity of migration, cases of legal migration should be dominated by client friendly

[30] Tineke Strik, Betty de Hart, Ellen Nissen, Family Reunification: a barier or facilitator of integration? A comparative study, HW Oisterwijk: Wolf Legal Publishers, 2013.
[31] Strik at al, p. 39.
[32] Strik et al, p. 41.
[33] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/475679/Donald_Tusk_letter.pdf (accessed on 12 November 2015)

and client centric administration. This is essential to decrease the continuously increasing level of xenophobia in Europe and the growing securitization of migration issues.[34]

[34] See on this phenomenon: Valsamis Mitsilegas, *Immigration Control in the Era of Globalization, Deflecting Foreigners, Weakening Citizens, Strengthening the State*, in: Indiana Journal of Global Legal Studies, Vol. 19, No. 1, Winter 2012.

Summary of the 2nd Hungarian - Sino International Forum

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Keywords: Hungarian-Sino International Forum, globalization, auditing, governance, economic crimes

On 12-14 October 2015, following the first successful international forum in Nanjing, China in 2014, the 2nd Hungarian-Sino International Forum took place in Pécs, Hungary. The title of the event was *„Globalization, National Auditing, National Governance and Economic Crimes"* and was organized by two faculties of the University of Pécs – the Faculty of Business and Economics and the Faculty of Law – in cooperation with the Faculty of Law of the Josip Juraj Strossmayer University in Osijek. The Chinese counterparts which were invited were the Nanjing Audit University (NAU), the Shanghai Academy of Social Sciences (SASS) and the East China University of Political Science and Law (ECUPL).

At the Opening Ceremony, *József Bódis* (rector, University of Pécs), *Yan Weilong* (president, NAU), *Ye Qing* **(**president, ECUPL; president, Law Institute of the SASS), *István Tarrósy* (director, Centre for International Relations, University of Pécs) and *Barna Miskolczi* (Ministry of Justice, Hungary) welcomed Chinese, Romanian and Hungarian attendees and the forum itself. Each speaker agreed on the fact that the organization of the 2nd forum pushed the relationship of the universities up to a higher level.

In the Plenary Session, *Gyula Zeller* (professor, Faculty of Business and Economics, University of Pécs) pointed out the importance of explaining and comprehending theoretical influences relating to the understanding of the economy, and analysing practice which may or may not confirm theoretical and scholarly assumptions. As an example, he used economic crises and the related presumptions. He stated that the adequate use of business conception during Subprime Crisis management was essential. *Antal Ádám* (professor emeritus, Faculty of Law, University of Pécs) focused in his presentation on the similarities and differences in Chinese and European philosophies and religious beliefs. He expressed that all issues (such as cultural ones), even interdisciplinary conflicts (between different disciplines of sciences), may be solved if parties are open-minded and if they conciliate their values to reach a mutually prosperous consensus.

The conference continued in two parallel sessions: a Law Panel and an Economics Panel. What follows below is a brief summary of the most relevant presentations in the Law Panel. An edited volume collecting all of the conference papers would be very much welcomed in the future, as all presentations discussed relevant issues of international significance.

Tímea Drinóczi held an '*umbrella presentation*' concerning the correlation of corruption and the rule of law. Her topic was based on two research papers prepared by the Organization for Security and Co-operation in Europe and by the Group of States against Corruption (GRECO). She mentioned several possible instruments for fighting against corruption – for example, more emphasis should be placed on the gender dimension. It would mean, according to studies, that where more female representation exists, less corruption is detected, provided that the framework is a liberal democracy context. She concluded that combatting corruption is a must in order to maintain old democracies and foster new ones; a successful

fight against corruption shall contain political will and awareness of the functioning of corruption. Besides, proper and quality law making, implementation and compliance, ethical public servants at any level and field of public administration and in the judiciary and in any other state organ are also necessary. Finally, researching gender perspective and dimensions of corruption may be another tool with which we can combat corruption.

Sun Wanhuai gave a presentation about the development of economic crimes, especially the crime of misappropriation of public funds in the Chinese Criminal Code. After a historic overview he set out the role of the Supreme People's Court which is a good example of how the theory can benefit from practice, since the judicial practice affected the progress of criminalisation of different types of economic crimes – like embezzlement, for example. He also explained the differences between the judicial interpretation of law and that of the Peoples' Congress. The latter is authorized to give binding interpretation of criminal acts of the Criminal Code also during the period when the Criminal Code is applied. Regarding the misappropriation of public funds, this body gave an interpretation which was based on the case law of the courts. The presumed effect is that this activity brings uniformity to the application of law.

Csongor Herke presented an overview and provided detailed information about different systems of prosecution in Europe. He portrayed the status, tasks and organisational structure of the prosecutor in common law and civil law systems, the differences and similarities in subordination, rights and responsibilities of prosecutors in some states. Structures of the prosecution services always align to the court system; the subordination connected to the constitutional status of the prosecutor service itself or that of the chief prosecutor (e.g. subordination to the ministry in Germany, independence from executive power in Hungary). There might be specialised prosecutor units, mainly due to the special threats a state may face (e.g. Italy and its anti-mafia unit). His presentation triggered a discussion about surprising similarities of the Chinese and the Hungarian prosecution system, such as the hierarchy in the prosecution system and the way in which the independency of prosecutors is guaranteed.

In his speech *Gábor Molnár* gave an informative overview on the problem of life imprisonment, which is a recently a disputed question in Hungary. He touched upon some constitutional law related aspects of life imprisonment and showed the findings of the European Court of Human Rights in general and in connection with Hungary. In his opinion the earliest time of release on parole shall be determined in years. The European Court of Human Rights should determine the form of act (executive or judicial) that the review of conditional release should take.

Xia Fei surveyed the improvement of the Comprehensive Administration of Public Security (CAPS). After a summary of both the historic development and the multilevel organization system, the speaker showed the problems and necessary future improvements of the CAPS system and drew attention to new challenges, such as the threat of terrorism. In her view, improvements may include self-discipline of individuals and self-running of social orders. She stated that it was "time to make a change", socialization and marketization of public security is necessary and the government should put more effort on informal control.

The presentation by *Zoltán Nagy* covered the Hungarian Penal System. He conducted a review of the different penalties and measures – especially those penalties which were introduced by the new Criminal Code in 2012 – and correctional and other institutes, where the sentence of imprisonment is executed. He outlined the effectiveness of the penal system and the possible methods for improving it. He recommended that legislation should embrace the indisputable opinion of Beccaria from 1764, that penalty for all crimes is the real way if curbing crime. In his opinion nowadays this was just an unrealistic expectation which made criminal law shoreless.

István László Gál presented a paper on the criminal law protection of the stock market in Hungary. He gave detailed information about the new regulation in the Hungarian Criminal Code and drove attention to the unsolved problems of insider trading, like missing definitions of benefit and insider information and the difficulty of proving intent in a criminal trial.

In his presentation Professor *Wei Chang Dong* showed how a criminal strategy is chosen in a transition country, from a legal history perspective. Since Hungary may be considered a transition country as well (mainly in the period between 1990 and 2004), he made a comparison of the regulation of bribery and other economic crimes vis-à-vis China and Hungary. He demonstrated how the fall of communism in Eastern Europe modernized corruption, and presented how the Hungarian practice improved Chinese legislation: Hungary's experience introduced governmental activism, established an 'offensive' legislation strategy which may be used to improve China's criminal legislation system on the crime of bribery.

Dániel Tran gave a practice-orientated lecture about loan-sharking in Eastern Europe. He set a definition of loan-sharking according to sociological research papers, anecdotal evidences, journalism and his own research. He also analysed the commission of the crime from the point of view of perpetrators, victims and even from the perspective of authorities. He showed different possible solutions to reduce the number of perpetrations, mentioning the Romanian example of police raids on loan sharks. In his conclusion he stated that there is a need for more academic research in this topic.

Mihály Tóth expressed that the number of violent crimes and crines against property have stagnated while the number of economic crimes has seen a reduction during the last couple of years. However, perpetrators of economic crimes are more 'intelligent' and capable of causing more damage to society. He mentioned some tools of criminal law; in his opinion these instruments often react to criminal situations late and in an inappropriate manner. Later he shared some data with the audience on the criminality of Chinese people in Hungary, which is not considerable at all. To decide which law shall be applied in the prosecution, cooperation between the Chinese and Hungarian authorities is indispensable, in his view.

In her lecturer, *Wang Pheifen* invited us into the world of crimes of possession in Chinese law. She mentioned that the legislation is derived from the Qing dynasty when hiding forbidden books and weapons was a crime. Today the crime of possession can be classified due to the extent of how an act harms the society. She also listed and classified possession-crimes. Accordingly, possession of drugs and weapons could cause severe bodily harm or could jeopardize personal security, while possession of forged currency is harmful in a social or economic context. She drew attention to the fact that the intention of the perpetrator is the most important element of finding someone guilty in committing the crime of possession.

Du Wenjun explained the three theories of legal interest protection regarding crimes against property in China. According to the general theory, ownership should be protected, but based on his research on 128 cases of Supreme Peoples' Court, he concluded that the judicial practice does not support the general theory. This phenomenon is closely related to the local criminal culture, which usually takes the place of criminal law by applying customs and usages. The lecturer invited courts to use different theories in different cases to reach fair decisions.

An international forum, especially if it invites researchers from two states, is always a great occasion for all participants to present the results of their academic work and to learn from others and see best practices and reveal similarities and differences between their respective legal systems. Similarities and differences of Chinese and Hungarian criminal legislation, its organisational aspects as well as legal culture often lead to vivid discussions. It can be concluded that the examination and discussion of how practice can evolve into theory or may be taken into consideration by theory, and vice versa –one of the main focus points of the international forum – can lead to new legislative and judicial solutions.

After the sessions all participants, especially the heads of the universities and research institutes agreed that the professional relationship between them was worth deepening and that a lot of current problems and issues of international relevance in which could be discussed further in the near future.

Framing the Concept of Citizenship in a Contested Nation-State: Reflections on Kosovo

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Since the inception of the Republic of Kosovo in February 2008, the contouring of its statehood has been predominantly affected by four interwoven factors: the partial recognition of its sovereignty, perplexed inter-ethnic relations, profound international interference and parallel jurisdictions with the Republic of Serbia. The efforts put forth to conceptualise the meaning and scope of Kosovo citizenship in such a sensitive socio-political environment have proved particularly challenging. This paper aims to provide an analytical framework for determining essential elements of Kosovo citizenship, with particular emphasis on its practical and ideological implications for the multicultural, yet ethnically divided society. This is done through an assessment of the key nation-constituting legal norms as well as the deep-rooted ethnic tensions sparked by conflicting perceptions of Kosovo's statehood by the majority (Kosovo Albanian) and minority (Kosovo Serbian) population. By formal definition, Kosovo is an indivisible state of all citizens, however, polarised majority-minority interests have impinged the constitutionally guaranteed civic spirit of the entity, thereby threatening not only national, but also wider international security and integrity. With the purpose of determining and delineating labyrinthine intersections of a contested nation-state, citizenship, 'communities' and security, the paper offers a comprehensive theoretical analysis of the respective quadrilateral nexus.

