

## Pécs Journal of International and European Law



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## Editorial

The editors are pleased to present issue 2017/II of the 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.

In the Articles section, Attila Pánovics focuses on the issue of non-compliance by the EU with the Aarhus Convention. Viola Vincze sheds light on the role that customary principles of international humanitarian law play in the protection of the environment, while Tamás Molnár looks at how EU migration law is shaping international migration law, specifically as regards the field of expulsion. As for this issue's shorter reflections, Lukáš Mareček analyses the criminal responsibility of legal persons as introduced by the Special Tribunal for Lebanon. Zsolt Cseporán provides an overview of international and foreign trends regulating the freedom of artistic expression, whereas Andrei Dragan looks at current challenges facing the Dublin III regulation. Finally, Bettina Németh reviews 'The Making of International Human Rights: The 1960s, Decolonization, and the Reconstruction of Global Values' by Steven L. B. Jensen, published by Cambridge University Press in 2016.

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 issues. The next formal deadline for submission of articles is 15 March 2018, though submissions are welcomed at any time.

THE EDITORS

# Case ACCC/C/2008/32 and Non-compliance of the EU with the Aarhus Convention

ATTILA PÁNOVICS

*Assistant professor, University of Pécs*

*The importance of wider public participation in shaping environmental policy and the advantages of better access to courts for citizens and their organisations are widely recognized. The Aarhus Convention obliges contracting parties to guarantee the public environmental rights. These rights are essential tools which contribute to strengthen effective environmental protection policies*

*The present situation in EU law as far as access to justice in environmental matters is rather complex. EU legal instruments in force do not cover fully the implementation of the obligation resulting from Article 9(3) of the Convention.*

*In March 2017, after extensive and detailed consideration of a communication that was submitted by an environmental NGO in 2008, the Compliance Committee of the Aarhus Convention found that the European Union was in non-compliance with the Convention due to the very limited possibilities for citizens and NGOs to have access to justice at EU level and to bring cases before the Court of Justice of the EU. Hopefully, the case before the ACCC against the EU will have important consequences for the Aarhus-conform interpretation of EU law by the Court.*

*Keywords: Aarhus Convention, access to justice, compliance*

## 1. Introduction

The Convention on Access to Information, Public Participation in Decision-making and Access to Justice<sup>1</sup> (hereinafter the Convention) is a multilateral environmental agreement under the aegis of the United Nations Economic Commission for Europe (UNECE). The Convention entered into force in 2001 and has currently 47 Parties, including the EU and its Member States. Together with its Protocol on Pollutant Release and Transfer Registers (PRTRs), the Convention is one of the two legally binding international instruments that put into effect and implement Principle 10 of the 1992 Rio Declaration on Environment and Development.<sup>2</sup>

The Convention is an essential step forward in encouraging and supporting public awareness in the field of environmental protection and better implementation of environmental legislation in the UNECE region, in accordance with the concept of sustainable development. Even though it only to countries in the UNECE region (the Parties to the Convention), it has had some influence on the political discussion and legal development also in other parts of the world.<sup>3</sup>

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<sup>1</sup> Aarhus, Denmark, 25 June 1998, 2161 UNTS 447.

<sup>2</sup> <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm> (16 August 2017).

<sup>3</sup> A. Pánovics: The Aarhus Convention Model, in M. Szabó, P.L. Láncoš & R. Varga (Eds.): Hungarian Yearbook of International Law and European Law 2016, Eleven International Publishing, 2017, pp. 259-261.

The Convention is a unique international legal instrument, which combines the subject of environmental protection with human rights, and simultaneously with the responsibilities of public institutions and citizens toward the environment. It represents an important extension of environmental rights, and its focus is strictly procedural in content. The main aim of the Convention is to guarantee three procedural rights for citizens and environmental NGOs: access to information, access to participation and access to justice in environmental matters. The content of the Convention is structured around these ‘pillars’. Another element that distinguishes the Convention from human rights regimes is that it grants environmental NGOs, subject to relevant requirements under national laws, a right to act on behalf of the environment.<sup>4</sup>

Under Article 1 of the Convention, each Party must guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in order to contribute to protection of the right of every person of present and future generations to live in an environment adequate to his health or well-being. The seventh and eighth recitals in the preamble confirm that aim and supplement it with the duty of every person to protect and improve the environment.

The institutional structure of the Convention is composed of two main bodies: the Secretariat and the Meeting of the Parties (hereinafter MOP). The MOP meets ordinarily every two years, and it has the power to set up subsidiary bodies. The Convention is endowed with a compliance mechanism that is unique, particularly when compared to with the compliance mechanisms of other environmental agreements. Pursuant to Article 15, the Convention’s respected compliance mechanism, the ‘Aarhus Convention Compliance Committee’ (hereinafter the ACCC) was set up by the first MOP, held in Lucca in 2002.<sup>5</sup>

The most innovative feature of the ‘non-confrontational, non-judicial and consultative’ procedure of the ACCC is that members of the public have the right to make complaints to an independent and impartial committee at international level.<sup>6</sup> This is the first compliance system which permits members of the public to lodge a claim against a state.<sup>7</sup>

The cases brought to the ACCC are almost entirely based on communications from members of the public, and for each admissible case the ACCC concludes whether it finds that the Party concerned is in compliance with the Convention or not. The ACCC conducts a comprehensive assessment of the circumstances and of the national system in each case. Compliance control is not limited to fact-finding; the compliance procedure was established to improve compliance with the Convention, rather than to redress violations of individual rights.<sup>8</sup>

The effectiveness of the ACCC relies heavily on cooperation by the Party experiencing difficulties in complying. Upon recommendations of the ACCC, the MOP makes final decisions on compliance issues. The ACCC’s power to adapt recommendations directly towards the Parties to the Convention is severely

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<sup>4</sup> J. Ebbesson: Public Participation, in D. Bodansky, J. Brunnée & E. Hey: *The Oxford Handbook of International Environmental Law*, Oxford University Press, 2008, p. 701.

<sup>5</sup> <http://www.unece.org/fileadmin/DAM/env/pp/documents/mop1/ece.mp.pp.2.add.8.e.pdf> (18 August 2017).

<sup>6</sup> The members of the Compliance Committee are legal experts who serve in their personal capacity, and do not represent the countries of which they are nationals.

<sup>7</sup> M. Fitzmaurice: Environmental justice through international complaint procedures? Comparing the Aarhus Convention and the North American Agreement on Environmental Cooperation, in J. Ebbesson and Ph. Okowa (Eds.): *Environmental Law and Justice in Context*, Cambridge University Press, 2009, p. 214.

<sup>8</sup> J. Ebbesson: Access to Justice at the National Level: Impact of the Aarhus Convention and European Union Law, in M. Pallemmaerts (Ed.): *The Aarhus Convention at Ten: Interactions and Tensions between Conventional International Law and EU Environmental Law*, Europa Law Publishing, Groningen, 2011, p. 250.



limited by the requirement of consent by the latter.<sup>9</sup> Up to the present time, all its findings have been approved by consensus by the MOP.<sup>10</sup>

## 2. The Third Pillar of the Aarhus Convention

‘Access to justice in environmental matters’ can be defined as ensuring effective redress for citizens and their associations, by allowing them to challenge acts or omissions of the public administration before a court of law or other independent or body established by law (also known as ‘*locus standi*’ or legal standing). This involves broad access rights, with timely and not prohibitively expensive procedures, including effective remedies covering also injunctive relief, as appropriate.<sup>11</sup>

Within the provisions of the Convention, the essential requirements of access to justice are expressed in Article 9. In its structure, this provision reflects the three above-mentioned ‘pillars’ of the Convention, and highlights that access to justice rights are auxiliary to, and supportive of, other rights.<sup>12</sup>

Article 9(3) of the Convention provides that “(...) each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge act and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.” While Article 9(3) refers to “the criteria, if any, laid down in national law”, the Convention neither sets these criteria nor sets out the criteria to be avoided.<sup>13</sup> Rather, the Convention allows a great deal of flexibility in defining which members of the public have access to justice. On the one hand, the Parties are not obliged to establish a system of popular action (*‘actio popularis’*) in their domestic laws with the effect that anyone can challenge any decision, act or omission relating to the environment. On the other hand, the Parties may not take the clause “where they meet the criteria, if any, laid down in national law” as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental NGOs or other members of the public from challenging acts or omissions that contravene national law relating to the environment.

As far as access to justice is concerned, the Convention tackles the lack of standing for the environment by granting the right to a judicial review procedure to members of the public directly interested in a decision or an omission or maintaining the impairment of a right as well as to non-governmental organisations (hereafter NGOs) promoting the environment and meeting any requirements set out in national law (requirements which must, in any case, be consistent with the objective of giving the public

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<sup>9</sup> C. Pitea: Procedures and Mechanisms for Review of Compliance under the 1998 Aarhus Convention Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, in T Treves, L. Pineschi, A. Tanzi, C. Pitea, C. Ragni & F. Romanin Jacur (Eds.): Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements, T.M.C. Asser Press, The Hague, 2009, p. 241.

<sup>10</sup> V. Koester: The Compliance Mechanism – Outcomes and Stocktaking, Environmental Policy and Law, Vol. 41, No. 4-5, 2011, p. 202.

<sup>11</sup> See Ann. 12 of SWD(2017) 255 final, Impact assessment on a Commission Initiative on Access to Justice in Environmental Matters.

<sup>12</sup> Art. 9(1) refers to the separate right of access to information; Art. 9(2) relates to rights to participate in decision-making procedures; Art. 9(3) covers acts and omissions that infringe environmental law in general; Art. 9(4) addresses remedies and the timeliness and costs of the procedures in previous paragraphs.

<sup>13</sup> See the findings of the ACCC with regard to communication ACCC/C/2005/11 (Belgium) (ECE/MP.PP/C.1/2006/4/Add.2, paras 29-37) and communication ACCC/C/2006/18 (Denmark) (ECE/MP.PP/2008/5/Add.4, paras 29-31).

the widest possible access). The Convention completed the package by stipulating that judicial review procedures should be effective, timely and not prohibitively expensive.<sup>14</sup>

### 3. The EU as a Party to the Convention

Recognizing the specific features of the Convention, the European Community signed it in 1998. It was back then and still is of considerable importance for the Parties to the Convention. The Convention has been ratified by all Member States<sup>15</sup> and the EC; the latter approved it on 17 February 2005, just before the second MOP to the Convention.<sup>16</sup>

Since its ratification, the Convention is an integral part of the EU legal order under the terms of Article 216(2) TFEU, which confers competence on the EU with respect of the conclusion of international agreements.<sup>17</sup> Pursuant to Article 216(2) TFEU, international agreements concluded by the EU bind its institutions and consequently prevail over acts of secondary EU legislation.<sup>18</sup> It follows that international agreements concluded by the EU, including the Convention, do not have primacy over EU primary law. The primacy of international agreements concluded by the EU over acts of secondary law means that the latter must, so far as is possible, be interpreted in a manner that is compatible with those agreements.<sup>19</sup>

The EC felt important not only to sign up to the Convention at Community level, but also to cover its own institutions, alongside national authorities.<sup>20</sup> The EC made a Declaration upon signature and upon approval of the Convention in which it notified the Aarhus bodies about the “institutional and legal context of the Community” and the repartition with its Member States in the areas covered by the Convention.<sup>21</sup>

In October 2003, the European Commission proposed a package of three legislative acts to implement the Convention. The Commission wanted to get it decided by the Council as a package deal.<sup>22</sup> As a result, the first two pillars of the Convention have been covered in EU law by means of two Directives from 2003,<sup>23</sup> but the proposal on access to justice in environmental matters from the same year, directed

<sup>14</sup> See Ann. 12 of SWD(2017) 255 final (Impact assessment on a Commission Initiative on Access to Justice in Environmental Matters: <http://ec.europa.eu/transparency/regdoc/rep/10102/2017/EN/SWD-2017-255-F1-EN-MAIN-PART-1.PDF> [17 October 2017]).