Keywords: Kosovo, contested nation-state, citizenship, communities, security

1. Prologue

The Republic of Kosovo was the last entity to arise from the disintegrated Yugoslav federation, thus closing the 27-year-long chapter of a thorny and convoluted process of the dissolution of the predecessor state.[1] Its path to independence has been characterised by three distinctive features which the creation of the Kosovo nation-state have made particularly challenging and strenuous. First, although embedded in the geospatial timeline and chronology of events unmistakably related to the dissolution of the Socialist Federal Republic

[1] Earlier referendums and declarations of independence, which resulted in subsequent waves of the post-Yugoslav nation-states genesis, included those of Slovenia (1991), Croatia (1991), Macedonia (1991), Bosnia and Herzegovina (1992), Montenegro (2006) and Serbia (2006). See Deklaracija ob neodvisnosti, *Uradni list Republike Slovenije*, no. 1/1991, 25.6.1991; Deklaracija o proglašenju suverene i samostalne Republike Hrvatske, *Narodne novine*, no. 31/1991, 25.6.1991; Сашо Георгиевски, Сашо Додевски, *Декларација на Собранието на Република Македонија по повод референдумското изјаснување, 17. септември 1991 – Документи за Република Македонија 1990-2005* (Скопје: Универзитет "Св. Кирил и Методиј", Правен факултет "Јустинијан Први", 2008), 166-168; Deklaracija o državnoj suverenosti i nedjeljivosti Republike Bosne i Hercegovine, Rezultati republičkog referenduma za utvrđivanje statusa Bosne i Hercegovine koji je održan 29. februara i 1. marta 1992. godine, *Službeni list Republike Bosne i Hercegovine*, no. 7/1992, 27.3.1992; Deklaracija nezavisne Republike Crne Gore, *Službeni list Republike* Crne Gore, no. 36/2006, 5.6.2006; Odluka o obavezama državnih organa Republike Srbije u ostvarivanju nadležnosti Srbije kao sledbenika državne zajednice Srbija i Crna Gora, *Službeni glasnik Republike Srbije*, no. 48/2006, 5.6.2006.

of Yugoslavia (hereinafter: SFRY), Kosovo's interconnection with the respective preceding state was indirect in its nature for the reason that the fate of Kosovo has always been primarily dependant on the Republic of Serbia as one of the Yugoslav constituent and, later on, successor entities. As a consequence, when the SFRY collapsed, Kosovo followed Serbia's statehood trajectories, having constituted first a territorial unit within the Federal Republic of Yugoslavia (1992 – 2003)[2], then, of the State Union of Serbia and Montenegro (2003 – 2006)[3] and finally, of the Republic of Serbia (2006 – 2008).[4] Its centuries-long and deep-rooted ties with Serbia have created an immense level of connectives not inherent to the interrelationship between the SFRY and its six former constitutive republics. Hence, Kosovo's decision to secede from Serbia was both greeted with an outright disapproval by the Serbian regime and disputed by a substantial part of the international community, severely affecting the establishment of a fully functional nation-state. The second specificity is related to the character of territorial and political arrangements of the predecessor state(s) in which Kosovo had the status of an autonomous province with no explicit right to secede.[5] Along these lines, the preamble of the Constitution of the Republic of Serbia (2006) specifies that "the Province of Kosovo and Metohija is an integral part of the territory of Serbia" with "a substantial autonomy within the sovereign state of Serbia" and analogous "constitutional obligations of all state bodies to uphold and protect the state interests of Serbia in Kosovo and Metohija in all internal and foreign political relations".[6] Although Kosovo Albanians were for the most part excluded from the referendum on the adoption of the respective Constitution and in the meantime, *de facto* circumstances have significantly altered,[7] the act has remained unchanged to date and might be seen as a symbolic reflection of the official Serbian stance toward Kosovo's independence. Finally, the third aggravating factor in exercising Kosovo's sovereign and fully independent governmental control is limited international recognition.[8] Although the international law doctrine is ambivalent about the character of recognition of states (constitutive *vs.*

[2] Ustav Savezne Republike Jugoslavije, *Službeni list Savezne Republike Jugoslavije*, no. 1/1992, 5.1.1992.

[3] Ustavna povelja državne zajednice Srbija i Crna Gora, *Službeni list Srbije i Crne Gore*, no. 1/2003, 4.2.2003.

[4] Ustav Republike Srbije, *Službeni glasnik Republike Srbije*, no. 98/2006, 10.11.2006.

[5] According to Basic Principle I of the last Constitution of the SFRY (1974), the right to self-determination, including the right of secession, was granted to constitutive peoples only (hr. *narodi*; and subordinately, to republics as their sociopolitical units) and not to nationalities/national minorities (hr. *narodnosti*; and their sociopolitical units, if any, such as autonomous provinces). Ustav Socijalističke Federativne Republike Jugoslavije, Službeni list Socijalističke Federativne Republike Jugoslavije, no. 9/1974, 21.2.1974. Cf. Milojica Šutović, "Samoopredeljenje naroda i raspad Jugoslavije," *Kultura polisa* 8(2011): 46, 50, 52.

[6] Ustav Republike Srbije, loc. cit. (note 4).

[7] *Ustav Republike Srbije – Nedostaci i potreba za reformom* (Beograd: Komitet pravnika za ljudska prava – YUCOM, 2013), 13-14, 16.

[8] As of April 14, 2015, 110 countries have recognised Kosovo, including 23 European Union member states. Those which have refrained from recognising it include, *inter alia*, China, Cyprus, Greece, India, Romania, Russia, Slovakia and Spain. "Countries that have recognized the Republic of Kosova", Ministry of Foreign Affairs of the Republic of Kosovo, accessed April 14, 2015, http://www.mfa-ks.net/?page=2,33 ; "Who Recognized Kosova as an Independent State", Kosovo Thanks You, accessed April 14, 2015, http://www.kosovothanksyou.com/ . More on reasons behind the decision of particular states not to recognise Kosovo see Liridon Lika, "La consolidation internationale de l'indépendance du Kosovo: quelle est la viabilité de ce 'nouvel état'?," *Revue de la Faculté de droit de l'Université de Liège* 4, 2012, pp. 494-497.

declaratory approach),[9] the prevailing standpoint treats it as a declaratory act of political significance,[10] with oftentimes far-reaching legal and practical implications.[11]

By determining the scope and limits of sovereignty in today's Kosovo as well as by analysing complex dynamics of interethnic relations as a *primum mobile* of Kosovo's statehood contestation, this paper focuses on a peculiar facet of Kosovo's statehood: citizenship: its meaning, genesis, boundaries and materialisation in everyday life. Since the inception of the Republic of Kosovo in February 2008, the contouring of its statehood has been predominantly affected by four interwoven factors: the partial recognition of its sovereignty, perplexed inter-ethnic relations, profound international interference and parallel jurisdictions with the Republic of Serbia. The efforts put forth to conceptualise the meaning and scope of Kosovo citizenship in such a sensitive socio-political environment have proved particularly challenging. This research aims to provide an analytical framework for determining essential elements of Kosovo citizenship, with particular emphasis on its practical and ideological implications for the multicultural, yet ethnically divided society. This is done through an assessment of the key nation-constituting legal norms as well as the deep-rooted ethnic tensions sparked by conflicting perceptions of Kosovo's statehood by the majority (Kosovo Albanian) and minority (Kosovo Serbian) population. By formal definition, Kosovo is an indivisible state of all citizens, however, polarised majority-minority interests have impinged the constitutionally guaranteed civic spirit of the entity, thereby threatening not only national, but also wider international security and integrity. With the purpose of determining and delineating labyrinthine intersections of a contested nation-state, citizenship, 'communities' and security, the paper offers a comprehensive theoretical analysis of the respective quadrilateral nexus.

Structurally, every factor employed in the contouring of Kosovo's statehood is portrayed in a separate chapter with the aim of providing a thorough factual background about societal specificities of paramount importance for the defining of Kosovo citizenship. The subsequent chapter summarises the essence of Kosovo citizenship as construed by the Kosovo's key normative package on citizenship encompassing the Unilateral Declaration of Independence, the Constitution and the Law on Citizenship.

[9] Vladimir-Đuro Degan, *Međunarodno pravo*, Zagreb: Školska knjiga, 2011, pp. 261-263; Matthew Craven, "*Statehood, self-determination, and recognition*," in *International Law, Third Edition*, Malcom D. Evans (Ed.) New York: Oxford University Press Inc., 2010, p. 243; Conway W. Henderson, *Understanding International Law*, Malden/Oxford/Chichester: Wiley-Blackwell, 2010, p. 28.

[10] James Crawford, *Brownlie's Principles of International Law,* Eighth Edition, Oxford: Oxford University Press, 2012, p. 145; Juraj Andrassy et al., *Međunarodno pravo 1*, Zagreb: Školska knjiga, 2010, p. 94; Antonio Cassese, *International Law*, Second ed., New York: Oxford University Press, 2005, pp. 73-74.

[11] As Craven explains, recognition implies respect for the sovereignty and territorial integrity of a recognized state as well as for its laws and legal transactions undertaken within its jurisdiction. Craven, "*Statehood, self-determination, and recognition*," op. cit. (note 9), 243. For a more elaborate list of advantages of recognition see Sean D. Murphy, *Principles of International Law, Second Edition*, St. Paul: Thomson/West, 2012, p. 34; Robert Jennings and Arthur Watts (Eds.), *Oppenheim's International Law*, New York: Oxford University Press, 2008, pp. 158-160.

2. Delimitating the Scope of Kosovo's Sovereignty through the Internal Legal Framework

Legally, the Republic of Kosovo came into being on 17 February 2008, by a unilateral Declaration of Independence proclaimed unanimously at an extraordinary meeting of the Kosovo Assembly.[12] Although of a non-binding nature, the document is of prime importance in the catalogue of nation-constituting acts and as such, a pillar of Kosovo's independence which sets nomotechnically accurately-defined acknowledgments, commitments and principles comprising the essence of statehood, many of which have direct effect on citizenship and minority issues. Being aware of the sensitivity of the Declaration, the legislator opted for genuinely egalitarian, conciliatory and tactful wording. The points of importance for our study are embodied already in the underlying philosophy of the preamble which accentuates the pledge to build a society that honours human dignity and affirms the pride and purpose of its citizens in a spirit of reconciliation and forgiveness; and to protect, promote and honour the diversity of Kosovo's people. Additionally, it is noted that in a decade preceding the Declaration (*i.e.* since placing Kosovo under United Nations interim administration in 1999), Kosovo developed functional, multi-ethnic and democratic institutions which freely express the will of Kosovo's citizens.[13] In point 2 of the Declaration, Kosovo is defined as "a democratic, secular and multi-ethnic republic guided by the principles of non-discrimination and equal protection under the law" which aims to "protect and promote the rights of all communities in Kosovo and create the conditions necessary for their effective participation in political and decision making processes".[14] Point 3 regulates the responsibility to implement in full obligations deriving from the *Ahtisaari Plan*, "particularly those that protect and promote the rights of communities and their members".[15] As expected, the Declaration has drawn mixed reactions within the international community with a larger share of countries backing the right to self-determination at the expense of the Serbian territorial integrity. The reluctance of states to recognise Kosovo was principally excused by the fear that its independence would serve as a dangerous precedent powerful enough to initiate a domino effect in other contested territories striving for their own independence. To preclude or lessen such concerns, the observation that Kosovo is "a special case arising from Yugoslavia's non-consensual breakup and not a precedent for any other situation" was added to the Declaration of Independence.[16]

The lack of consensus on compatibility of the Declaration with the existing international legal order and the delicacy of political atmosphere surrounding the proclamation of independence, especially Serbia's vehement opposition, prompted the UN General Assembly to request for an Advisory Opinion of the International Court of Justice on whether the Kosovo's unilateral Declaration of Independence is in accordance with international law.[17] On 22 July 2010, the International Court of Justice concluded that "the adoption of the declaration of independence of 17 February 2008 did not violate general international law, Security Council resolution 1244 (1999) or the Constitutional Framework. Consequently the adoption of

[12] "Kosovo Declaration of Independence", Republic of Kosovo – Assembly, accessed 15 April 2015, http://www.assembly-kosova.org/?cid=2,128,1635 .

[13] *Ibid.*

[14] *Ibid.*

[15] *Ibid.*

[16] *Ibid.*

[17] "Request for an Advisory Opinion of the International Court of Justice on whether the Unilateral Declaration of Independence of Kosovo is in Accordance with International Law", Resolution A/RES/63/3 (A/63/L.2) adopted by the General Assembly at its 22nd plenary meeting on 8 October 2008.

that declaration did not violate any applicable rule of international law."[18] The value of the Advisory Opinion for the construction of Kosovo's statehood was of a limited nature as it only addressed the legacy of the Declaration, deliberately avoiding to take into consideration its consequences, *i.e.*, whether or not a new state was actually born as a result of the respective legal act. Such a development in the evolution of Kosovo's statehood raises several important questions: First, what was the status of Kosovo in relation to Serbia, on one hand, and to the international community, on the other hand, during the period between the declaration of independence and the adoption of the ICJ Advisory Opinion? Second, how did the controversy about the legal subjectivity of Kosovo impact the citizenship status of its residents during the given period? Third, taking into consideration a severely polarised majority-minority interrelationship between Kosovo Albanians and Kosovo Serbs, did Kosovo have sufficient preconditions for putting into practice all the rights, duties and principles enshrined in the Declaration? And fourth, what was the effect of the Declaration on the security situation in Kosovo and the stability of the region at large?

Legal prerequisites for effective functioning of the newly declared state were established soon after the adoption of the Declaration. Nationality law was thereby given the highest priority. Namely, just three days following the proclamation of independence, the Kosovo Assembly promulgated the Law on Citizenship of the Republic of Kosova, thus prescribing "the rules and procedures for the acquisition and loss of the citizenship of the Republic of Kosova" and regulating "other issues related to the citizenship of the Republic of Kosova" (Article 1).[19] By definition of the respective Law, citizenship is perceived exclusively as a legal bond between a state and a person, which establishes mutual rights and obligations (Article 2). Kosovo citizenship can be chiefly acquired in four conventional ways: by birth, by adoption, by naturalisation and on the basis of international treaties (Article 5). In addition, the Law has also introduced two peculiar modes of the acquisition of citizenship: first, on the basis of habitual residence and second, in accordance with the Comprehensive Proposal for the Republic of Kosova Status Settlement. As for the first modality, in line with Article 31(1), "every person who is registered as a habitual resident of the Republic of Kosova pursuant to UNMIK Regulation No. 2000/13 on the Central Civil Registry shall be considered a citizen of the Republic of Kosova and shall be registered as such in the register of citizens".[20] The second criterion is a post-succession transitory provision, stipulated by Article 32, which in its paragraph 1 prescribes that "all persons who on 1 January 1998 were citizens of the Federal Republic of Yugoslavia and on that day were habitually residing in the Republic of Kosova shall be citizens of the Republic of Kosova and shall be registered as such in the register of citizens irrespective of their current residence or citizenship".[21] Paragraph 2 of the same Article expands the circle of persons who are eligible to acquire Kosovo citizenship to direct descendants of the persons referred to in paragraph 1. In order to boost the contingency of potential Kosovo citizens, the Law foresees the simplified procedure for the acquisition of citizenship by Kosovars with lawful residence outside Kosovo through facilitated naturalisation. Namely, a member of the Kosovo's diaspora can obtain citizenship by fulfilling one requirement only (out of six needed for regular naturalisation) – that "he/she declares and with his/her conduct proves that he/she accepts the constitutional

[18] "Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo", Advisory Opinion, I.C.J. Reports 2010, p. 403.

[19] Law Nr. 03/L-034 on Citizenship of Kosova, *Official Gazette of the Republic of Kosovo*, no. 26/2008, 2.6.2008. The Law was amended in 2011 (Law No. 04/L-059 on Amending and Supplementing the Law No.03/L-034 on Citizenship of Kosovo, *Official Gazette of the Republic of Kosovo*, no. 26/2011, 25.11.2011) and in 2013, a new, consolidated version of the Law was passed (Law No 04/L-215 on Citizenship of Kosovo, *Official Gazette of the Republic of Kosovo*, no. 33/2013, 2.9.2013).

[20] *Ibid.*

[21] *Ibid.*

and legal order of the Republic of Kosova and that he/she is integrated into the society of the Republic of Kosova through social, cultural, scientific, economic or professional links" (Article 16.1).[22] The norm concerns persons born in Kosovo and their descendants within one generation likewise, but does not specify their ethnicity; indeed, the entire Law is contoured in a way to create a de-ethnicised citizenship model.[23] Finally, the Law facilitates establishment of linkages between Kosovo and its diaspora as well as between Kosovo and Kosovo Serbs through the institution of dual citizenship. Kosovo's attitude towards dual or multiple citizenships is very liberal, thus, the acquisition and holding of another citizenship(s) does not cause the loss of the citizenship of Kosovo (Article 3).

Primus inter pares in a normative package regulating citizenship and inter-ethnic issues – the Constitution of the Republic of Kosovo entered into force on 15 June 2008.[24] It has introduced three cardinal features of the newly proclaimed state, aiming at long-term peace, security and stability in the country and its neighbouring regions. First, Kosovo is defined as "an independent, sovereign, democratic, unique and indivisible state" (Article 1.1),[25] with special emphasis on its sovereignty and territorial integrity which are construed as "intact, inalienable, indivisible and protected by all means provided in this Constitution and the law" (Article 2.2).[26] The idea behind such a construction referred to preservation of the unity of the state territory, as an opposing view to the attitude much potentiated among Kosovo Serbs who favoured division of the area along ethnic lines (Kosovo Serbian North-Kosovo Albanian South). Second, Kosovo is established as a civic state – "a state of its citizens" (Article 1.2), in which sovereignty "stems from the people, belongs to the people and is exercised in compliance with the Constitution through elected representatives, referendum and other forms in compliance with the provisions of this Constitution" (Article 2.1).[27] The term "people" implies "Albanian and other communities" (Article 3.1) comprising Kosovo's multi-ethnic society.[28] Tolerance and balance between Kosovo Albanians and Kosovo Serbs (as well as between other "communities") are to be achieved through exercise of public authorities "based upon the principles of equality of all individuals before the law and with full respect for internationally recognized fundamental human rights and freedoms, as well as protection of the rights of and participation by all communities and their members" (Article 3.2).[29] And third, in order to neutralise and eliminate concerns that in the future, Kosovo could possibly expand territorial claims on nearby areas predominantly inhabited by ethnic Albanians (parts of Macedonia, Montenegro and Serbia) and/or to unify with Albania, the

[22] *Ibid.*

[23] Gëzim Krasniqi, *Country Report on Citizenship Law: Kosovo*, San Domenico di Fiesole: European University Institute, 2015, pp. 10 & 13.

[24] Constitution of the Republic of Kosovo of 9 April 2008, *Official Gazette of the Republic of Kosovo*, no. 31/2008.

[25] Such a portrayal is built on the preamble's definition of Kosovo as a "free, democratic and peace-loving country" which is "a homeland to all of its citizens" and "a state of free citizens" aiming to guarantee "the rights of every citizen, civil freedoms and equality of all citizens before the law". *Ibid.*

[26] *Ibid.*

[27] *Ibid.*

[28] The vision of multi-ethnic Kosovo has been embedded in a number of constitutional provisions designed to promote and reflect the multi-ethnic character of the society. Apart from Art. 3 on equality before the law, the other include Art. 6.1 on state symbols, Art. 59.1(9) on rights of communities and their members, Art. 108.2 on the Kosovo Judicial Council, Art. 109.4 on the State Prosecutor, Art. 110.1 on the Kosovo Prosecutorial Council and Art. 129.2 on the Kosovo Intelligence Agency. *Ibid.*

[29] *Ibid.*

legislator specified that Kosovo will have "no territorial claims against, and seek no union with, any State or part of any State" (Article 1.3).[30]

The Kosovo Constitution explicitly grants the right to citizenship (Articles 14[31] and 155.1[32]) and sets it as a precondition for exercise of a wide range of other constitutionally guaranteed rights and freedoms, *e.g.* the freedom of movement (Article 35), passive and active voting rights (Article 45.1), the right to candidacy for the Assembly (Article 71.1), the right to be elected President of the Republic of Kosovo (Article 85 and 86.3), the right to active participation in the decision-making process of municipal bodies (Article 124.1), the right to be a member of the Kosovo Security Force (Article 126.4) and the right to be elected as Ombudsperson (Article 134.2). Additionally, the notion of citizenship acts as an integral element of the provisions regulating jurisdiction over citizens abroad (Article 15)[33], the promotion of welfare by fostering sustainable economic development (Article 119.4) as well as the temporary composition of the Constitutional Court (Article 152.4). Aside from conferring the right to acquire citizenship to persons who were legal residents in Kosovo at the time of the adoption of the Constitution (art. 155.1), the act expands the right also to "all citizens of the former Federal Republic of Yugoslavia habitually residing in Kosovo on 1 January 1998 and their direct descendants to Republic of Kosovo citizenship regardless of their current residence and of any other citizenship they may hold" (Article 155.2).[34]

A number of other constitutional provisions compose a legal framework for the promotion of inter-ethnic equality and non-discrimination. For example, both Albanian and Serbian are declared official languages (Article 5.1), alongside Turkish, Bosnian and Roma languages, which "have the status of official languages at the municipal level or will be in official use at all levels as provided by law" (Article 5.2).[35] Furthermore, the Constitution guarantees a large range of rights and freedoms (enumerated in Chapter II – Fundamental Rights and Freedoms) as well as regulates the application of ratified international treaties on human rights, which are legally binding norms with supremacy over domestic law (Article 19). Separate Chapter III stipulates the rights of communities and their members and correlated responsibilities of the State. Self-identification with a certain community is the crucial point of departure and a basis for "the right to freely express, foster and develop (…) identity and community attributes" (Article 57.2 and 3).[36] The notion of identity thereby encompasses religion, language, traditions and culture (Article 59.1.1).