<sup>15</sup> Ireland was the last Member State to ratify the Convention in 2012.

<sup>16</sup> Council Decision 2005/370/EC, OJ 2005 L 124/1.

<sup>17</sup> Á. Mohay: The complex relationship of EU law and international law, with special regard to the European Convention on Human Rights, *Państwo I Prawo*, Vol. 71, No. 6, 2016, pp. 25-43.

<sup>18</sup> Case C-308/06, *Intertanko and Others v Secretary of State for Transport*, EU:C:2008:312, para 42; Case C-401/12 P to C-403/12 P, *Council and Others v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*, EU:C:2015:4, para 52; Case C-404/12 P and 405/12 P, *Council and Commission v Stichting Natuur en Milieu and Pesticide Action Network Europe*, EU:C:2015:5, para 44.

<sup>19</sup> Case C-335/11 and C-337/11, *HK Danmark v Dansk almennyttigt Boligselskab, HK Danmark v Dansk Arbejdsgiverforening*, EU:C:2013:222, para 29.

<sup>20</sup> In accordance with EU law, the references to ‘national law’ in the Convention should be interpreted as referring to the domestic law of the EU.

<sup>21</sup> The Declaration of the EU is published on the UNECE website, see: [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XXVII-13&chapter=27&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27&clang=_en) (25 August 2017).

<sup>22</sup> T. Delreux: *The EU as International Environmental Negotiator*, Ashgate, 2011, p. 89.

<sup>23</sup> Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (OJ 2003 L 41/26) and Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans

at implementing provisions relevant to the third pillar, received strong opposition from a number of EU Member States.<sup>24</sup> The Commission proposal of 2003 remained with the Council for over a decade without any agreement being found or in prospect.<sup>25</sup> Finally, the signature of the Convention is the direct reason for the adoption of another Community act in the form of a regulation (hereinafter the ‘Aarhus Regulation’<sup>26</sup>) whilst previous Community rules on access to documents helped shape the Convention.

#### 4. Access to Justice in Environmental Matters and the CJEU

Ineffective access to justice contributes to implementation failures. The European Commission’s annual reports highlight that significant shortcomings in the implementation and enforcement of EU environmental legislation persist in some Member States.<sup>27</sup> On 6 February 2017 the Commission published the first ever comprehensive overview of how EU environmental policies and laws were applied on the ground. The analysis shows that they work but there are big gaps in how they are put into practice across the Member States.<sup>28</sup>

Enforcement of environmental law, in contrast to other areas of EU law, mainly rests with public authorities. Their ability to take into account the need to protect the environment may be limited by many factors. It is therefore important that supplementary avenues for improving enforcement of environmental law are available. In particular, actions by citizens and/or environmental NGOs in relation to the application and enforcement of environmental laws would assist in the protection of the environment.<sup>29</sup> Ensuring that individuals and NGOs have access to justice is also a means of improving Member State’s implementation of EU environmental laws.

In general, most authors underestimate the nature of standing requirements. More than any single point of law, they can tell the story of a state’s DNA.<sup>30</sup> In the case of environmental law, access to justice is complicated because correct implementation may relate to public rather than private interests.<sup>31</sup> For reasons of legal history, such concerns are usually of a type which is less easy for an environmental interest group (citizens and their organisations) to satisfy than for a property owner of an economic operator. Under classic rules on standing, only where a subjective right is impaired, or when a direct

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and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (OJ 2003 L 156/17).

<sup>24</sup> The proposed directive specified minimum common rules for the transposition of access to justice provisions by the Member States.

<sup>25</sup> In 2014 the Commission withdrew the pending proposal of the Directive on access to justice in the framework of the REFIT exercise, and started looking into alternative ways to improve access to justice in environmental matters at national level. See Withdrawal of obsolete Commission proposals, OJ 2014 C 153/3.

<sup>26</sup> Regulation (EC) No 1367/2006 of the European Parliament and the Council of 6 September 2006 on the application of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ 2006 L 264/1.

<sup>27</sup> COM(2017) 370 final, p. 5.

<sup>28</sup> See SWD(2017)33-60 final, The EU Environmental Implementation Review: Common challenges and how to combine efforts to deliver better results.

<sup>29</sup> COM(96) 500, Implementing Community Environmental Law, p. 11.

<sup>30</sup> M. van Wolferen: The Limits to the CJEU’s Interpretation of Locus Standi, a Theoretical Framework, Journal of Contemporary European Research, Vol. 12, Issue 4, 2016, p. 921.

<sup>31</sup> As AG Sharpston observed at the hearing in Case C-115/09 (EU:C:2011:289), „the fish cannot go to court”.

interest is at stake, can environmental law be the subject of court actions. Traditional concepts on standing can be therefore inadequate when it comes to the environment.

Legal protection in environmental matters generally serves not only the individual interests of claimants, but also, or exclusively, the public. Environmental issues simply cannot be reduced to private or public interest, because environmental interests are collective, diffuse and fragmented to a large extent.<sup>32</sup> Recognition of the public interest in environmental protection is especially important since there may be many cases where the legally protected interests of particular individuals are not affected or are affected only peripherally. However, the environment cannot defend itself before a court, but needs to be represented, for example by active citizens and their organisations.<sup>33</sup>

#### 4.1. The Principle of Effective Judicial Protection

Effective justice systems play a crucial role in upholding the rule of law and the fundamental values of the EU, as well as in ensuring effective application of EU law. In order to function effectively, every judicial system needs to set out clear procedural rules, including on access to justice. In national justice systems normally whoever claims the impairment of a right or has an interest to act may bring a case before a court in order to seek redress for an alleged breach caused by private persons or public entities (rules on standing). Access to justice in environmental matters, in addition to the issue of who can bring an action (*i.e.* standing), also includes issues on the scope and conditions of the action, the available remedies and the costs. In other words, it is a package made up of several interlinked parts.<sup>34</sup>

Access to justice in environmental matters is intrinsic to EU environmental law,<sup>35</sup> and draws on fundamental principles of EU law that are reflected in the EU Treaties, the Convention and secondary legislation as interpreted in case-law of the CJEU. Specific provisions aimed at ensuring reasonable access to justice are currently restricted to a few areas of EU environmental law.<sup>36</sup>

The rule of law includes an effective judicial protection of rights conferred by EU law. This is reflected in EU primary law. Both the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) strengthen access to justice in general, including via explicit reference in Article 19(1) TEU on sufficient remedies to ensure effective legal protection and incorporation of the Charter on Fundamental Rights.<sup>37</sup>

Under the principle of sincere cooperation laid down in Article 4(3) TEU it is for the courts of the EU Member States to ensure judicial protection of a person's right under EU law. In addition, Article 19(1) TEU requires EU Member States to 'provide remedies sufficient to ensure effective legal protection in

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<sup>32</sup> A. Pánovics: The Need for an EU Directive on Access to Justice in Environmental Matters, Essays of Faculty of Law University of Pécs, Yearbook of 2010, Pécs, pp. 137-138.

<sup>33</sup> See Opinion of AG Kokott in Case C-260/11, *Edwards and Pallikaropoulos v Environment Agency*, EU:C:2012:645, paras 40, 42.

<sup>34</sup> SWD(2017) 255, Impact Assessment on a Commission Initiative on Access to Justice in Environmental Matters, p. 3.

<sup>35</sup> EU environmental law covers a wide range of legislation which contributes to the pursuit of the objectives set out in Art. 191 TFEU.

<sup>36</sup> See Art. 6(2) of Directive 2003/4/EC, Art. 13 of Directive 2004/35/EC, Art. 25 of Directive 2010/75/EU, Art. 11 of Directive 2011/92/EU, Art. 23 of Directive 2012/18/EU, and recital 27 of Directive (EU) 2016/2284.

<sup>37</sup> See Art. 47 which covers the conditions of access, including legal aid.

the fields covered by Union law'.<sup>38</sup> This provision confirms the principle of effective legal protection that has been developed in the case-law of the Court.<sup>39</sup>

Article 37 of the Charter of Fundamental Rights of the European Union only contains a principle providing for a general obligation on the EU in respect of the objectives to be pursued in the framework of its policies, and not a right to bring actions in environmental matters before the CJEU.<sup>40</sup> Article 47 of the Charter on Fundamental Rights enshrines in its first paragraph the right to an effective remedy.<sup>41</sup> That provision reaffirms the principle of effective judicial protection, which is a general principle of EU law stemming from the constitutional traditions common to the Member States and enshrined in Articles 6 and 13 ECHR.<sup>42</sup>

As regards Article 47 of the Charter, it is also settled case-law that that provision is not intended to change the system of judicial review laid down by the EU Treaties, and particularly the rules relating to the admissibility of direct action brought before the CJEU.<sup>43</sup> However, legal protection under the Convention goes further than effective legal protection under the Charter on Fundamental Rights, as Article 47 expressly relates to the protection of individual rights. The basis for the assessment of the need for effective legal protection is therefore the actual person whose rights have been violated, rather than the public interest of society.

Stressing that EU law is a distinct and autonomous legal order, the Court has endorsed and developed general principles, such as those of equivalence and effectiveness,<sup>44</sup> in order to define and support it, while recognizing the procedural autonomy of EU Member States, *i.e.* the power to fix their own detailed procedural requirements.<sup>45</sup>

## 4.2. Preliminary Rulings and the Direct Effect of Article 9(3)

Effective judicial protection is closely linked to the uniform interpretation of EU law by the Court, and the possibility for national courts to submit questions to the Court by way of preliminary reference under the conditions set out in Article 267 TFEU.<sup>46</sup> Under EU law, while it is not possible to contest directly an EU act before the courts of the Member States, individuals and NGOs may in some countries be able

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<sup>38</sup> Case C-404/13, *ClientEarth and Regina v The Secretary of State for the Environment, Food and Rural Affairs*, EU:C:2014:2382, para 82.

<sup>39</sup> J.H. Jans & H.H.B. Vedder: *European Environmental Law after Lisbon*, 4<sup>th</sup> edn., Europa Law Publishing, Groningen, 2012, p. 274.

<sup>40</sup> Order of the General Court in Case T-600/15, *PAN Europe and Others v Commission*, ECLI:EU:T:2016:601 para 47.

<sup>41</sup> "Everyone whose rights and freedoms guaranteed by the law of the Union are violated, has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article."

<sup>42</sup> Case C-432/05, *Unibet v Justitiekanslern*, EU:C:2007:163, para 37.

<sup>43</sup> Case C-283/11, *Sky Österreich v Österreichischer Rundfunk* (EU:C:2013:28, para 42), Case C-426/11, *Alemo-Herron and Others v Parkwood Leisure*, EU:C:2013:521, para 32; Case C-583/11 P, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, EU:C:2013:625, para 98.

<sup>44</sup> See, for example Case C-115/09, *Bund für Umwelt und Naturschutz Deutschland Landesverband Nordrhein-Westphalen eV v Bezirksregierung Arnsberg*, para 43; Case C-570/13 *Karoline Gruber v Unabhängiger Verwaltungssenat für Kärnten and Others*, para 37.

<sup>45</sup> Case C-416/10, *Križan and Others v Slovenská inšpekcia životného prostredia*, EU:C:2013:8, para 106.

<sup>46</sup> The evolution of CJEU case-law on access to justice is mostly the result of preliminary references from national courts in which they seek clarification of what their role should be in applying EU environmental law.

to challenge an implementing measure and thus pursue the annulment by asking the national court to request a preliminary ruling of the Court.

The system of preliminary rulings is the keystone of the EU legal order, which, by setting up a dialogue between the CJEU and the national courts, has the object of securing uniform interpretation of EU law.<sup>47</sup> Yet, such a procedure requires that the NGO is granted legal standing in the Member State concerned, and that the national court decides to bring the case to the Court.

The Court has issued several rulings clarifying EU requirements on access to justice. A lot of preliminary references have been submitted to the Court by national courts, seeking clarification on whether access should be given and under what conditions.<sup>48</sup> The growing number of preliminary references shows that many EU Member States may be forced to change their national legislation to bring it in line with the obligations resulting from the Convention as interpreted by the Court.

Through its case-law, the Court has *partly filled the gap* left by the absence of EU legislation concerning Member States obligations under Article 9(3) of the Convention. In the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding right derived from EU law, since the Member States are responsible for ensuring that those rights are effectively protected in each case.<sup>49</sup> In the *'Slovak Brown Bears case'*<sup>50</sup> the Court confirmed that national courts must interpret access to justice rules in a way which is compliant with the Convention. The Court found that Article 9(3) of the Convention had no direct effect, but despite the absence of access to justice provisions in the Habitats Directive, national courts should nevertheless facilitate access by environmental NGOs. The famous judgment forced national courts to interpret law as much as possible in such a way as to enable environmental NGOs, in line with Article 9(3) of the Convention, to challenge administrative decisions in the EU Member States.

In general, the provisions of an international agreement to which the EU is a party can be directly relied on by individuals, if the nature and the broad logic of that agreement do not preclude it, and those provisions appear, as regards their content, to be unconditional and sufficiently precise.<sup>51</sup> The Court has already held that Article 9(3) of the Convention did not contain any unconditional and sufficiently precise obligation capable of directly regulating the legal position of individuals and therefore did not fulfil those conditions. Since only members of the public *'who meet the criteria, if any, laid down in national law'* are entitled to exercise rights provided for in Article 9(3), that provision is subject, in its implementation or effects, to the adoption of a subsequent measure.<sup>52</sup>

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<sup>47</sup> See Opinion 2/13 on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (EU:C:2014:2454, para 198).

<sup>48</sup> Especially the Djurgården case (C-263/09), the Trianel case (C-115/09), the Boxus case (C-128/09), the Slovak Brown Bears case (C-240/09), the Solvay case (C-182/10) and the Altrip case (C-72/12) should be mentioned in this respect.

<sup>49</sup> Case C-567/10, *Inter-Environnement Bruxelles and Others v Région de Bruxelles-Capitale*, EU:C:2012:159, paras 28-31.

<sup>50</sup> Case C-240/09, *Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky*, EU:C:2011:125. This case concerned an environmental association's entitlement to challenge a ministerial hunting derogation from the strict species protection provisions of the Habitats Directive (92/43/EEC, OJ 1992 L 206/7).

<sup>51</sup> Case C-300/98 and C-392/98, *Dior and Others v Assco Gerüste and Others*, EU:C:2000:688, para 42; Case C-401/12 P to C-403/12 P *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*, para 54.

<sup>52</sup> Case C-240/09, *Lesoochránárske zoskupenie*, para 45; C-401/12 P to C-403/12 P, *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*, para 55.

### 4.3. The Plaumann Doctrine in Environmental Matters

The legal remedies available to private persons against EU acts of general application have long been one of the most contentious issues in EU law. According to the system for judicial review of legality established by the EU Treaties, Articles 263, 267 and 277 TFEU established a ‘complete’ legal system of remedies and procedures designed to ensure judicial review of the legality of acts of the EU institutions and has entrusted such review to the EU Courts.<sup>53</sup> First on Article 173 of the EEC Treaty and subsequently on Article 230 EC, the Court has adopted a strict interpretation of standing of natural and legal persons to institute proceedings. Despite much criticism, the Court adhered to this case-law, and confirmed it in particular in cases *Unión de Pequeños Agricultores*<sup>54</sup> and *Jégo-Quéré*.<sup>55</sup>

According to the formula often used in the case-law of the Court, ‘*direct concern*’ means that an EU act must affect directly the legal situation of the individual and leave no discretion to its addressees, who are entrusted with the task to implementing it, such implementation being purely automatic and resulting from EU rules without the application of other intermediate rules.<sup>56</sup> In accordance with settled case-law dating back to the judgment of 15 July 1963 in the *Plaumann* case,<sup>57</sup> “*persons other than those whom a decision is addressed may only claim to be individually concerned if that decision affect them by certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed*” (so-called ‘Plaumann doctrine’ or ‘Plaumann formula’).

As far as natural persons are concerned, where the specific situation of the of the applicant was not taken into consideration in the adoption of the act, which concerns him in a general and abstract fashion and, in fact, like any other person in the same situation, the applicant is not individually concerned by the act. The same applies to associations which claim to have *locus standi* before the CJEU. In the absence of special circumstances, such as the role which it could have played in a formal procedure leading to the adoption of the measure in question, an association cannot be considered to be individually concerned, and is therefore not entitled to bring an action for annulment on behalf of its members where the latter cannot do so individually.<sup>58</sup>

The entry into force of the Treaty of Lisbon and the developments in CJEU case-law have put alternative ways of improving access to justice in EU environmental law back in the spotlight.<sup>59</sup> Not least as a reaction to the case-law of the Court, the Treaty of Lisbon introduced a reform of direct legal remedies available to private persons. The fourth paragraph of Article 263 TFEU permitted private persons to bring an action for annulment ‘against a regulatory act which is of direct concern to them and does not entail implementing measures’.<sup>60</sup> It is still debated how far that reform extended the standing of

<sup>53</sup> See, to that effect, Case C-294/83, *Les Verts v Parliament*, EU:C:1986:166, para 23.

<sup>54</sup> Case C-50/00 P, *Unión de Pequeños Agricultores v Council*, EU:C:2002:462, para 36.

<sup>55</sup> Case C-263/02 P, *Commission v Jégo-Quéré, & Cie SA*. EU:C:2004:210, para 45.

<sup>56</sup> Case C-386/96 P, *Dreyfus v Commission*, EU:C:1998:193, para 43.

<sup>57</sup> Case 25/62, *Plaumann v Commission*, EU:C:1963:17, para 107.

<sup>58</sup> Case C-321/95 P *Greenpeace Council and Others v Commission* (EU:C:1998:153, paras 28-29).

<sup>59</sup> M. Pallemarts: Compliance by the European Community with its Obligations on Access to Justice as a Party to the Aarhus Convention, Report for WWF-UK, Institute for European Environmental Policy (IEEP), June 2009, p. 30.

<sup>60</sup> This provision was originally to be incorporated into the Treaty establishing a Constitution for Europe (‘the Constitutional Treaty’) as Art. III-365(4). Against this background, the Treaty of Lisbon does not establish a systematisation and hierarchisation of EU acts like the Constitutional Treaty.

individuals and their organisations, but the Court has pointed out that the interpretation of the EU system of remedies cannot have the effect of setting aside the conditions expressly laid down in the Treaty. This would go beyond the jurisdiction conferred by the Treaty on the EU Courts.<sup>61</sup>

## 5. The Draft Aarhus Decision in Case ACCC/C/2008/32

On 1 December 2008, an environmental NGO (Client Earth), supported by a number of entities and a private individual, brought a case to the ACCC concerning insufficient compliance by the EU with its obligations under the Convention. The communicant alleges a failure by the EU as a Party to the Convention to comply with Article 3(1) and Article 9(2)-(5), of the Convention. The communication alleged that by applying the ‘individual concern’ standing criterion for private individuals and NGOs that challenged decisions of EU institutions before the CJEU, the EU fails to comply with Article 9(2)-(5). Moreover, the Aarhus Regulation fails to grant to individuals or entities, other than NGOs, such as regional and municipal authorities, access to internal review; and that the scope of this internal review procedure is limited to appeals against administrative acts of an individual nature. As a result, the EU fails to comply with Articles 3(1) and 9(2). Finally, the communication alleges that by charging the applicants before the CJEU with expenses of an uncertain and possibly prohibitive nature in the event of the loss of their case, the EU fails to comply with Article 9(4). Additionally, the communicant alleges also a breach of Article 6 by not providing for public participation, and related access to justice, in decision-making related to certain decisions taken by the EU institutions.

After lengthy discussions, the ACCC submitted its findings in Case ACCC/C/2008/32 to the EU on 17 March 2017. The jurisprudence examined by the ACCC was built by the CJEU on the basis of the old text in the EC Treaty.<sup>62</sup> Despite of the fact that the wording of Article 263(4) TFEU is different, this difference in itself did not provide a significant change of the jurisprudence. This means that the Plaumann doctrine still can be considered as an *absolute bar* to proceeding in environmental cases. The consequences of applying the Plaumann doctrine to environmental and health issues is that in effect no member of the public is ever able to challenge an EU act in such case before the CJEU. While businesses have relatively easy access to the CJEU to defend their commercial interests, environmental NGOs have virtually no access to the same Court to protect the environment other than in access to documents cases.

Both the system of judicial review in the national courts and the request for preliminary ruling is a significant element for ensuring consistent application and proper implementation of EU law in the Member States, but they cannot serve as a basis for generally denying members of the public access to the CJEU. Thus, the system of preliminary ruling does neither in itself meet the requirement of access to justice in Article 9 of the Convention, nor compensate for the strict jurisprudence of the Court.<sup>63</sup>

In paragraph 123 of its findings, the ACCC held that “*the Party concerned fails to comply with Article 9, paragraphs (3) and (4), of the Convention with regard to access to justice by members of the public neither the Aarhus Regulation, nor the jurisprudence of the CJEU implements or complies with the obligations arising under those paragraphs*”. The Aarhus Regulation, in combination with the jurisprudence of the CJEU, has effectively prevented individuals and environmental NGOs from seeking access to justice in environmental matters at EU level in all but access to documents cases.

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<sup>61</sup> Unión de Pequeños Agricultores (C-263/02 P, EU:C:2004:210, paras 43-44).

<sup>62</sup> Art. 230(4) EC.

<sup>63</sup> ACCC/C/2008/32 (Part I); ECE/MP.PP/C.1/2011/4/Add.1, May 2011, paras 89-90.