Despite the exceptional efforts of Kosovo Albanians to establish a fully functional sovereign state through creation of a solid legal framework, Kosovo remains deeply polarised and unstable, both externally and internally. The external factor in diminishing the prospects for actualisation of Kosovo's statehood is the discord stance of the world community towards the recognition of independence. Internally, Kosovo struggles with unprecedented levels of corruption, organised crime, antagonistic inter-party relations,

[30] *Ibid.*

[31] "*The acquisition and termination of the right of citizenship of the Republic of Kosovo are provided by law*". *Ibid.*

[32] "*All legal residents of the Republic of Kosovo as of the date of the adoption of this Constitution have the right to citizenship of the Republic of Kosovo*". *Ibid.*

[33] According to international law doctrine, every state exercises its jurisdiction not only over its citizens within its own territory but also over those residing or travelling abroad, *i.e*. all the citizens, in or outside the national boundaries, are set under the state's personal authority. See Jennings and Watts, eds., *Oppenheim's International Law*, op. cit. (note 11), 462; Andrassy et al., *Međunarodno pravo 1*, op. cit. (note 10), 353; Degan, *Međunarodno pravo*, op. cit. (note 9), 466.

[34] Constitution of the Republic of Kosovo, loc. cit. (note 24).

[35] *Ibid.*

[36] *Ibid.*

ruined economy and severely impaired inter-ethnic relations.[37] All these factors impede both the reinforcement of Kosovo's statehood and the formation of the body of its citizens.[38]

3. Perplexity of Inter-Ethnic Relations in Kosovo

As of 31 December 2013, the total residential population in Kosovo was 1,820,631 inhabitants.[39] The latest census, conducted in 2011, discloses an ethnically homogenous character of the Kosovo society which is comprised of 91% of Kosovo Albanians, 3,4% of Kosovo Serbs and 5,6% of others.[40] Such a proportion is a feature pertinent to the 21st century, as earlier statistics (1948 – 1981) illustrate considerably different ethnic maps with higher shares of Serbs and others in the total population. Namely, in *1948*, the ethnic distribution of Kosovo Albanians, Kosovo Serbs and others was 68%, 24,1% and 7,9%, respectively; in *1953*, it gradually changed to 64,3%, 24,1% and 11,6%; in *1961*, it was 67,1%, 23,5% and 9,4%; in *1971*, a more prominent decrease in the number of Kosovo Serbs and increase in number of Kosovo Albanians ensued, leading to the following proportions: 73,7%, 18,4% and 8%; and finally, in *1981*, the respective trend progressed, so the numbers were set at 72,4%, 13,2% and 9,4%.[41] The succeeding thirty years have witnessed a drastic transformation of ethnic landscape which remodelled the Kosovo society from a multi- to a mono-ethnic one. Thus far, such a transfiguration has neither neutralised nor eliminated the centuries-long antagonisms between Kosovo Albanians and Kosovo Serbs, but further widened their inter-ethnic tensions. Kosovo Serbs have expanded efforts to preserve their growingly endangered identity while Kosovo Albanians have put a focus on creation of a state free of the tenacious Serbian influence regularly channelled through Kosovo Serbs.

A number of facts framing the discourses on the origins of Kosovo Albanians and Kosovo Serbs as well as on the earliest patterns of their settlement in the Kosovo area remains unclear. In brief, Serbs are Slavs for whom it is assumed that they first arrived to the north-western side of Kosovo in the early 7th century. The two prevalent theories interpreting the origins of the Albanians classify them as either Illyrians or Thracians, both of which inhabited the Balkans (Illyrians the western and Thracians the eastern part) during pre-Roman and Roman times. Albanians were first introduced in the historical narrative in the early 11th century. As far as other major ethnic specificities are concerned, Kosovo Albanians speak Albanian which is a separate branch of the Indo-European language (*i.e.* a branch on its own), while Kosovo Serbs speak Serbian, a Slavic language. Moreover, Kosovo Albanians are predominantly (Sunni) Muslims while Kosovo Serbs declare themselvesOrthodox Christians. Although sharing the same geographic space for centuries, they have strived to preserve very distinct and strong ethnic identities.[42] Such a unique evolution of the Kosovo society can be well depicted by using Hondius' brilliant portrayal of the Yugoslav community of nations

[37] Ilir Deda, *Kosovo After the Brussels Agreement: From Status Quo to an Internally Ethnically Divided State*, Priština: Konrad Adenauer Stiftung, 2013, p. 6.

[38] Krasniqi, *Country Report on Citizenship Law: Kosovo*, op. cit. (note 23), 1.

[39] *Statistical Yearbook of the Republic of Kosovo 2015*, Prishtina: Kosovo Agency of Statistics, 2015, p. 17.

[40] However, these results should be cautiously taken into consideration because most Kosovo Serbs boycotted the census. Given the fact that they were also excluded from the 2011 census of the Republic of Serbia, many felt betrayed by the only country they considered a homeland, so 21,000 of them signed a petition requesting acquisition of Russian Federation citizenship. As it was expected, their demand was rejected by the Russian authorities because they did not meet naturalisation requirements. Krasniqi, *Country Report on Citizenship Law: Kosovo*, op. cit. (note 23), 21.

[41] *Statistical Yearbook of the Republic of Kosovo 2015*, op. cit. (note 39), 35.

[42] See more Noel Malcom, *Kosovo: A Short History*, London: Pan Books, 2002, pp. 22-40.

which he described in his 1968 study as "an interesting combination of parallels and contrasts" and "an experimental theatre in which different manifestations are performed on different stages in one and the same hall."[43]

Throughout history, the ethnic specificities of Kosovo residents have been shaped by various regimes ruling the territory. As anticipated, respective changes in the statehood led to reconfiguration of their citizenship statuses as well. For the longest period of time, spanning more than five centuries (1455-1912), Kosovo was under the Ottoman rule, during which it was first subsumed under the so-called *millet* system that regulated the link between the state and different communities (classified in two categories: Muslims and non-Muslims) and later on under the Ottoman Edicts, Nationality Law and Constitution which granted Ottoman citizenship to all inhabitants of the Empire. In the period between the Balkan Wars (1912-1913) and the formation of the Kingdom of Serbs, Croats and Slovenes (1918), Kosovo was partitioned between the Kingdom of Montenegro and the Kingdom of Serbia with a *de facto* stateless population because when the First World War started and Kosovo was occupied by the Austro-Hungarian Empire, Montenegrin and Serbian laws had virtually no effect. After 1918, Kosovars were entitled to various citizenship rights and in 1928, they officially became citizens of the Kingdom of Serbs, Croats and Slovenes following the enactment of its Citizenship Act. In 1929, the Kingdom was renamed into the Kingdom of Yugoslavia. During the Second World War, most of Kosovo was occupied by Italy (and Germany) and merged with previously occupied Albania; hence, Kosovars were granted some citizenship rights of the Kingdom of Albania. When the war ended in 1945, Kosovo was first incorporated into the Federal People's Republic of Yugoslavia and then, became part of a number of other states and their citizenship schemes: the Socialist Federal Republic of Yugoslavia (1963), the Federal Republic of Yugoslavia (1992), the State Union of Serbia and Montenegro (2003) and the Republic of Serbia (2006).[44]

As Ahtisaari pointed out in his 2007 report on Kosovo's future status, "a history of enmity and mistrust has long antagonised the relationship between Kosovo Albanians and Serbs".[45] The animosity culminated in the 1990s during the Milošević regime which abolished Kosovo's autonomy and started oppressing the Albanian majority through their systematic discrimination and methodical elimination from public life. Oppression led to aggression and the ensuing large-scale and brutal armed conflict resulted in massive displacement and loss of human lives. That was the moment when the international community opted to intervene in order to mitigate and manage the conflict, first through the North Atlantic Treaty Organization (NATO) and subsequently, through the United Nations, as outlined in the following chapter.[46] The international presence on the Kosovo territory did alleviate tensions and stop military activities, but the strict division of the Kosovo population along ethnic lines has persisted to date.

Unyielding delineations of a heterogeneous society along ethnic lines is an ingrained attribute of Kosovo's actuality, much contrasted with the official vision of the Kosovo nation-state construed by the Constitution, as a conglomerate of equal peoples in which no strict division between the principal nation and 'the others'

[43] Frederik Willem Hondius, *The Yugoslav Community of Nations*, The Hague/Paris: Mouton, 1968, p. 7.

[44] See more Krasniqi, *Country Report on Citizenship Law: Kosovo*, op. cit. (note 23), pp. 3-7; Gëzim Krasniqi, *Equal citizens, uneven 'communities: differentiated and hierarchical citizenship in Kosovo*, CITSEE Working Paper Series 2013/27, 2013, p. 6; Gëzim Krasniqi, *The challenge of building an independent citizenship regime in a partially recognised state: the case of Kosovo*, CITSEE Working Paper Series 2010/04, 2010 pp. 4-9; Malcom, *Kosovo*, op. cit. (note 42), pp. 264-356.

[45] *Report of the Special Envoy of the Secretary-General on Kosovo's future status*, S/2007/168, 26 March 2007.

[46] *Ibid.* See more Paul Latawski & Martin A. Smith, *The Kosovo crisis and the evolution of post-Cold War European security*, Manchester/New York: Manchester University Press, 2003, pp. 11-38; Andru E. Wall (Ed.), *Legal and Ethical Lessons of NATO's Kosovo Campaign*, Newport: Naval War College, 2002.

is drawn. With the aim of eliminating the negative effects of explicit partition of the population on majority and minority groups, the legislators have introduced the neutral and politically correct term of 'communities' for all ethnic collectivities residing in Kosovo. Pursuant to Article 57.1 of the Constitution, they are defined as "inhabitants belonging to the same national or ethnic, linguistic, or religious group traditionally present on the territory of the Republic of Kosovo".[47] Preservation of their identity has become the imperative of the multi-ethnic polity, achieved through specific rights set forth in the Constitution and safeguarded by positive obligations of the state. Alongside the unalienable right to self-identification with a particular community, every community member has "the right to freely express, foster and develop her/his identity and community attributes" (Article 57.3), in compliance with internal laws and the rights of other people (Article 57.4).[48] Specific provisions aiming at preservation of the essential elements of communities' identities encompass a wide array of rights, for instance the right to express, maintain and develop their culture (Article 59.1), to receive public education in one of the official languages of their choice and in their own language (Article 59.2 and 59.3), to establish and manage their own private educational and training establishments (Article 59.4), to use their language and alphabet freely in private and in public (Article 59.5 and 59.6), to use and display community symbols (Article 59.7), to have personal names registered in their original form (Article 59.8), to have guaranteed access to public broadcast media (Article 59.10 and 59.11), to enjoy unhindered contacts among themselves and co-ethnics in other countries likewise (Article 59.12), to establish associations for culture, art, science and education (Article 59.14), to equitable representation in employment in public bodies and publicly owned enterprises at all levels (Article 61), to guaranteed seats in the Assembly (Article 64.2) and consequently, in the (permanent) Committee on Rights and Interests of Communities (Article 78), to positions in Ministries and other executive bodies (Article 96), to be appointed a judge of the Supreme or any other court (Article 103) or a member of the Kosovo Judicial Council (Article 108), of the Office of the Ombudsperson (Article 133) and of the Central Election Commission (Article 139), etc.[49] These rights can be exercised individually or collectively, but in essence, none of them is truly individual because they are granted to a person only as long as he/she is a member of a community.[50]

The state's measures aimed at preserving, protecting and developing the distinctive identities of Kosovo's communities include support of cultural initiatives and related financial assistance (Article 58.1), promotion of a spirit of tolerance, dialogue and reconciliation among communities in line with the Council of Europe Framework Convention for the Protection of National Minorities and the European Charter for Regional or Minority Languages (Article 58.2), protection from discrimination, hostility or violence based on a specific national, ethnic, cultural, linguistic or religious identity (Article 58.3), promotion of full and effective equality among members of communities (Article 58.4), preservation of the cultural and religious heritage of all communities as an integral part of the heritage of Kosovo (Article 58.5), taking effective actions against those undermining the enjoyment of the rights of members of communities or supporting assimilation (Article 58.6), and the establishment of the Consultative Council for Communities, a platform for linking ethnic groups and enabling their dialogue (Article 60).[51] Moreover, the Committee on Rights

[47] Constitution of the Republic of Kosovo, loc. cit. (note 24).