The recommendations of the ACCC do not either explicitly or implicitly require or suggest an amendment of Article 263(4) TFEU or any other provision of the EU Treaties. The EU is entirely free to decide whether to implement the recommendations via case-law,<sup>64</sup> or by amending the Aarhus Regulation,<sup>65</sup> or by taking any other measure it considers appropriate.<sup>66</sup>

At the express invitation of the Council of the EU, two members of the ACCC and a representative of the secretariat attended the session of the Council Working Party on International Environmental Issues<sup>67</sup> held on 22 March 2017. It is also worth mentioning that on 28 April 2017, the Commission adopted an interpretative guidance document ('Notice') to the Member States on how to implement the access to justice provisions of the Convention within their own jurisdictions.<sup>68</sup> The notice document covers legal standing, the intensity of scrutiny, and the effective remedies to be provided by national courts, and several other safeguards. Its scope is limited to access to justice in relation to decisions by public authorities of the Member States, and it does not address legal standing of private parties before the CJEU. Nor does it concern the judicial review of acts of the EU institutions.

## 6. The Position of the EU at MOP-6

One of the findings, namely that the EU fails to comply with paragraphs (3) and (4) of Article 9, has been incorporated into draft Decision VI/8f, which was submitted to the sixth session of the Meeting of the Parties to the Convention (MOP-6). The event provided a platform for Parties, signatories, international organisations, NGOs and other stakeholders to discuss achievements and challenges with regard to promoting effective environmental rights in relation to a wide range of issues.<sup>69</sup> MOP6 was held in parallel with the fifty-eight meeting of the ACCC (10-13 September 2017). The MOP also re-elected by consensus two members of the ACCC, and elected by consensus four new members.<sup>70</sup>

On 29 June 2017, in the context of the ongoing MOP-6 preparations, the Commission presented a proposal for a Council decision on the position to be adopted at MOP-6 regarding case ACCC/C/2008/32.<sup>71</sup> In response to the findings of the ACCC, the Commission initially proposed that the MOP should *reject* the finding of non-compliance. The Explanatory Memorandum to the Commission's proposal asserts that the "*Union secondary legislator may not amend the rules provided for in Article 263(4) TFEU and has to respect the case-law developed by the Union judiciary which determines the correct interpretation of the Treaty.*"<sup>72</sup> Moreover, the findings "*challenge constitutional principles of EU law that are so fundamental that it is legally impossible for the EU to follow and comply with the findings.*"<sup>73</sup>

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<sup>64</sup> Para 123 (c).

<sup>65</sup> Para 123 (b).

<sup>66</sup> Para 123 (a).

<sup>67</sup> The Working Party on International Environmental Issues EU positions for international negotiations related to environmental and climate change issues.

<sup>68</sup> C(2017) 2616 final, Commission Notice on Access to Justice in Environmental Matters.

<sup>69</sup> The sessions also featured a 'joint High-level Segment', where delegations focused on the role of the Convention and the Protocol in implementing the Sustainable Development Goals (SDGs).

<sup>70</sup> Including Ms. Zsuzsanna Bögös who had been nominated by Hungary.

<sup>71</sup> COM(2017) 366 final.

<sup>72</sup> Ibid 5.

<sup>73</sup> Ibid 7.

On 17 July 2017, the Council adopted a decision on the position of the EU at MOP-6 regarding case ACCC/C/2008/32. Whilst the Commission's concerns were acknowledged by the Council, it agreed to amend the proposal.<sup>74</sup> The Council stressed that the findings of the ACCC are problematic for the EU because the findings do not recognize the EU's special legal order. In view of separation of powers in the EU, the Council cannot give instructions to the CJEU concerning its judicial activities.<sup>75</sup>

In the Council decision, the EU – with all Member States in unanimity – accepted the draft EU position; subject to some amendments of the Commission's proposal in order to clarify *inter alia* the intention of the MOP not to require the EU to interfere with the independence of its judiciary. On the other side, the EU and its Member States reiterated their full commitment to the principles and objectives of the Convention, as well as their unwavering respect for its compliance system.<sup>76</sup>

The decision entered into force immediately after its adoption, and the Council communicated it to the Convention's Secretariat. Thus, the EU has arrived to Montenegro with a proposal that the MOP should end the longstanding practice whereby findings of non-compliance are endorsed by the MOP, proposing instead that the MOP should only '*take note*' of these findings.<sup>77</sup> The EU has also proposed further weakening amendments to the draft decision on its non-compliance, notably that the actions recommended by the ACCC should only be '*considered*' and that the recommendations should not explicitly address the problems with the jurisprudence of the CJEU.

Every single finding of non-compliance has been endorsed by the MOP since the establishment of the Aarhus compliance mechanism, with the full support of the EU. The flat refusal has put the spotlight on the weaknesses of the EU's internal decision-making processes. The Member States of the EU are the only Parties to the Convention whose positions during the MOP sessions are not public. In practice a few Member States together with the Commission can effectively determine the position of the entire EU, which represents a majority of the Parties.

Despite the EU's considerable influence in the UNECE region, not a single other Party or stakeholder has spoken in support of the EU position at MOP-6. The Parties to the Convention – including the EU – discussed adopting the findings of the ACCC, and rejected the EU's proposal not to adopt the findings that the EU is breaching the Convention by preventing the members of the public from challenging the EU institutions' environmental decisions in court. The EU has been heavily criticized for its failure to accept an international panel's ruling; environmental NGOs expressed their deep concern at the response of the EU to the findings of the ACCC.<sup>78</sup>

As no other Parties supported the position of the EU, the resulting stand-off led to the matter being postponed to the next session of the MOP in four years' time. While this delay and the poor precedent it creates are problematic, the adoption of the EU position would have been far worse for the Convention.

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<sup>74</sup> Statement by the Commission, 11194/17 ADD1 REV1, 17 July 2017:  
<http://data.consilium.europa.eu/doc/document/ST-11194-2017-ADD-1-REV-1/en/pdf> (30 August 2017).

<sup>75</sup> <http://data.consilium.europa.eu/doc/document/ST-11150-2017-INIT/en/pdf> (30 August 2017).

<sup>76</sup> <http://www.consilium.europa.eu/en/press/press-releases/2017/07/17-aarhus-convention/> (30 August 2017).

<sup>77</sup> This is crucial for the EU as endorsing makes them legally binding.

<sup>78</sup> <http://eeb.org/eu-slammed-for-lack-of-respect-for-rule-of-law-on-environmental-justice/> (15 September 2017).

## 7. Conclusions

Environmental law is at the forefront of EU efforts to build a sustainable future, and by bringing environmental cases to the courts, citizens and NGOs can help ensure the correct application of environmental law. The extent and complexity of EU environmental legislation, combined with the implementation deficit, underline the importance of access to justice at both EU and national levels.

It is important to note that review of the Parties' compliance with the Convention is an exercise governed by international law. A Party to the Convention may not invoke its internal law as justification or failure to perform an international treaty. The internal division of powers is no excuse for not complying with international law.<sup>79</sup>

Over the years, the Aarhus Convention and the EU have mutually reinforced and developed each other. The interplay between EU law and the Convention have been subject to numerous accounts in academic literature, including the double standards applied by the EU institutions in this area.<sup>80</sup> Now the EU institutions should start to work on revising the relevant EU legislation to bring it into line with the findings of the ACCC. As one of the Parties to the Convention, the EU has to explore ways and means to comply in a way that is compatible with the fundamental principles of the EU legal order and with its system of judicial review.

The Commission should review the application of the request for internal review procedure according to the Aarhus Regulation, namely the criteria applied for the admissibility of the requests. The legal instrument 'request for internal review' has not fulfilled the expectations. In recent years only a few requests have been filed and even fewer accepted as eligible. Especially criteria concerning the characteristics of an act taken by an EU institution or body should be a subject of review and be interpreted in a restrictive manner to ensure wider access to the merits of the cases.<sup>81</sup>

The Court also should, within the limits of its judicial prerogatives, interpret the provisions of the EU Treaties and of the Aarhus Regulation in a manner consistent with the obligations of the EU established by the Convention. The judgments of the CJEU show that it can be extremely traditional in its views on access to justice issues. In recent years, there have been a number of evolutions in CJEU case-law with respect to access to justice in environmental matters before the national courts, clearly demonstrating an 'activist' approach by the Court.

With the findings and recommendations of the ACCC the time has come for the reassessment of the Plaumann case-law on individual concern. Unfortunately, the CJEU is an authoritative international court, and its members are not keen on having their decisions scrutinized by a non-judicial body set up by an environmental agreement.<sup>82</sup> If the Court will in the future confirm its traditional case-law on legal standing for non-privileged applicants, it will be up to the Member States (also as Parties to the Convention) to extend access to the EU judicature.

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<sup>79</sup> ECE/MP.PP/C.1/2006/4/Add.2, para 41.

<sup>80</sup> See L. Krämer: Access to Environmental Justice: the Double Standards of the ECJ, *Journal of European Environmental & Planning Law*, Vol. 14, Issue 2, pp. 159-185.

<sup>81</sup> Access to Justice in Environmental Matters under the Aarhus Convention, Justice & Environment Position Paper, May 2010, p. 6.: [http://www.justiceandenvironment.org/\\_files/file/J&E-Aarhus-position-paper-2010-05-24\(1\).pdf](http://www.justiceandenvironment.org/_files/file/J&E-Aarhus-position-paper-2010-05-24(1).pdf) (9 September 2017).

<sup>82</sup> A. Ali: The EU and the compliance mechanisms of multilateral environmental agreements: the case of the Aarhus Convention, in E. Morgera (Ed.): *The External Environmental Policy of the European Union: EU and International Law Perspectives*, Cambridge University Press, 2012, p. 298.

# The Role of Customary Principles of International Humanitarian Law in Environmental Protection

Viola Vincze LL.M.

*Legal advisor at the Ministry of Defence, Legal Department; PhD Candidate at ELTE Law School*

*Since armed conflicts exist, environment has been a suffering object, a passive victim of hostilities. This essay attempts to introduce and analyse the contemporary problems deriving from applying the customary principles of International Humanitarian Law (IHL) to environmental protection. Witnessing the environment degradation caused by conflicts, there is an unquestionable antagonism between the seemingly adequate provisions protecting the environment and their practical implementation. IHL sets forth an unrealistically high threshold of destruction that calls for the rationalisation of legal and environmental arguments. This article aims to uncover the gaps and weaknesses in the application of the relevant principles and their assessment is complemented with a short overview of the UN Work Program concerning reports providing another interpretation of the applicable IHL principles and with the introduction of NATO standards and doctrines specifically aiming at environmental protection during operations.*

*Keywords: International Humanitarian Law, customary rules, environmental protection, NATO*

## 1. Introduction

Throughout millennia, our ancestors have learnt how to occupy territory and exploit its resources. Subsequently, they successfully cultivated, altered, and manipulated it to reap its benefits. The interaction and adaptation between human activities and nature became commonplace but as time went by, our attitude towards nature transformed and developed. Redgwell argues that this development can be divided into three periods: in the first one, exploitation of resources and other environmental benefits were dominating, which later gave place to a reactive approach with a rising number of treaties on pollution abatement, and species and habitat conservation.<sup>1</sup> The fundamental change of approach happened after World War II and nowadays, environmental protection is defined by the precautionary and preventive approach. It may suggest that humanity learnt to appreciate nature both for the benefits it provides and for its own intrinsic values. However, our peaceful symbiosis seems quite afar. When we closer examine the human efforts to protect the environment, there are also signs of systematic abuse both in time of peace and armed conflict. The environment abuse in time of armed conflict raises important questions. One of them is whether provisions of International Humanitarian Law (IHL) concerning environmental protection during armed conflicts are necessary at all. However, if they are, are they adequate? To answer these questions, we should closer examine the nature of direct and indirect

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<sup>1</sup> Catherine Redgwell, *International Environmental Law*, in M. D. Evans (Ed.), *International Law*, 2<sup>nd</sup> edn., Oxford University Press, Oxford 2006, p. 657.

wartime impacts on the environment,<sup>2</sup> which may be extremely severe and may overstretch the peacetime impacts to the extent that their regulation becomes crucial and unavoidable and therefore a peacetime-wartime separation.

During armed conflicts environmental damage can occur either as the result of direct attack (against land, sea and inland waters, air or any natural resources) or as collateral damage in cases where attacks are directed against military objects or dual-use critical infrastructure (for example water supply, electricity generation, heating or agriculture). Harm to the environment might include the total or partial destruction of land,<sup>3</sup> marine environment,<sup>4</sup> wildlife and agriculture, destabilisation of the surface, flora and fauna, and it can upset the climate and change weather patterns. But it is only an exemplary list of possible results; causing (directly or indirectly) harm to the environment may have additional indirect implications in the near and far future, such as dislocation of people, the growing migration's effect on the environment, water scarcity, poor environmental management with decline in production level and even famine.

Another reason why the peacetime-wartime differentiation might be justified is the growing support for the ecocentric view. According to their supporters, the “ecosphere ... [t]ranscends in importance any one single species”<sup>5</sup> defeating slowly the domination of the opposite anthropocentric perspective which has always emphasised the needs and wants of human beings and underlining the necessity of preventing large-scale environmental degradation caused by armed activities. The main aims of legislation regarding environmental protection are to preserve and protect the natural environment from any adverse impact and deterioration, and to improve its present state by careful management. By extending this protection to armed conflicts we not only acknowledge its vital importance in sustaining human life, but also its inherent values and exceptional attributes which make it indispensable in supporting any life form on the Earth.

One of the earliest reference indirectly applicable to environmental protection in modern history is found in the 1868 St Petersburg Declaration<sup>6</sup> which states that “the progress of civilization should have the effect of alleviating as much as possible the calamities of war” and that “the only legitimate object which state should endeavour to accomplish during war is to weaken the military forces of the enemy.” Another early indirect reference is contained in the 1899 Hague Declaration,<sup>7</sup> according to which, projectiles cannot be used with the sole purpose of dispersing asphyxiation or deleterious gases. Notwithstanding the positive effect the above documents may have had, it has to be seen that at the time of adoption of these declarations, there was no expressed concern regarding environmental protection during hostilities. Today they are still in force and it is all too tempting to refer to some of their provisions as

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<sup>2</sup> For more on the adverse impacts of armed conflicts see Nick Middleton, *The Global Casino, An Introduction to Environmental Issues*, 4th edn., London Hodder Education, London 2008.

<sup>3</sup> Scorched earth policy has accompanied the history of warfare from the ancient Scythians until today. Despite it has been prohibited by Article 54 of 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), it still seems to be a familiar routine, see for example the methods used by the Islamic State <http://foreignpolicy.com/2016/04/06/the-islamic-states-scorched-earth-strategy/> (22 August 2017).

<sup>4</sup> The impact assessment of uses and values carried out by the IUCN and Collaborators in 1994 (*The 1991 Gulf War: Environment Assessment of IUCN and Collaborators*) serves with an estimation and review on the extent of damage done to the flora and fauna, the cleanup activities and possible assistance needed after the Gulf War. <http://www.greenpeace.org/international/Global/international/planet-2/report/1994/4/the-1991-gulf-war-environment.pdf> (22 August 2017).

<sup>5</sup> J Stan Rowe, *Ecocentrism and Traditional Ecological Knowledge* [www.ecospherics.net/pages/Ro993tek\\_1.html](http://www.ecospherics.net/pages/Ro993tek_1.html) (22 August 2017).

<sup>6</sup> 1868 St Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight.

<sup>7</sup> 1899 Declaration (IV, 2) concerning Asphyxiating Gases.

relevant to environmental protection.<sup>8</sup> Anxiety about the damage became more pronounced at the dawn of the twentieth century, when states gradually started to retreat from the extensive and intentional destruction of nature, and after World War II and the Vietnam War concerns gave way to IHL regulations regarding environmental protection in times of armed conflict: Additional Protocol I<sup>9</sup> and the ENMOD<sup>10</sup> Convention.<sup>11</sup> It seems that by today, the devastating effects of modern warfare inflicted by hostile forces and the findings of scientific research regarding the effects of the environment abuse and degradation facilitated the recognition that exposing the environment to impacts of warfare should be avoided.

## 2. Different Levels and Regimes of Environmental protection

From time immemorial humankind intended to control and manipulate its surroundings. It meant better or worse resource management on the small scale and substantial modification of the environment on the large scale. The quests to conquer and control (involving military activities) were able to produce adverse multidimensional impact on land, water, air quality and natural resources, and implications of damages caused to nature stretched far beyond the obvious degradation. They also constitute financial, aesthetic, recreational, emotive loss, the lost bequest and option value (often beyond recovery), as well as the actual cost of restitution.<sup>12</sup> Concerning the legal aspect, national environmental legislation creates the most realistic and feasible framework to implement environmental standards regarding the protection of the environment, however, “states and specialized agencies realized fairly rapidly that purely national environmental policies were inadequate in view of the magnitude and the transnational nature of many environmental problems, and that it was essential to adopt international rules.”<sup>13</sup> In order to avoid clashes, national legal orders were to accept the universally recognised rules and regulations of International Law (conventions, protocols, agreements) and harmonise the internal laws and statutes with the obligations assumed under International Law. (Article 27 of the 1969 Vienna Convention on the Law of Treaties declares that “a party may not invoke the provisions of its internal law as justification for its failure to perform the treaty.”) Apart from treaties on the international plane, bilateral, multilateral and regional agreements can also contribute to the development of international standards and principles,

<sup>8</sup> See for example Alexandre Kiss & Dinah Shelton, *Guide to International Environmental Law*, Martinus Nijhoff Publisher, Leiden 2007, p. 254.

<sup>9</sup> 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I).

<sup>10</sup> 1976 Convention on the prohibition of military or any hostile use of environmental modification techniques.

<sup>11</sup> The ENMOD Convention’s history started in 1970 at Stockholm where, under the egis of the United Nations, an environment conference was held which adopted a Declaration stating, inter alia, that states have the responsibility “to ensure that activities within their ... [c]ontrol do not cause damage to the environment of other States” (Principle 21 of the Declaration of the United Nations Conference on the Human Environment (A/CONF.48/14/Rev.1, Chapter 1)). Following the Conference, the US Government and the Soviet Union both supported the possibility of an international agreement, and in July 1974, President Nixon and General Secretary Brezhnev “formally agreed to hold bilateral discussions on how to bring about ‘the most effective measures possible to overcome the dangers of the use of environmental modification techniques for military purposes’” (U.S. Department of State, *Diplomacy in Action* website <https://www.state.gov/t/isn/4783.htm> (5 September 2017)). The discussions held between the two nations in 1974 and 1975 resulted in agreement on a common approach and, after intensive negotiations, the text of the draft ENMOD Convention could be agreed upon. For more on the procedural history of ENMOD Convention, see the United Nations website <http://legal.un.org/avl/ha/cpmhuent/cpmhuent.html> (5 September 2017).

<sup>12</sup> For more on the subject see Christopher D Stone, *The Environment in Wartime: An Overview*, in J. E. Austin & C. E. Bruch (Eds.), *The Environmental Consequences of War; Legal, Economic and Scientific Perspectives*, Cambridge University Press, Cambridge, 2000.

<sup>13</sup> Antoine Bouvier, *Protection of the Natural Environment in Time of Armed Conflict*, *International Review of Red Cross* No. 285, 31 December 1991, p. 567.

therefore accession to these instruments shall also be encouraged.<sup>14</sup> The prerequisite of assessing the question of environmental protection in times of armed conflict is the fact that environment is to be regarded as a civilian object in IHL and enjoys protection accordingly. There is only one specific provision in IHL treaty law protecting the environment according to which “care shall be taken to protect the natural environment against widespread, long-term and severe damage.”<sup>15</sup> The environment is however given an additional protection by the application of IHL principles, which is in the focus of the present essay. Before introducing these principles, let us specify those areas of International Law whose provisions and principle may also have a direct effect on environmental protection.

## 2.1. Different Regimes of Law Protecting the Environment During Armed Conflicts

Four complementing bodies of International Law constitute the legal framework with provisions directly aiming at protecting the environment.

- A wide range of International Environmental Law (IEL) provisions apply during armed conflict including not only multilateral or regional agreements but also customary principles of IEL (*e.g.* responsibility for environmental damage or the precautionary principle).<sup>16</sup>
- International Human Rights Law is also to be included in this exclusive list by virtue of containing Human Rights with a strong link to environmental protection (right to life, private life or the right to a standard of living adequate for the health and well-being).<sup>17</sup> This link is however based on highlighting the green aspects of existing Human Rights rather than adding new rights to the existing treaties.<sup>18</sup> Securing a higher degree of environmental protection based on the degradation’s possible effects on life itself and the quality of life (health) require governments to regulate circumstances and situations, which may lead to environmental harm and thereby adversely affect Human Rights.
- The third pillar, International Criminal Law deals with individual (international) criminal responsibility. Grave breaches of IHL include actions, which indirectly result in environmental damage (widespread, long-term and severe damage to the natural environment clearly excessive in relation to the military advantage anticipated).<sup>19</sup>

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<sup>14</sup> For more on the importance of accession see Harry H Almond Jr, *Weapons, War and the Environment*, Georgetown International Environmental Law Review, Vol. 3, 1990, pp. 167-197.

<sup>15</sup> Art. 55 of Additional Protocol I.

<sup>16</sup> According to the UNEP’s analysis, “Many argue that the precautionary principle, the principle of pollution prevention and the right to a healthy environment either are or are emerging as principles of customary international law.” in: *Protecting the Environment During Armed Conflict, An Inventory and Analysis of International Law*, United Nations Environment Programme, 2009, p 40

[http://www.un.org/zh/events/environmentconflictday/pdfs/int\\_law.pdf](http://www.un.org/zh/events/environmentconflictday/pdfs/int_law.pdf) (22 August 2017).

<sup>17</sup> Arts. 3, 12 and 25 of Universal Declaration of Human Rights, Art. 6 of International Covenant on Civil and Political Rights, Arts. 2 and 8 of the European Convention on Human Rights, Arts. 4, 14, 16 and 24 of African Convention on Human and Peoples’ Rights, Arts. 4, 11, 21 of the American Convention on Human Rights.

<sup>18</sup> Alan Boyle, *Human Rights and the Environment: Where Next?*, *European Journal of International Law*, Vol. 23, No. 3, 1 August 2012, p. 614.

<sup>19</sup> According to Art. 8 (2) (b) (iv) of the Rome Statute, “intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated” constitutes a war crime by virtue of violating of the laws and customs applicable in international armed conflict.