[48] *Ibid.*

[49] *Ibid.*

[50] Most widely-used phrases which confirm the collective element in the constitutional provisions stipulating the rights of members of communites include "*inhabitants belonging to (…) group*" (Article 57.1), "*every member of a community*" (Article 57.2), "*members of communities*" (Article 57. 3, 58.4, 58.6, 59), "*communities and their members*" (Article 58.1, 58.7, 61). *Ibid.*

[51] *Ibid.*

and Interests of Communities was established within the Assembly as a permanent body with considerably wide competencies such as overseeing enactment of laws, ensuring that community rights and interests are adequately addressed as well as proposing laws and other measures which concern communities (Art. 78). The laws implementing the rights of communities and their members are declared a legislation of vital interest which may not be submitted to a referendum (Art. 81).[52]

De iure societal decentralisation through the introduction of the concept of communities has had a limited effect on the *de facto* balance of power among Kosovo Albanians and Kosovo Serbs. Their deeply polarised perceptions of Kosovo's statehood and identity have to a large extent subverted the enthusiastically defined concept of egalitarianism.

A historic milestone which has initiated a new, progressive phase in the normalisation of relations between Belgrade and Priština, with positive effects on Kosovo Albanian and Kosovo Serbian relations as well as on the framing of Kosovo's statehood, is the Brussels Agreement of 19 April 2013.[53] Its fifteen points crystalise the modus of inclusion of the four northern Serb majority municipalities (Northern Mitrovica, Zvečan, Zubin Potok and Leposavić) into Kosovo's legal order by substantially retaining their independent position. Namely, it has brought to establishment of the Association/Community of Serb majority municipalities in Kosovo with competences not only in the areas of economic development, education, health, urban and rural planning but also regarding other potential issues which might be delegated by the central authorities. The integration of Northern Kosovo's institutions into Kosovo's legal framework is foreseen for police forces and other security structures as well as for judicial authorities.[54] Although Deda argues that the Agreement has transformed Kosovo into a 'bi-national unfinished state' which capacitates "the concept of mono-ethnic based solutions",[55] it is widely understood that the respective twist in the official Kosovo and Serbian political discourse has led to overall enhancement of Kosovo's statehood.[56] Formally, *de iure*, it has unified the country's territory and consolidated its governance while Kosovo Serbs have got considerable authorities aiming to secure a level of autonomy vital for preserving their identity. Yet, even after the conclusion of the Agreement, Kosovo has *de facto* remained gridlocked between tree imbalanced realities. The largest share of countries treats it as an independent and sovereign state, but many others perceive it solely as an independent entity within Serbia. For Serbia, it is a part of itself and a separate territory governed by United Nations Security Council Resolution 1244.[57] Given the limited leeway of the

[52] *Ibid.* Although Kosovo's legal framework formally grants equal treatment to all communities and citizens, the accuracy of the *de facto* balance of the Kosovo population is clearly revealed in Krasniqi's categorisation of the Kosovo society distinguishing seven groups of citizens: "(1) Albanians – the core dominant community; (2) Serbs – the core non-dominant community; (3) Serbs from North Kosovo – the core of the 'core non-dominant' community; (4) Turks – the semi-peripheral community; (5) Gorani and Bosniaks – elusive peripheral communities; (6) Montenegrins and Croats – unrecognised communities; and (7) Roma, Egyptians and Ashkali – invisible communities". Krasniqi, *Equal citizens, uneven 'communities'*, op. cit. (note 44), p. 9.

[53] "The Agreement of Dialogue of Normalization", The Republic of Kosovo – The Office of the Prime Minister, accessed August 20, 2015, http://www.kryeministri-ks.net/?page=2,253. The dialogue between the Governments of Serbia and Kosovo was facilitated by the European Union and it comprised ten rounds of political talks. Ilir Deda, Kosovo After the Brussels Agreement, op. cit. (note 37), pp. 4-5.

[54] "The Agreement of Dialogue of Normalization", *Ibid.*

[55] Deda, *Kosovo After the Brussels Agreement*, op. cit. (note 37), p. 1.

[56] For example, Lika holds that the Agreement should be seen as an important step forward towards formal recognition of Kosovo's independence by Serbia, because already by signing the respective act, Belgrade recognised certain components of the newly construed state of Kosovo. Liridon Lika, "Un pas en avant vers la reconnaissance officielle de l'indépendance du Kosovo par la Serbie?," *Perspectives Internationales*, 8 June 2013.

[57] Deda, *Kosovo After the Brussels Agreement*, op. cit. (note 37), 1.

Agreement, Kosovo's potential to evolve into a fully functional sovereign state will primarily depend on Serbia's recognition of Kosovo's independence. For the time being, it is likely that the Agreement will act as a *status quo* maintainer and/or possibly, a peaceful partition facilitator.[58] The last Brussels Agreements Implementation State of Play, covering the period of October 2014 – March 2015, highlights three levels of progress in the Northern Kosovo municipalities since the signing of the Agreement: good, none and some. The major positive novelty refers to the establishment of Kosovo's unitary justice system in Northern Kosovo and the merger of Serb judges and prosecutors with Kosovo justice institutions following the intergovernmental meeting of February 2015. The respective meeting also gave impetus for drafting an implementation plan on the issue of civil protection, which has been moderately successful by now . The list of the areas in which no progress has been identified is, regrettably, the largest. Deficiencies have been pinpointed in relation to the dismantlement of Serbia's parallel structures in Kosovo, introduction of international dialling code for Kosovo, distribution of power, removal of barricades, confirmation of the Vehicle Insurance Agreement and specifying competences of the Association/Community of Serb majority municipalities.[59]

4. International Interference in Kosovo

From the very beginning, the creation of the independent Kosovo state has been administered by various international bodies responsible for facilitating an inter-ethnic dialogue and eradicating tensions between Kosovo Albanians and Kosovo Serbs, as well as establishing democratic state structures and promoting peace and stability. Their arrival to Kosovo was initiated by a severe armed conflict between Kosovo Albanians and Serbs commenced in 1998. To end the immense atrocities, the United Nation's Security Council adopted Resolution 1244 of 10 June 1999 on the establishment of the United Nations Mission in Kosovo (UNMIK), international civil and security presence which started administering Kosovo in complete separation from Serbia (at that time, the Federal Republic of Yugoslavia). In other words, Serbia lost its legislative, executive and judicial governing authorities over Kosovo (with the exception of Northern Kosovo municipalities), which has gradually turned into an irreversible process.[60] Although *de facto* Serbia no longer exercised power over Kosovo, Kosovo was *de lege* a part of the Federal Republic of Yugoslavia since its inhabitants held Yugoslav citizenship. Krasniqi indicates that such an imbalance generated two categories of people: those born before 1999 and having Yugoslav documents and those born after June 1999 and having no prospects of entering into the Yugoslav register of citizens, *i.e.* stateless persons.[61] In order to tackle the issue of statelessness, in 2000, the UNMIK established the Central Civil Registry of habitual residents of Kosovo[62] and the Regulation on Travel Documents for persons registered in the Central

[58] *Ibid.*, 6.

[59] More on different levels of progress in the implementation of the Brussels Agreements see: *Brussels Agreements Implementation State of Play, 1 October 2014 – 20 March 2015*, Prishtina: Republic of Kosovo, Government, 2015, pp. 6-7. The respective document is a periodical report submitted to the European Union/European External Action Service by the Government of the Republic of Kosovo. Its purpose is to evaluate the progress achieved and challenges met within the implementation of agreements reached in the Brussels dialogue.

[60] *Report of the Special Envoy of the Secretary-General on Kosovo's future status*, loc. cit. (note 45).

[61] Krasniqi, *Country Report on Citizenship Law: Kosovo*, op. cit. (note 23), 8.

[62] *Regulation No. 2000/13 on the Central Civil Registry*, 17 March 2000, UNMIK/REG/2000/13. Pursuant to Section 3 of the Regulation, habitual residents of Kosovo encompassed: (a) persons born in Kosovo or who had at least one parent born in Kosovo; (b) persons who could prove that they had resided in Kosovo for at least a continuous period of five years; (c) such other persons who, in the opinion of the Civil Registrar, were forced to leave Kosovo and for that reason were unable to meet the residency requirement in paragraph (b); or (d) otherwise ineligible dependent children of persons registered pursuant to subparagraphs (a), (b) and/or (c), such children being

Civil Registry.[63] The purpose of the respective travel documents was to substitute passports, *i.e.* to facilitate the ability of persons in Kosovo to travel outside Kosovo, even though they were neither considered passports nor did they confer citizenship to their holders. As Krasniqi argues, such a system led to construction of a special form of 'quasi-citizenship', mostly exercised by Kosovo Albanians, while Kosovo Serbs opted for Yugoslav (and later on, Serbian) documents.[64]

One of the principal legal pillars in the construing of Kosovo's statehood was the 2007 Comprehensive Proposal for the Kosovo Status Settlement (the so-called Ahtisaari's plan),[65]a report on Kosovo's future status prepared by the Special Envoy of the Secretary-General (Martti Ahtisaari) which set a legal and political basis for Kosovo's Declaration of Independence.[66] The report upheld Kosovo's independence as the only viable option for reconciliation of the diametrically opposed positions of Kosovo Albanians and Kosovo Serbs and called for international supervision of the territory. Among an array of measures defined to create viable, sustainable and stable Kosovo, there are also those aiming at promotion and protection of the rights of communities and their members as well as at protection of cultural and religious heritage in Kosovo (Annexes II and V to the Proposal). *Inter alia*, they promote equal use of Albanian and Serbian as official languages, adequate representation of communities in public life, specific representation mechanisms, enhanced municipal competencies for Kosovo Serb majority municipalities, etc. The Proposal also determines a framework for future involvement of the international community, both its civilian and military corpus, and it involved the International Civilian Representative, the European Security and Defence Policy Mission, a NATO-led military mission continuing the tasks of the Kosovo Force (KFOR) and the Organization for Security and Cooperation in Europe.[67]

Although not on the above list, the European Union has also been actively involved into the shaping of Kosovo's statehood and citizenship policy, primarily through the European Union Rule of Law Mission in Kosovo (EULEX), the largest EU mission abroad, established in 2008.[68] The purpose of EULEX is to

under the age of 18 years, or under the age of 23 years but proved to be in full-time attendance at a recognized educational institution. More on the Registry see Krasniqi, *ibid.*, 9; Gezim Krasnići, "Preklapanje nadležnosti, sporna teritorija, nerešen status države: Komplikovan slučaj državljanstva na Kosovu," in *Državljani i državljanstvo posle Jugoslavije*, Džo Šo & Igor Štiks (Eds.), Beograd, Clio, 2012, p. 124.