- The fourth pillar in the legal structure of environmental protection is IHL, which seeks to regulate the protection of not only those who are not (or no longer) taking part in the hostilities and the conduct of hostilities but also the protection of civilian objects like the environment.

## 2.2. The Principles of IHL Applicable to Environmental protection

“Custom is at the core of the *jus in bello*”<sup>20</sup> coexisting with the treaty law in force. Any custom presumes the existence of consistent state practice (by the majority of states) and the *opinion juris sive necessitatis*, namely the conviction that their action is based on an obligation. According to Richards and Schmitt,<sup>21</sup> the customary principles of the law of war can be derived from the basic standard that the right of any belligerent to adopt means of injuring the adversary is not unlimited,<sup>22</sup> or, according to the contemporary phrasing of Article 35 (1) of Additional Protocol I, “in any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.” In this restatement, the editors of the instrument made it clear that the protection shall be extended to the civilian population and civilian objects too – including the natural environment. Regarding this rule, Baker has rightly argued that “standing on its own, however, limitation provides basic wartime environmental protection.”<sup>23</sup> This provision therefore shall be studied and interpreted in connection with the principles of IHL, first and foremost with the principle of distinction, whose customary status, Roscini points out, “is nowadays well-established,”<sup>24</sup> according to which parties to the conflict shall distinguish between civilian objects and military objectives and shall direct any operation solely against military objectives.<sup>25</sup> (When there is a choice possible between several military objectives for obtaining a similar military advantage, the one causing the least danger to civilian objects<sup>26</sup> must be selected.)<sup>27</sup> The rest of the customary IHL norms originate from this sole rule being the first significant step in introducing limitations on the modern battlefield; the ICJ found it to be a “cardinal principle”<sup>28</sup> intransgressible at all time.

### 2.2.1. Martens Clause

Assessing the dawn of IHL clauses and principles with an indirect link to environmental protection, the Martens Clause<sup>29</sup> may prove a valuable starting point.

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<sup>20</sup> Michael N. Schmitt, *Green War: An Assessment of the Environmental Law of International Armed Conflict*, *Yale Journal of International Law*, Vol. 22., No. 1, Winter 1997, p. 51.

<sup>21</sup> Peter J. Richards & Michael N. Schmitt: *Mars Meets Mother Nature: Protecting the Environment during Armed Conflict*, *Stetson Law Review*, Vol. 28, 1999, p. 1075.

<sup>22</sup> Art. 22 of the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land.

<sup>23</sup> Betsy Baker, *Legal Protection for the Environment in Times of Armed Conflict*, *Virginia Journal of International Law*, Vol. 33, 1992/93, p. 360.

<sup>24</sup> Marco Roscini, *Targeting and Contemporary Aerial Bombardment*, *International and Comparative Law Quarterly*, Vol. 54, 2005, p. 413.

<sup>25</sup> Art. 48 of Additional Protocol I.

<sup>26</sup> According to Art. 52 (2) of Additional Protocol I, military objects are those “which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”

<sup>27</sup> Art. 57 (3) of Additional Protocol I.

<sup>28</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 257, Para 78.

<sup>29</sup> The Clause was named after its drafter, Friedrich Martens who was part of the Russian delegation.



The first codification of the Martens Clause is found in the preamble of 1899 Hague Convention II with Respect to the Laws and Customs of War on Land<sup>30</sup> which was followed by a slightly changed formulation in the Preamble of the 1907 Hague Convention IV respecting the Laws and Customs of War on Land.<sup>31</sup> Although according to Cassese, “the clause essentially served as a diplomatic ploy”<sup>32</sup> and was “part of a diplomatic manoeuvring to overcome political difficulties,”<sup>33</sup> it proved to be a valuable help in interpreting IHL and continues to have an undeniable impact not just on civilians and those taking part in the hostilities, but also on policy makers and the public.

The 1949 Geneva Conventions did not contain the clause among their provisions and it appeared again only in Additional Protocol I<sup>34</sup> and II.<sup>35</sup> Article 1 (2) of Protocol I exceeds the Protocol itself and other conventional instruments of humanitarian law too, when it places the prospective victims under the protection and authority of the principles of International Law derived from established custom, the principles of humanity and dictates of public conscience. Although the Martens Clause underlines the requirement that parties to an armed conflict shall not fight without certain limitations imposed on them, Additional Protocol I does not clarify the notions of “principles of humanity” and “dictates of public conscience” whose content is therefore still subject to arguments. The provision has already given place to various interpretations since it puts the emphasis onto humanity and standards of public conscience instead of referring to state practice. The formulation of Martens Clause demonstrates not just the significance attributed to the principles of humanity and dictates of public conscience but - by being ambiguous - the elusive nature of the concepts, too. There is also a debate among legal experts whether it generates new sources of law, identifies principles of International Law, or creates legal standards inspiring development of International Humanitarian Law.<sup>36</sup>

The core question however relates to the content of the Clause, which seems to bring in natural law in the way of representing moral values guiding human conduct during hostilities.<sup>37</sup> In the Commentary of Additional Protocol I (Geneva, 1987) the ICRC argues that since no IHL codification can be regarded complete given the complex nature of the regulated subject, “the Martens clause prevents the assumption that anything which is not explicitly prohibited by the relevant treaties is therefore permitted”<sup>38</sup> or as Ticehurst puts it, “the Clause provides that something which is not explicitly prohibited by a treaty is not ipso facto permitted.”<sup>39</sup>

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<sup>30</sup> “ ... [i]n cases not included in the Regulations adopted by them (Parties), populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.”

<sup>31</sup> “Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.”

<sup>32</sup> Antonio Cassese, *The Martens Clause: Half a Loaf or Simply Pie in The Sky?*, *European Journal of International Law*, Vol. 11, 1 March 2000, p. 198.

<sup>33</sup> Cassese 2000, p. 216.

<sup>34</sup> According to Art. 1 (2) of Additional Protocol I, “In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from dictates of public conscience.”

<sup>35</sup> 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

<sup>36</sup> Cassese 2000.

<sup>37</sup> For more on the influence of natural law on IHL see Rupert Ticehurst, *The Martens Clause and the Laws of Armed Conflict*, *International Review of Red Cross*, No. 317, 1997, pp. 125-134.

<sup>38</sup> Commentary of 1987, *General principles and scope of application*, p. 39, Para 55.

<sup>39</sup> Ticehurst 1997, p. 126.

It is the opinion of this author that the Martens Clause shall be interpreted as considering the demands deriving from humanity conveyed by the public conscience, but it should also be underlined that although it was considered in decisions of international courts,<sup>40</sup> no court has ever based its decision solely on the Martens Clause.<sup>41</sup> Projecting the above onto environmental protection, it can be concluded that the Martens Clause is an autonomous principle, which can contribute to the preservation of environment by creating a boundary for military considerations, prohibiting conduct of hostilities (means and methods) which are exceeding the degree necessary for attaining a definite military advantage. According to the Clause, principles of general International Law apply during armed conflicts even if there is no particular provision in the concerning treaty law. With IHL being silent on a certain matter, the Martens Clause may serve as a backdoor that ensures that other sources of International Law may provide protection to the natural environment.

### 2.2.2. The Principle of Military Necessity

Similarly to the Martens Clause, the precise content and practical feasibility of the principle of military necessity is also somewhat blurred. Military necessity is basically the concept of legally using only that kind and degree of force which is required to overpower the enemy. At the heart of the concept lies the criterion that no defence (no excuse) shall be provided for unlawful actions committed during hostilities. Unlike the generally acceptable interpretation of military necessity as humanity's counterbalance, Hayashi provides a refreshing new approach of regarding military necessity as being normatively indifferent permitting both the pursuit and abandonment of military necessities.<sup>42</sup>

It is mentioned in the Preambles of Hague Convention II<sup>43</sup> and Hague Convention IV<sup>44</sup> but it is regulated *expressis verbis* only in Article 23 (g) of the 1907 Hague Convention IV (reflecting customary law), which indicates that any destruction or seizure of the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war, is forbidden. This formulation clearly points to the limited power of the adversaries to cause harm to their enemies. The concept of Hague Convention IV requires the destruction to be "imperatively demanded by the necessities of war", however, no adequate definition is provided, so a less restrictive interpretation may allow the term to be twisted into the required direction allowing acts not militarily necessary. It is also important whether we assess one particular situation involving environment destruction or longer term military plans including the possibility of detrimental environmental effects. If the latter idea prevails, the ability to justify destruction can be seriously undermined.<sup>45</sup> As Schmitt puts it, "the degree of military advantage ...

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<sup>40</sup> See for example the Trial Chamber Decision of the International Criminal Tribunal for the Former Yugoslavia on 8 March 1996 issuing an international arrest warrant against Milan Martić (IT-95-11-R61), p. 5, Para 13 and Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 257, Para 78.

<sup>41</sup> The International Court of Justice referred to it as "an effective means of addressing the rapid evolution of military technology." Nuclear Weapons 1996, p. 257, Para 78.

<sup>42</sup> See Nobuo Hayashi, Military Necessity as Normative Indifference, *Georgetown Journal of International Law*, Vol. 44, 2013, pp. 675-782.

<sup>43</sup> "... [i]n the view of the High Contracting Parties, these [i]n provisions ... [s]o far as military necessities permit, are destined to serve as general rules of conduct for belligerents in their relations with each other and with population ..."

<sup>44</sup> "... [t]hese provisions ... [a]s far as military requirements permit, are intended to serve as a general rule of conduct for the belligerents and their mutual relations and in their relation with the inhabitants ..."

<sup>45</sup> Rex Zedalis, Burning of the Kuwaiti Oilfields and the Laws of War, *Vanderbilt Journal of Transnational Law*, Vol. 24, 1991, p. 714.

[i]nfluences its normative admissibility.”<sup>46</sup> This author shares Luban’s opinion<sup>47</sup> that the licensing function of IHL is not as fundamental as the constraining function. Hague Convention II and IV are still in force and Green underlines the fact that the rules embodied in these documents have been adopted and adjusted to military requirements; therefore, “the mere plea of military necessity ... [i]s not sufficient to evade compliance with the laws of war.”<sup>48</sup>

Another example for regulating military necessity can be found in the London Charter<sup>49</sup> establishing the Nuremberg Tribunal and the judgment of the Nuremberg Military Tribunal in the *Hostage Case*<sup>50</sup> provides important references to the development of the concept. In the case, the United States prosecuted German military commanders charging the defendants with committing war crimes and crimes against humanity. Regarding General Rendulic the defence has invoked the concept of military necessity in order to justify the destruction caused by the retreating German 20th Mountain Army that followed the scorched earth policy in the Norwegian province of Finnmark destroying villages and isolated habitations. As a result of the trial a concept emerged (Rendulic Rule) according to which, situations, circumstances and evidence have to be judged as they appeared to the defendant at the time (the question being whether the defendant could “honestly conclude that urgent military necessity warranted the decision made”). The judges opined that based on the evidence available at the time, the General rightly assumed possible Russian attacks and ordered “to carry out the ‘scorched earth’ policy in Finnmark as a precautionary measure against an attack by superior forces”<sup>51</sup> and therefore the defendant was found not guilty on this charge.

The Geneva Conventions of 1949 hardly contain any reference to the principle of military necessity for the rules regarding the conduct of hostilities were considered part of customary IHL, and therefore the Conventions have not encompassed these apart from a few references. Article 53 of the Fourth Geneva Convention Relative to the Protection of Civilian Persons however provides that “any destruction by the Occupying Power of real or personal property belonging ... [t]o private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.” The scope of Article is limited however to prohibited destruction in occupied territories.<sup>52</sup> In cases where there is no occupation and parties to the conflict have not ratified Additional Protocol I,<sup>53</sup> Article 23 (g) of Hague Convention (IV)

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<sup>46</sup> Peter J. Richards & Michael N. Schmitt, *Mars Meets Mother Nature: Protecting the Environment during Armed Conflict*, *Stetson Law Review*, Vol. 28, 1999, p. 1074.

<sup>47</sup> David Luban, *Military Necessity and the Cultures of Military Law*, *Leiden Journal of International Law*, Vol. 26, 2013, p. 320.

<sup>48</sup> Leslie C. Green, *The Contemporary Law of Armed Conflict*, 3rd edn., Juris Publishing, Manchester University Press, Manchester 2008, p. 147.

<sup>49</sup> According to Art. 6 (b) of the London Charter of the International Military Tribunal, “the following acts ... [a]re crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(b) war crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to ... [p]lunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.”

<sup>50</sup> *Hostage Case, United States v List (Trial Judgment)* (Nuremberg Military Tribunal, Trial Chamber, Case No 7, 19 February 1948) 8 LRTWC 34 in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Volume XI/2*.

<sup>51</sup> *Hostage Case, United States v List (Trial Judgment)* (Nuremberg Military Tribunal, Trial Chamber, Case No 7, 19 February 1948) 8 LRTWC 34 in *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Volume VIII, p. 69*.

<sup>52</sup> According to Art. 42 of Hague Convention (IV), “territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.”

<sup>53</sup> Art. 55 (1) sets forth that “care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or

will be applicable as it was in case of the extensive environmental damage<sup>54</sup> caused by Iraq in Kuwait during the Gulf War.

Military necessity is problematic from another aspect too as the identification and determination of the parties' intent is always context sensitive and can be decided on the basis of causality and by eliminating any unnecessary and wanton destruction. Clarifying whether environment destruction was crucial to secure any military advantage and balancing between military necessity and environmental concerns will be always challenging, unless a universally acknowledged interpretation of these terms will be accepted. As the ICJ put it in the *Nuclear Weapons Advisory Opinion*, "states must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality."<sup>55</sup>

### 2.2.3. The Principle of Humanity

The principle protecting indirectly the natural environment in times of armed conflict is the principle of humanity "prohibiting inhumane methods and means of warfare, and usually applied to human suffering – may conceptually offer an avenue for expanding protection of the environment."<sup>56</sup> The thought of decency, charity and the goodwill to alleviate suffering has been present in the humanitarian law for a long time. It refers to the attitude of humanity towards the defeated by regarding them as part of humankind and equals to the victors, which shall protect life, integrity, health and dignity by protecting the vanquished from inherently wrongful acts. After the horrors of the Second World War, the allied powers brought the International Military Tribunal to life, which was rendered to try and punish the major war criminals of the European Axis among others for crimes against humanity.<sup>57</sup> According to Article 6 (c) of the Charter of the Military Tribunal,<sup>58</sup> "the Tribunal shall have power to try and punish persons, who committed ... [c]rimes against humanity: ... [o]ther inhuman acts committed against any civilian population before or during the war [...], whether or not in violation of the domestic law of the country where perpetrated." The enumeration of Article 6 ("other inhuman acts") is open-ended leaving

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may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population."

<sup>54</sup> Destruction of oil wells, oil spills in the Gulf, pollution to the air, the forming of hundreds of oil lakes, disruption of the desert surface, damaging vegetation, destruction of livestock animals, etc. For more on the subject see O. Linden & A. Jerneloef & J. Egerup, *The Environmental Impacts of the Gulf War 1991*, IIASA Interim Report April, 2004 <http://pure.iiasa.ac.at/7427/1/IR-04-019.pdf> (25 August 2017) and William M. Arkin & Damian Durrant & Marianne Cherni, *On Impact, Modern Warfare and the Environment, A Case Study of the Gulf War*, Greenpeace Study, 1991 <http://www.greenpeace.org/international/Global/international/planet-2/report/1991/6/on-impact-modern-warfare-and.pdf> (25 August 2017).

<sup>55</sup> *Nuclear Weapons* 1996, p. 242, Para 30.

<sup>56</sup> Michael N. Schmitt, *War and the Environment: Fault Lines in the Prescriptive Landscape*, in J. E. Austin & C. E. Bruch (Eds.), *The Environmental Consequences of War; Legal, Economic and Scientific Perspectives*, Cambridge University Press, Cambridge, 2000, p. 101.

<sup>57</sup> Crimes inseparable from the principle of humanity.

<sup>58</sup> 1945 Charter of the International Military Tribunal (Nuremberg).

space for including acts which, apart from injuring human life, health and dignity,<sup>59</sup> can inflict damage upon the environment too, by poisoning water, destroying crops and food,<sup>60</sup> setting oil ablaze.

While alleviating human suffering, the principle of humanity can apparently promote the expanded protection for the environment, too. One of the most significant contemporary definitions of crimes against humanity is found in the Rome Statute. Its Article 7 renders punishable “(k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health” and according to Green, “once a charge of crimes against humanity is lodged there is no real reason to bring any other, since such a charge may be regarded as ‘wholesale’ in character, embracing within itself all other breaches of the law of armed conflict.”<sup>61</sup> All things considered, the principle of humanity, as opposed to its name, might promote the development of the *ecocentric* concept and it can be conveniently expanded to the protection of certain elements of the natural environment. It may also prove to be a possible avenue for “green” Human Rights (*e.g.* the right to healthy environment or right to natural resources) to flow into IHL.

#### 2.2.4. The Principle of Proportionality

The customary principle of proportionality refers to the undissolvable balancing between two competing interests: military advantage and environmental damage. The concept of proportionality is not mentioned *expressis verbis* in the Geneva Conventions and in Additional Protocol I, there is a clear reference however in Article 51 (5) (b) of the Protocol to the requirement of proportionality<sup>62</sup> and it is also regulated among the war crimes in Article 8(2)(b)(iv) of the Rome Statute.<sup>63</sup> Partly because of the limited number of provisions and partly because of the extensive scope of possible interpretations of the expressions used in the Protocol and in the Statute, the practical application of this principle may be demanding. It requires the finding of an implementable, viable and rational balance between military advantage and environmental damage.

Any military advantage anticipated shall be calculated corresponding to the attack in question and not to the military operation or the armed conflict as a whole by the reasonable military commander in charge, on the grounds of the information available when making any decision on such attack. Since the text refers to the military advantage *anticipated*, what matters is the believed probability of the outcome and not the actual effect. No military action shall ensue collateral damage “disproportionate to the anticipated military advantage likely to result.”<sup>64</sup> The military advantage shall be concrete and direct,

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<sup>59</sup> According to Para 28 of the Sentencing Judgement of the ICTY in the Prosecutor v Drazen Erdemović case (Judgement of 29 November 1996, IT-96-22-T), “crimes against humanity are serious acts of violence which harm human beings by striking what is most essential to them: their life, liberty, physical welfare, health and dignity. They are inhumane acts which by their extent and gravity go beyond the limits tolerable to the international community, which must perforce demand their punishment.”

<http://www.unhcr.org/refworld/docid/402765a27.html> (25 August 2017).

<sup>60</sup> E.g. Arts. 54 and 56 of Additional Protocol I.

<sup>61</sup> Leslie C. Green: *The Contemporary Law of Armed Conflict*, 3rd edn., Juris Publishing, Manchester University Press, Manchester, 2008, p. 362.

<sup>62</sup> “An attack which may be expected to cause ... [d]amage to civilian objects ... [w]hich would be excessive in relation to the concrete and direct military advantage anticipated.”

<sup>63</sup> “For the purpose of this Statute, ‘war crimes’ means [...] (b) other serious violations of the laws and customs applicable in international armed conflict ... [n]amely, any of the following acts: (iv) intentionally launching an attack in the knowledge that such attack will cause ... [w]idespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.”

<sup>64</sup> Michael N. Schmitt, *War and the Environment: Fault Lines in the Prescriptive Landscape*, in J. E. Austin & C. E. Bruch (Eds.), *The Environmental Consequences of War; Legal, Economic and Scientific Perspectives*, Cambridge University Press, Cambridge, 2000, p. 103.

ruling out the opportunity to aim at indirect, potential, immeasurable or indeterminate military advantage and the disproportion in question should be clearly perceptible (the phrasing of the Statute “clearly excessive” discards any excessiveness not obvious for the military commander in charge). It has to be recognized though that even when proportionality is observed, “an attack against a military objective is apt to produce lawful collateral damage to the environment.”<sup>65</sup>

However, how can one measure the devastation caused for example by setting oil rigs ablaze, spilling crude oil into the Persian Gulf and into the desert in Kuwait on a military scale? Putting it differently, how can a definite military advantage be expressed in terms of environmental damage? It definitely requires our reasonable military commander to think, analyse and balance rationally and sensibly when deciding on the fine line separating proportionate and disproportionate damage as “the very subjectivity of value renders agreement on specific balances highly elusive.”<sup>66</sup> The most important factors to be considered are the civilian nature of natural environment<sup>67</sup> and the possible extent of foreseeability regarding collateral damage.<sup>68</sup> Again, Schmitt interprets this question as an antagonism between anthropocentrism with its emphasis on (military) utility and ecocentrism advocating the intrinsic values of nature,<sup>69</sup> which, though noble as it is, will probably not be resolved satisfactorily in the near future and therefore will leave space for competing interests and interpretations.

### 2.2.5. The Principle of Unnecessary Suffering

The most important rules for the methods and means of warfare are set in Part III, Section I of the Additional Protocol I. According to the basic rules,<sup>70</sup> parties do not have an unlimited choice of methods and means of warfare and cannot employ weapons, methods and means that are of a nature to cause superfluous injury or unnecessary suffering.<sup>71</sup> This rule appeared first in the 1868 St Petersburg Declaration<sup>72</sup> and was later reiterated in Hague Convention IV,<sup>73</sup> according to which it is especially forbidden to employ arms, projectiles, or material calculated to cause unnecessary suffering. Long time passed by until the codifiers decided to revive this rule in order to reconfirm its relevance. As a result, the Convention on Certain Conventional Weapons (CCW) serves as an umbrella convention<sup>74</sup> in order to ban or restrict the use of specific weapons that are believed to cause unnecessary suffering to combatants or to affect civilians, because of their indiscriminate feature; the concept of the unnecessary

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<sup>65</sup> Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, 3<sup>rd</sup> edn., Cambridge University Press, Cambridge 2016, p. 231.

<sup>66</sup> Michael N. Schmitt, *The Environmental Law of War: An Invitation to Critical Reexamination*, *Military Law and Law of War Review*, Vol. 36, No. 1 and 2, 1997, p. 23.

<sup>67</sup> I.e. it is considered a military object.

<sup>68</sup> I.e. how far shall the commander look ahead.