[63] *Regulation No. 2000/18 on Travel Documents*, 29 March 2000, UNMIK/REG/2000/18.

[64] There were around 600,000 Travel Documents and 1,600,000 ID cards issued by the UNMIK between 2000 and 2008. The existence of parallel Kosovar and Serbian structures in Kosovo made it possible that even after the UNMIK had undertaken its mission in 1999, the Serbian authorities kept on issuing Serbian passports both to Kosovo Albanians and Kosovo Serbs.The number of such passports issued in the period from 1999 to 2007 is estimated at 200,000.. Krasniqi, *Country Report on Citizenship Law: Kos*, loc. cit. (note 62). More on the *sui generis* status of Kosovo created by United Nation's Security Council Resolution 1244 and the subsequent UNMIK's decisions as well as their impact on Kosovo's citizenship regime see: Duško Dimitrijević, *Regulisanje državljanstva na prostoru bivše SFR Jugoslavije*, Međunarodni problemi 60, 2008, pp. 311-317.

[65] *Comprehensive Proposal for the Kosovo Status Settlement*, S/2007/168/Add.1, 26 March 2007.

[66] *Report of the Special Envoy of the Secretary-General on Kosovo's future status*, loc. cit. (note 45); Krasniqi, *Country Report on Citizenship Law: Kosovo*, op. cit. (note 23), 2, note 4.

[67] *Report of the Special Envoy of the Secretary-General on Kosovo's future status*, ibid.; *Comprehensive Proposal for the Kosovo Status Settlement*, loc. cit. (note 65).

[68] "About EULEX", European Union – External Action, accessed September 6, 2015, http://www.eulex-kosovo.eu/?page=2,44. Aside from EULEX, the other main EU body operating in Kosovo is the European Union Office in Kosovo/European Special Representative in Kosovo, responsible for "realising the European agenda in Kosovo with the aim to promote Kosovo's approximation to the European Union". One of its major tasks includes the assistance in the development and protection of human rights and fundamental freedoms in Kosovo. See more

support Kosovo "on its path to a greater European integration in the rule of law area" through expertise in the area of the visa liberalisation process, the Feasibility Study, the Priština-Belgrade dialogue, the rule of law dialogue, the fight against corruption and achievement of sustainability and EU best practices in Kosovo.[69] Its mandate encompasses four operational objectives: (1) "Monitoring, Mentoring and Advising (MMA)" objective; (2) "Executive" objective; (3) "North" objective and (4) "Support to Dialogue Implementation" objective. For instance, within the first objective, EULEX, *inter alia*, gives assistance to the senior management of the Department of Citizenship of the Ministry of Internal Affairs while the third objective aims to restore the rule of law in the Northern Kosovo. The latter is closely intertwined with the fourth objective which includes providing a technical basis for implementation of the legal framework of the EU-facilitated dialogue related to the integration of Kosovo Serbs into the Kosovo security structures and the support of religious and cultural heritage unit within the Kosovo Police.[70] The negotiations of Kosovo with the EU on a Stabilisation and Association Agreement (SAA) were concluded on 6 May 2014[71] and the SAA proposal for Kosovo was approved by the European Commission on 30 April 2015[72], which should be seen as an important step forward in construing and acclaiming Kosovo's statehood.

The grounds for the engagement of international organisations in the Kosovo crisis are set by the Constitution. More precisely, partial delegation of sovereignty for specific matters to international organisations on the basis of ratified international treaties is foreseen by Art. 20.1 of the Constitution.[73]

Although international organisations have an active role in Kosovo, Kosovo has been still denied access to their membership. Namely, a limited character of its sovereignty has directly reflected on Kosovo's prospects for becoming a Member State of international organisations and, consequently, for adhering to their international treaties. Thusly, Kosovo is neither a Member State of leading international organisations which have codified the citizenship-related segments of international law[74] nor is a State Party to their

"The EU in Kosovo", European Union – External Action, accessed 6 September 2015, http://www.eulex-kosovo.eu/?page=2,19 .

[69] EULEX conducts its activities within the framework of UN Security Council Resolution 1244 and it will be operational until 14 June 2016. "What is EULEX?", European Union – External Action, accessed 6 September 2015, http://www.eulex-kosovo.eu/?page=2,16 .

[70] "About EULEX: EULEX implements its mandate through four operational objectives", European Union – External Action, accessed 6 September 2015, http://www.eulex-kosovo.eu/?page=2,44 .

[71] Krasniqi, *Country Report on Citizenship Law: Kosovo*, loc. cit. (note 23), 27.

[72] "Adoption of the Stabilisation and Association Agreement proposal with Kosovo", European Commission, accessed 6 September 6 2015, https://ec.europa.eu/commission/2014-2019/hahn/announcements/adoption-stabilisation-and-association-agreement-proposal-kosovo_en .

[73] Constitution of the Republic of Kosovo, loc. cit. (note 24).

[74] This primarily stands for the United Nations and the Council of Europe which have both retained a neutral stance towards Kosovo's statehood. Although both international organisations intensively cooperate with Kosovo (in providing for conditions for peaceful coexistence and institution building as well as for the advancement of human rights and regional stability), their overall posture in referring to the territory, institutions or population of Kosovo remains within the limits defined by United Nation's Security Council Resolution 1244 and the principle of neutrality. "Kosovo", Council of Europe – Office of the Directorate General of Programmes, accessed 28 August 2015, http://www.coe.int/en/web/programmes/kosovo ; "UNMIK: Mandate and Structure", United Nations Interim Administration Mission in Kosovo (UNMIK), accessed 28 August 2015, http://www.unmikonline.org/Pages/about.aspx. Nonetheless, Kosovo has become a full member of some regional initiatives such as the Regional Cooperation Council (RCC), the South Eastern Europe Cooperation Process (SEECP), the Regional School of Public Administration (ReSPA), the Centre for Security Cooperation (RACVIAC), and the International Organization of La Francophonie. *Brussels Agreements Implementation State of Play*¸ op. cit. (note 59), 20.

corresponding legal acts.[75] Relying solely on the domestic legal order, it undeniably lacks a comprehensive framework for governing citizenship issues.[76]

5. Parallel Jurisdictions of the Republic of Serbia and the Republic of Kosovo

As elucidated in earlier chapters, the overlapping Kosovo Albanian and Kosovo Serbian jurisdictions have beenone of the most dominant features in Kosovo since its proclamation of independence , stemmed from the Serbian contestation and rejection of Kosovo's statehood. This controversy has greatly reflected on the construing of a uniform citizenship regime because most Kosovo Serbs consider themselves Serbian citizens and hold Serbian passports, while Kosovo Albanians have opted for newly established Kosovo citizenship.[77]

In the latest 2015 report on the implementation of the Brussels Agreement, it is accentuated that Serbia keeps on maintaining parallel structures in Kosovo's four northern municipalities, a practice described as "illegal interference" and "the main obstacle in the process of normalisation of situation in northern part of Kosovo".[78] This included prevention of adoption of legal budgets (in order to restrict the integration of education and health sectors in the Kosovo system); appointment of illegal mayors who receive political and financial support from Serbia and thus hinder the work of democratically elected mayors and other municipal bodies in accordance with Kosovo law; illegitimate appointment of other officials (*e.g.* board members of the National Theatre of Priština and acting directors of health centres); failure to remove barricades dividing Kosovo Albanian and Kosovo Serbian municipality portions; illegal usage of (Serbian) municipal logos and seals as official ones (e.g. custom stamps); double taxation, etc.[79]

[75] *E.g*. Convention Relating to the Status of Stateless Persons (1954), Convention on the Nationality of Married Women (1957), Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality (1963), European Convention on Nationality (1997) and Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession (2006). See UN General Assembly, *Convention Relating to the Status of Stateless Persons*, 28.9.1954, United Nations, Treaty Series, vol. 360, p. 117; *Convention on the Nationality of Married Women*, 29.1.1957, A/RES/1040(XI), pp. 18-19; *Convention on the Reduction of Cases of Multiple Nationality and on Military Obligations in Cases of Multiple Nationality*, 6.5.1963, ETS No. 43; *European Convention on Nationality*, 6.11.1997, ETS No. 166; *Council of Europe Convention on the Avoidance of Statelessness in relation to State Succession*, 19.5.2006, CETS No. 200.

[76] However, the normative framework for respecting international law is prescribed by a number of constitutional provisions. By way of illustration, it is envisaged that ratified and officially published international agreements have superiority over the laws of the Republic of Kosovo (Article 19.2) and are directly applied except for cases when they are not self-applicable and the application requires promulgation of a law (Article 19.1). The list of eight directly applicable international documents is incorporated into Article 20 and six of them contain explicit references to citizenship (Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Elimination of All Forms of Discrimination Against Women, Convention on the Rights of the Child and Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment). To avoid the post-succession legal vacuum, Kosovo has opted for advocating the principle of continuity of international agreements and applicable legislation related to international cooperation which have been in effect since the day the Constitution entered into force and shall remain being treated as such until they arerenegotiated or withdrawn, or superseded by new international agreements (Article 145). See Constitution of the Republic of Kosovo, loc. cit. (note 24).

[77] Krasniqi, *Country Report on Citizenship Law: Kosovo*, loc. cit. (note 38).

[78] *Brussels Agreements Implementation State of Play*, op. cit. (note 59), 3, 10.

[79] *Ibid.*, 10-14, 25.

6. Kosovo Citizenship: Practical and Ideological Implications

The concept of citizenship is of elusive and versatile nature even if perceived in the context of fully-functional sovereign states. The dimension of a contested statehood reshapes it into a contested polysemy which despite being *de iure* clearly defined by national law, *de facto* remains obstructed by a number of limitations. The legal definition of citizenship usually depicts it as a real and effective legal link between the state and an individual[80] or, as Bauböck illustrates it, "a sorting device for allocating human populations to sovereign states".[81] Hence, what if an element of a formally *real* and in practice *effective* link is justified, but it is established between an individual and an entity which has not yet been recognised as a sovereign state? The example of Kosovo confirms that such a situation does not lead to creation of a peculiar sub-category of provisional citizenship which needs to be denoted differently from the classic notion thereof as long as the entity is contested. Kosovo reflects the multifacetedness of the concept which is as contested as the corresponding statehood, but still performs the conventional features of classic citizenship vis-à-vis a significant portion of the international community that does not dispute Kosovo's independence. Moreover, although Kosovo citizenship is subject to a variety of restrictions related to mobility and visa regime, citizens of sovereign states are also not exempted either from strict visa procedures or even travel bans.[82]

A rigid legal interpretation of citizenship cannot oftentimes image all the aspects of this flexible notion because it commonly transcends the sole legal identification of an individual with the state[83] and associates with the senses of socio-political identity, nationalism, belonging, loyalty and economic benefits.[84] It is contextually interconnected with the phenomena of identity, statehood, multiculturalism and migrations which make the concept versatile and elusive.[85] Like in other successor states of the former Yugoslavia,

[80] See Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, Seventh edition, London: Routledge, 1997, p. 263; Andrassy et al., *Međunarodno pravo 1*, op. cit. (note 10), 353; Degan, *Međunarodno pravo*, op. cit. (note 9), 466. The most widely cited legal definition of the notion of citizenship, which promotes the criteria of a 'real' and 'effective' link between the state and an individual, is the one embedded in the historical judgment of the International Court of Justice in the Nottebohm Case (1955). It accentuates that "*according to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties*". *Nottebohm Case (Liechtenstein v. Guatemala)*, Second Phase, Judgment of 6.4.1955, I.C.J. Reports 1955, p. 23; See also Crawford, *Brownlie's Principles of Public International Law*, op. cit. (note 10), pp. 513-518.

[81] Rainer Bauböck, *Citizenship and migration – concepts and controversies*, in Rainer Bauböck (Ed.), *Migration and Citizenship:Legal Status, Rights and Political Participation*, Amsterdam: Amsterdam University Press, 2006, p. 16.

[82] On citizenship as a status (in relation to Kosovo) see also Krasnići, *Preklapanje nadležnosti, sporna teritorija, nerešen status države*, op. cit. (note 62), 126-129.

[83] Henderson, *Understanding International Law*, op. cit. (note 9), p. 132.

[84] See more Bauböck, *Citizenship and migration*, op. cit. (note 81), 18-21; Derek Heater, *A Brief History of Citizenship*, New York: New York University Press, 2004, 1, pp. 88-89; Ronald Beiner, *Introduction: Why Citizenship Constitutes a Theoretical Problem in the Last Decade of the Twentieth Century*, in Ronald Beiner (Ed.), *Theorizing Citizenship*, Albany: State University of New York Press, 1995, pp. 1-28.

[85] See Subrata K. Mitra, *Turning Aliens Into Citizens: A "Toolkit" for a Trans-Disciplinary Policy Analysis*, in Subrata K. Mitra (Ed.), *Citizenship as Cultural Flow: Structure, Agency and Power*, Heidelberg/New York/Dordrecht/London, Springer, 2013, p. 65; Haldun Gülalp, *Transcending the Nation-State?*, in Haldun Gülalp (Ed.), *Citizenship and Ethnic Conflict: Challenging the Nation-State*, Abingdon: Routledge, 2006, pp. 133-139; Will Kymlicka & Wayne Norman, C*itizenship in Culturally Diverse Societies: Issues, Contexts, Concepts*, in Will Kymlicka & Wayne Norman (Eds.), *Citizenship in Diverse Societies*, New York: Oxford University Press Inc.,

citizenship in Kosovo is to a great degree regarded as an expression of one's ethnic identity. Hence, following the proclamation of Kosovo's independence, the vast majority of Kosovo Serbs has embraced Serbian citizenship, while Kosovo Albanians have chosen the Kosovo citizenship[86]. Their initial choices induced by strong national feelings were soon softened by pragmatism. Namely, for practical purposes, Kosovo Serbs have also accepted Kosovo documents and *vice versa*, Kosovo Albanians have obtained Serbian ones. Flexible economic motives have evidently upstaged rigid national rationale.This has brought to a significant number of dual citizens, a phenomenon which is widespread in Kosovo nowadays, not only between Kosovo and Serbia but also in relation to third countries accommodating economic and political migrants from Kosovo. The exact number of dual citizens is, however, unknown[87]. An intrinsic peculiarity of Kosovo residents who are holders of Serbian citizenship, regardless of their ethnicity, is that their legal status is not identical with that of Serbian citizenship holders residing in the Republic of Serbia. Namely, although both categories of citizens are considered Serbian citizens, the residents of Kosovo are, unlike the latter, subject to greater travel restrictions and they cannot enter the Schengen area without a visa. Moreover, the front page of their Serbian passport includes caption "Kosovo". The respective passports are issued by the Coordination Directorate within the Ministry of Interior in Belgrade, but if their holders want to apply for a visa, they need to turn to the authorities/embassies in Priština[88].

Finally, citizenship can be portrayed as *the right to have rights*,[89] *i.e.* "a principle vehicle through which most people access their universal human rights"[90] as well as "one of the fundamental rights and a factor in achieving these rights".[91] Although most readings on citizenship put emphasis primarily on rights, neglecting responsibilities, it is necessary to ascertain that citizenship embodies both the *rights* and *responsibilities* of citizenship holders.[92] As outlined in previous chapters on Kosovo's legal framework

2000, p. 1; Tharailath Koshy Oommen, *Citizenship, Nationality and Ethnicity*, Cambridge: Polity Press, 1997, pp. 223-243.

[86] However, it remains debatable whether ethnic Albanians genuinely show their loyalty to the Kosovo *State* or the Albanian *nation* in general. See more Alexandra Channer, *Albanians Divided by Borders: Loyal to State or Nation?*, in Tristan James Mabry et al. (Eds.), *Divided Nations and European Integration*, Philadelphia: University of Pennsylvania Press, 2013, pp. 157-189.

[87] Krasniqi, *Country Report on Citizenship Law: Kosovo*, op. cit. (note 23), 1, 18. More on citizenship as an identity (in relation to Kosovo) see in Krasnići, *Preklapanje nadležnosti, sporna teritorija, nerešen status države*, op. cit. (note 62), 131-133.

[88] See Uredba o postupku utvrđivanja ispunjenosti propisanih uslova za izdavanje **pasoša** za lica sa područja Autonomne pokrajine Kosovo i Metohija, *Službeni glasnik Republike Srbije*, no. 76/2009, 16.9.2009. The Law on the Citizenship of the Republic of Serbia goes silent on the respective diversification of Serbian citizens. See Zakon o državljanstvu Republike Srbije, *Službeni glasnik Republike Srbije*, no. 135/2004, 21.12.2004 and no. 90/2007, 24.9.2007.

[89] The origin of the respective perception of citizenship through the angle of *rights* can be found in the 1958 US Supreme Court judgment in the case of Perez v. Brownell in which Judge Earl Warren emphasised that "Citizenship *is* man's basic right, for it is nothing less than the right to have rights". *Perez v. Brownell*, 356 U.S. 44, 31.3.1958.

[90] Lydia Morris, *Citizenship and human rights: ideals and actualities*, British Journal of Sociology 63, 2012, p. 43.

[91] Jean-Yves Carlier, *Droits de l'homme et nationalité*, Annales de Droit de Louvain 63, 2003, p. 243.

[92] See more Will Kymlicka & Wayne Norman, *Return of the Citizen: A Survey of Recent Work on Citizenship Theory*, in Ronald Beiner (Ed.), *Theorizing Citizenship*, Albany: State University of New York Press, 1995, pp. 291-301; Bauböck, *Citizenship and migration*, op. cit. (note 81), pp. 30-31; Hilde Coffé & Catherine Bolzendahl, *Partisan Cleavages in the Importance of Citizenship Rights and Responsibilities*, Social Science Quarterly 92, 2011, pp. 658-659, 662. See contra Dimitry Kochenov, EU *Citizenship without Duties*, European Law Journal 20, 2014, pp. 482-498. On citizenship as a right (in relation to Kosovo) see Krasnići, *Preklapanje nadležnosti, sporna teritorija, nerešen status države*, op. cit. (note 62), pp. 129-131.

regulating citizenship, Kosovo's legislation grants an array of human rights to Kosovo citizens, which corresponds to a usual set of citizenship rights secured by domestic laws.[93]

In a nutshell, the summary of the three prevalent approaches to citizenship, those addressing it from the angle of law, self-identification and rights respectively, upholds the stance that Kosovo citizenship falls within the ambit of these conventional conceptions. When juxtaposed with statehood, it can be also easily perceived as, in Krasniqi's words, "a tool of state-building in Kosovo".[94] In evaluating its credibility, it is necessary to note that the Kosovo citizenship legislation was drafted in collaboration with international institutions, so, to the greatest possible extent, it reflects their values and viewpoints. Yet, in spite of its solid legal basis, there are some objective concerns about its practical value, expressed due to Kosovo's generally weak international position.[95]

The contested Kosovo statehood and, hence, citizenship are inevitably intertwined with travel restrictions and visa schemes. Kosovo citizens are the only category of citizens in the Balkans who cannot travel visa-free to Schengen areas and indeed, the list of countries for which they do not need a visa is modest and encompasses Albania, Macedonia, the Maldive Islands, Montenegro, Serbia and Turkey only.[96]

Late 2014 and early 2015 witnessed an unprecedented scale of emigration flows from Kosovo to Western Europe induced by appalling economic and social conditions, before all high unemployment, corruption and crime.[97] The exodus was additionally prompted by technical changes to entry rules on the Serbian border which simplified the border crossing procedure for Kosovo Albanians to travel from Kosovo to Serbia which was on their way to Hungary and then to Western Europe. Namely, as a result of the 2013 Brussels Agreement negotiations, they were granted the right to travel to Serbia with their local identity documents.[98] It is estimated that the number of irregular migrants and asylum seekers of Kosovo origin registered throughout 2014 was as high as 37,000, while in the first months of 2015, additional 42,000 Kosovo citizens fled abroad. Their numbers reached a peak in mid-February 2015 and then, subsided.[99] Apart from pointing at Kosovo's inefficient governmental structures, critics for massive outflows were also

[93] Citizenship rights are commonly divided into three categories: civil (*e.g.* the right to privacy, to freedom of speech, etc.), political (*e.g.* the right to vote, to freedom of association, etc.) and social (*e.g.* the right to health, to education, etc.). See more Kymlicka and Norman, *ibid*., 285; Bauböck, *ibid*., 22-29; Elspeth Guild, *Does European Citizenship Blur the Borders of Solidarity?*, in Elspeth Guild, Cristina J. Gortázar Rotaeche and Dora Kostakopoulou (Eds.), *The Reconceptualization of European Union Citizenship*, Leiden/Boston: Brill Nijhoff, 2014, pp. 190-191.

[94] See: Gëzim Krasniqi, *Citizenship as a tool of state-building in Kosovo: status, rights, and identity in the new state*, *CITSEE Working Paper Series* 2010/10, 2010.

[95] Krasniqi, *Country Report on Citizenship Law: Kosovo*, op. cit. (note 23), 2.

[96] *Visas for Kosovo Citizens*, Republic of Kosovo – Ministry of Foreign Affairs, accessed 10 September 2015, http://www.mfa-ks.net/?page=2,70 .

[97] Poverty is considered as the main push factor for the sharp increase in Kosovo emigration (35%) preceded by family reunification (46%) defined as the main pull factor. Other factors include political or conflict-related reasons (8%), the lack of opportunities to relevant education (1%) and other reasons (10%). See *Coordinated Response Needed to Address Irregular Migration Flows*, International Organisation for Migration – Kosovo, accessed 10 September 10 2015, http://kosovo.iom.int/coordinated-response-needed-address-irregular-migration-flows .

[98] Andrew Byrne, *Thousands Seek to Escape Bleak Kosovo for Life in West*, Financial Times Europe, March 27, 2015, 2; *Coordinated Response Needed to Address Irregular Migration Flows*, *ibid*.

[99] *Coordinated Response Needed to Address Irregular Migration Flows*, *ibid*. For decades prior to the mass exodus of late 2014 – early 2015, Kosovo had experienced continuous emigration flows. The estimated number of the emigrated population of Kosovo and the population of Kosovo origin (with no reference to a specific ethnicity) in the period between 1969 and 2011 is set at 703,978 residents. *Kosovan Migration* (Kosovo Agency of Statistics: Prishtina, 2014), 75.

directed at international institutions on the Kosovo territory (especially EULEX) which in fifteen years of their tutelage have not done enough to annihilate the criminal networks within the government. Those institutions have, however, contributed to the society by increasing the stability of the region and improving the relations between Kosovo and Serbia, yet, these developments seemed insufficient to overpower bleak economic conditions and to avert citizens from migrating.[100]

7. Conclusion

Sixteen years ago, Kosovo was put under international tutelage and thus embarked on a path to full independence. Although it acquired a polity's main attributes soon after it had unilaterally proclaimed independence (*i.e.* a population, a defined territory, a government and independence/capacity to enter into relations with other states), all of them were of a highly fragile nature, impaired by utterly opposite Kosovo Albanian and Serbian perceptions of the Kosovo's future status. The population was rigidly polarised along ethnic lines and torn between the ideas of sovereign Kosovo and territorially intact sovereign Serbia. The polity's borders were known, but the newly proclaimed (Kosovo Albanian) Government did not have effective control over the substantial part of the territory inhabited by Kosovo Serbs. Hence, the Government was not considered legitimate both by Kosovo Serbs and Serbia but also by a significant portion of the international community. Consequently, Kosovo was limited in its capacity to enter into relations with other states and confined only to those which recognised its independence. Despite the fact that the Kosovo's international position has strengthened in the meantime, especially following the 2013 negotiations with Serbia, it has remained a contested nation-state struggling to accommodate the wishes and needs of alienated Kosovo Serbs.

Understandably, a contested-nation state has a correspondingly contested citizenship regime. Kosovo has created a well-construed citizenship framework, but the reality of contestation makes Kosovo citizens highly prone to discrimination and isolation. They are subject to rigid travel restrictions or bans which question the practical value of Kosovo citizenship as long as Kosovo is contested. The recent opening of the EU accession negotiations with Kosovo and Serbia has brought Kosovo a step closer to the final chapter in its statehood trajectories to full independence. The European Commission's approval of the Stabilisation and Association Agreement with Kosovo given in April 2015 has considerably improved these prospects, but the decisive factor in the successful transition from a partially to a fully functioning and recognised state will inevitably be Serbia's capacity to accept Kosovo's new realities.

[100] Byrne, *Thousands Seek to Escape Bleak Kosovo for Life in West*, loc. cit. (note 98).

Review

Rowan Cruft - S. Matthew Liao - Massimo Renzo (Eds.): The Philosophical Foundations of Human Rights[1]

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The Philosophical Foundations of Human Rights form the part of the series of the Philosophical Foundations of Law from the area of legal philosophy and doctrinal law from highly distinguished authors. The aim of this review is to give a quick insight to the current status of the idea of human rights after the publishing of *Griffin's* and *Beitz's* relevant books.[2]

Human rights are the contribution of the last six decades; this period seemed to be a "good time for human rights" according to Joseph Raz.[3] Contrary to overall trends, this volume is dealing with the medieval, Kantian and alternative roots of human rights. The scope of the questions to answer is the following: *Are there human rights at all, what is their content? What is the ground for human rights? Does a classification exist between human rights, etc.?* This volume intends to answer those questions or at least to attempt to do so.

According to the authors, human rights are *a) moral rights b) possessed by every human being c) anytime anywhere d) simply because of her/his human existence e) duty-bearers of human rights are all able people in appropriate circumstances.*

These criteria are disputed and discussed by the contributors of this volume, claiming that there might not be an overall '*opinio iuris*' in this regard. The conflict in the theory has several sources, some of the most well known are the questions concerning the dichotomy between morality *and*/*versus* legality of the universality of human rights, those questions accompany almost every four sections of this volume.

As for the *nature* of human rights, alternative approaches can also be found. John Rawls' political conception of human rights, which emphasizes the function of human rights, has become very popular which the several authors of this volume welcome, not to mention the dilemmas arising from the Rawlsian '*overlapping consensus*'.

As for the *grounds* of human rights, let's briefly sum up the possible justifications: these may be instrumental (*i.e.* human rights are useful or essential means to realize or further valued features of human lives), non-instrumental (which basically shares the same structure) and the practice-based justifications.

Which New Human Rights are Actual Human Rights? This question may seem a bit strange, but let's see an example. If we take the second generation socio-economic right as *e.g.* the right to a decent standard of

[1] Philosophical Foundation of Human Rights edited by: Rowan Cruft, S.Matthew Liao, Massimo Renzo Oxford University Press 2015.

[2] James Griffin: On Human Rights Oxford University Press 2014. And Charles R.Beitz: The Idea of Human Rights Ocford University Press 2011.

[3] *Ibid*. p. 6

health care it seems quite utopist to claim this right in a country where even the most fundamental rights are often violated. And yes, the question arises is it an actual right then to claim right to a health care in Mozambique? As *Nickel*[4] states, Mozambique will not be able to provide health care to its citizens so the above-mentioned right will be just a *sham*. Furthermore the authors are also critical regarding *group human rights*.

Are There Any Genuine Human Rights? Some authors of the volume claim that human rights are 'Western', expressing the western outlook of human rights. Human right will be considered as a right if it is considered as a right in western society from the western viewpoint. *Is it illegitimate* to enforce human rights within societies that do not recognize them, and perhaps even illegitimate to criticize such societies? Marxists even go further with those allegations, not to mention *Marx's* public/private distinction.

Another problematic interpretation arises from the *feministic* approach.To clarify it let me cite *Mac Kinnon*: "*power to act against public acts is left exclusively in the hands of those who commit those acts."* The final brand of human right concerns are connected to the (un)enforcement of human rights while according to *Bentham* and *Raymond Geuss* rights do not exist at all unless they are actually enforced.

After so many boosting questions addressed in the introduction, the real *in merito* examination of the volume is divided into four main chapters. Firstly on human rights' foundations, secondly, on human rights in law and politics, thirdly, on a range of canonical and contested human rights and fourthly, on concerns about and alternatives to human rights.

It goes beyond the scope of this paper to analyze each and every one of the thirty-eight individual contributions contained in the volume. Thus I have arbitrarily chosen to reflect only on some of them that seemed the most comprehensive to me.

The first section –among others– covers dialogues between *John Tasioulas* and *Onora O'Neil*. The main question arising from Tasioulas is the following: *"For an interest-based approach to rights, the operative question is whether any particular interest of ours – any aspect of our well- being – suffices to generate duties on others to respect or protect that interest."* O'Neil partly agrees with Tasioulas' allegations but rather leans on plural justification.

S. Matthew Liao deals with the question already mentioned about genuine human rights. Substantive account – the key to check the geniuses of the rights claim. This is closely connected to the Fundamental Condition Approach *i.e.* the fundamental conditions for pursuing a good life (mostly by basic activities, the author warns that good life is characterized on other way than the excellent life. Speaking generally this conception forms part of the Naturalistic Approach of human rights. Liao also examines deeply the alternatives that, according to him, are not applicable, when doing so he deals with the Agency, Capability and Political Conception, which are again a reaction to the Rawlsian concept. *Rowan Cruft* challenges the above-mentioned Fundamental Condition Approach. According to his view, respect for human rights does not automatically correlate with that person's right to a good life. Cruft further mentions the human rights violations and deficits which he consider to be overlooked, and also raises the question of what can be identified as a form of good life, and furthermore what is the minimum of it?

This chapter goes on with the contribution of *Jeremy Waldron* entitled *Is dignity the foundation of human rights?* The paper addresses a not so innovative approach when dealing with the foundations of human rights while *John Simmons*, *Zofia Stemplowska* and other authors' contributions broaden and challenge our philosophical horizons.

[4]*Ibid.* p. 25.

Chapter two, dealing with human rights in law and politics starts with *Joseph Raz*'s contribution, which introduces the role of human rights in the emerging world order and demonstrates that the legally created rights teach us that (moral) rights that people have can change. As the law creates new ones or terminates the existence of old ones, our (moral) rights change. Secondly, moral rights can rest on factors other than basic moral rights. Allen Buchanan's paper ("*Why international legal* human rights?") starts with the motivation behind establishing international human rights. It gives us some practical and logical answers, and justifies the system of international legal rights.

Samantha Besson's study describes the dual regime of safeguarding human rights, *i.e.*, the dichotomy and juxtaposition of international / constitutional law and the need for two-level protection. Though according to Renzo (in Chapter VI entitled Human Needs, Human Rights) the role played by human rights at the domestic level tends to get less attention but(?) still the most important human right provision are incorporated into domestic law, and states bear primary responsibility for their protection and enforcement.

Chapter three, connected to canonical and contested human rights, starts with *Corey Brettschneider*'s essay on Free Speech as an Inverted Right and Democratic Persuasion. The question of a cross in public schoolrooms– a highly controversial issue which was also posed before the ECtHR some years ago, Brettschneider's answer lies in '*value democracy*' which gives us a possible solution to handle inverted rights, *e.g.* in the case of hate speech. *Larry Alexander* gives a critical response. *Liora Lazus'* paper on the right to security gives us an explanation starting with the theory of Hobbes and Locke and concludes with the problem of the *in merito* definition of security (instead of the simple procedural reference to personhood or capabilities or other rights).

Chapter four, dealing with concerns and alternatives starts *with Matteo Renzo*'s *Human Need, Human Rights,* which deals with the questions already mentioned in the introduction. The naturalistic conception of human rights and its critic and the reconciliation of the latter are the aim of his analysis, introducing the idea of *minimally decent human life.*

It is clear that the questions posed by the contributors are very similar; at least at their core these issues all have something in common. As for the response to the overall question, there is no simple, easy answer. Probably no one can tell us what the actual philosophical foundation of human rights is, as this issue is too contested. The answer lies in pluralism. *Answers* can be given, different approaches and horizons that all contribute to the complexity and resolving of the topic, but one should not forget that this foundation is primarily metajuristic.