<sup>69</sup> Michael N. Schmitt, *Green War, An Assessment of the Environmental Law of International Armed Conflict*, *Yale Journal of International Law*, Vol. 22, No. 1, 1997, p. 56.

<sup>70</sup> Art. 35 (1)-(3).

<sup>71</sup> Art. 35 (2).

<sup>72</sup> 1868 Declaration Renouncing the Use, in Time of War, of certain Explosive Projectiles.

<sup>73</sup> According to Arts. 22 and 23 (e) in Section II of the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, “the right of belligerents to adopt means of injuring the enemy is not unlimited” and it is “especially forbidden to employ arms, projectiles, or material calculated to cause unnecessary suffering.”

<sup>74</sup> 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effect; its five Protocols address non-detectable fragments; mines, booby-traps and other devices; incendiary weapons; blinding laser weapons and explosive remnants of war.

suffering shall also extend to unnecessary destruction of property and thus to damage to the environment (US Joint Doctrine for Targeting).<sup>75</sup>

According to Rule 70 of the Customary International Humanitarian Law Study by the International Committee of Red Cross (ICRC),<sup>76</sup> the use of means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering is prohibited. Adopting this rule as a norm of customary International Law was intrinsically the confirmation of what has already been set forth in many instruments (St Petersburg Declaration, Hague Convention IV, Additional Protocol I, CCW), and supported by the International Court of Justice as a “cardinal principle of International Humanitarian Law”<sup>77</sup> introducing unnecessary suffering as a “harm greater than that unavoidable to achieve legitimate military objectives”. If an anticipated use of certain weapon would not meet the requirements of IHL, “a threat to engage in such use would also be contrary to that law”.<sup>78</sup> Though the prohibition of the employment of such weapons is given voice in the above instruments, it might not be easy to invoke this principle once a weapon is integrated in the weaponry, as states are not under the obligation to decide on an already assessed and approved weapon’s further use according to Article 36 of the Additional Protocol I.

### 2.2.6. The Principle of Precaution

Article 57 (1) of Additional Protocol I states that “in the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.” In case of deciding on an attack, all “feasible precaution”<sup>79</sup> should be taken in the choice of means and methods of attack in order to avoid or minimize incidental damage to civilian objects and no attack should be launched<sup>80</sup> in case it may be expected to cause incidental damage to civilian objects, which would be excessive in relation to the concrete and direct military advantage anticipated.<sup>81</sup> Although the environment is not mentioned explicitly in Article 57 and 58 (precautions against the effects of the attack), it is considered being a civilian object<sup>82</sup> and therefore the protection afforded by Article 57 and 58 extends to it.

## 2.3. Contemporary Targeting and Protection of the Environment

When engaging in any military operation with the potential of causing environmental damage either intentionally or incidentally, prevention and mitigation of adverse effects is required not only by various

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<sup>75</sup> A-1 Appendix A, US Joint Doctrine for Targeting, 2002 <https://www.hsdl.org/?abstract&did=472330> (25 August 2017).

<sup>76</sup> Jean-Marie Henckaerts & Louise Doswald-Beck, Customary International Humanitarian Law, Volume I: Rules, International Committee of Red Cross, Cambridge University Press, Cambridge 2007.

<sup>77</sup> Nuclear Weapons 1996, p. 257, Para 78.

<sup>78</sup> Nuclear Weapons 1996, p. 257, Para 78.

<sup>79</sup> According to Art. 3 (10) of Protocol (II) on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices annexed to the 1980 Convention on Certain Conventional Weapons, feasible precautions cover “precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.”

<sup>80</sup> Attacks may be cancelled or suspended in case excessive damage is expected in relation to the military advantage.

<sup>81</sup> Arts. 57 (2) a) ii)-iii) and 57 (2) b) of Additional Protocol I.

<sup>82</sup> According to Art. 52 of Additional Protocol I, “1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.

2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”

sources of International Humanitarian Law, but also by the values attached to the natural environment. The worth assigned to nature eventually depends on not only the legal provision and customary law but also on the geographic location where the operation (conflict) takes place, the context (objectives of the operation), as well as on the mind set of those in command. According to the contemporary regulations of targeting, lawful attacks against military objectives shall be limited to those targets which effectively contribute to a military action “or, at least, be about to do so,”<sup>83</sup> and whose destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.<sup>84</sup> Speculative, indistinctive or potential advantages are ruled out by the definition. As Schmitt argues, the phrase “civilian object” can be interpreted “as including all components of the environment - land, air, flora, fauna, atmosphere, high seas, etc. - that do not present an advantage (such as cover) to a military operation.”<sup>85</sup>

In order to ensure a high regard for the environment, the Parties to the armed conflict shall at all times distinguish between civilian objects and military objectives, and shall target only military objectives.<sup>86</sup> Indiscriminate attacks are prohibited by Article 51 (4) of Additional Protocol I, and even military objectives cannot be attacked if such attack “may be expected to cause incidental damage to civilian objects, which would be excessive in relation to the concrete and direct military advantage anticipated.”<sup>87</sup> Additional Protocol I holds further powerful constraints regarding targeting: according to Article 57, everything feasible shall be done by the planners and decision makers in order to verify that the objectives to be attacked are military objectives and that their attack is not prohibited by special protection and evade or at least minimise incidental damage to civilian objects; military commanders shall avoid launching any attacks which may be expected to cause collateral damage to civilian objects (including the natural environment) which would be excessive relative to the concrete and direct military advantage anticipated.<sup>88</sup> Parties shall take all necessary precautions to protect the natural environment against the adverse effects of military operations,<sup>89</sup> and if the attack is inescapable, whenever a choice is possible between more military objectives, on the basis of the available information, the objective expected to cause the least danger to the environment must be selected.<sup>90</sup>

The Rome Statute also renders the extensive destruction of property not justified by military necessity and carried out unlawfully and wantonly, to be a war crime,<sup>91</sup> alongside with the deliberate conduct of any attack against civilian objects<sup>92</sup> and the intentional launching of any attack in the knowledge that it will cause widespread, long-term and severe damage to the environment – clearly excessive in relation to the concrete and direct overall military advantage anticipated.<sup>93</sup> According to the Cassese, the expression

<sup>83</sup> Marco Roscini, *Protection of the Natural Environment in Time of Armed Conflict*, unproofed version, 2009, p 16 [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1351888](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1351888) (25 August 2017).

<sup>84</sup> Art. 52 (2) of Additional Protocol I.

<sup>85</sup> Schmitt 2000, p. 97.

<sup>86</sup> Art. 48 of Additional Protocol I.

<sup>87</sup> *Ibid* Art. 51 (5) (b).

<sup>88</sup> *Ibid* Art. 57 (2) (a) (i)-(iii).

<sup>89</sup> *Ibid* Art. 58 (c).

<sup>90</sup> *Ibid* Art. 57 (3).

<sup>91</sup> Art. 8 (2) (a) (iv).

<sup>92</sup> Art. 8 (2) (b) (ii) “For the purpose of this Statute, ‘war crimes’ means: ... [O]ther serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: ... [I]ntentionally directing attacks against civilian objects, that is, objects which are not military objectives...”

<sup>93</sup> Art. 8 (2) (b) (iv) “For the purpose of this Statute, ‘war crimes’ means: ... [O]ther serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: ... [I]ntentionally launching an attack in the knowledge that such attack will cause incidental loss of life or



within the established framework of international law is “intended to convey the notion that for the authors of the Statute the various classes of war crimes specified in Article 8 (2) (b) and (e) are already part of the established framework of international law.”<sup>94</sup> This latter, already mentioned rule of proportionality (“clearly excessive”) sets an extremely high threshold of application requiring the decision maker to continuously balance military and humanitarian values when developing, validating and nominating targets. The responsibility of a reasonable military commander for decision-making extends to the anticipated (collateral) damage caused and to the implications of inflicting damage. According to Rogers, the responsibilities in attack include (1) the evaluation of the importance of targets and the urgency of situation, (2) the use of intelligence, (3) the choice of weapon, (4) the conditions affecting the accuracy of targeting, (5) the factors affecting incidental loss or damage and (6) the risk to which a commander’s own troops are exposed.<sup>95</sup> Nevertheless, the accuracy these factors can be weakened by human omission, flawed target intelligence, adverse weather conditions or technical defaults despite the technologic advance and research in order to improve the accuracy in targeting.

Apart from Additional Protocol I and the ICC Statute, other soft and hard law instruments chose to recognise and reaffirm the principles and rules of contemporary targeting, too (e.g. the already mentioned 1994 ICRC/UN GA Guidelines for Military Manuals and Instructions<sup>96</sup> the 1978 ICRC Fundamental Rules of the International Humanitarian Law Applicable in Armed Conflicts<sup>97</sup> or the 2002 US Joint Doctrine for Targeting). The Joint Doctrine gives a lot of consideration to those rules of armed conflict that impact targeting decisions (basic principles of law of the armed conflict, rules of engagement, general restrictions, precautions in attack, separation of military activities and environmental considerations). It acknowledges the potential of joint operations to adversely affect natural resources and recommends action to develop plans to prevent or mitigate these adverse effects.<sup>98</sup> It recognises that it is lawful to cause collateral damage to the natural environment during an attack on a legitimate military target, although the military commander in charge has an obligation to avoid needless harm to the environment “to the extent that it is practical to do so consistent with mission accomplishment.”<sup>99</sup> Any damage or destruction to the environment not necessitated by military necessity and carried out wantonly is prohibited,<sup>100</sup> but on the other hand, it is long accepted that unintentional collateral damage on the environment does not make an attack unlawful;<sup>101</sup> therefore, environmental considerations shall be taken into account at all times (according to Article 35 (3) even against human considerations).

Military objectives, national security and interests have long been balanced against law, ethics and eventually against environmental protection by the decision makers and it is difficult to change human behaviour when it comes to execution in an armed conflict. One way to turn military commanders towards more thorough environmental considerations is making liability and responsibility for breaching

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injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated...”

<sup>94</sup> Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections*, *European Journal of International Law*, Vol. 10, 1999, p. 152.

<sup>95</sup> A. P. V. Rogers: *Zero-casualty warfare*, *International Review of the Red Cross*, No. 837, 2000, pp. 165-181.

<sup>96</sup> The instrument reconfirms the application of the principle of distinction (II/4), the principle of proportionality (II/4), the Martens Clause (II/7) and the general prohibition of destroying civilian objects (III/9).

<sup>97</sup> The Fundamental Rules restates that attacks shall be directed solely against military objectives (7).

<sup>98</sup> Joint Doctrine 2002, A-5, Appendix A.

<sup>99</sup> *Ibid.*

<sup>100</sup> *Ibid.*

<sup>101</sup> See, generally Thilo Marauhn, *Environmental Damage in Times of Armed Conflict – Not „Really” a Matter of Criminal Responsibility?*, *International Review of the Red Cross*, No. 840, 2000, pp. 1029-1036.

the regulations inescapable and setting compensation for the destruction cause so high that it would turn any environmental degradation/damage a costly mistake for the parties to the conflict.

## 2.4. The ICRC's Customary Rules Study

International Humanitarian Law went through an immense development in the twentieth century. Notwithstanding the progress (e.g. Geneva Conventions or Additional Protocols), the rules of Customary International Humanitarian Law (CIHL) developed by the ICRC should not be overlooked as they not only facilitate the interpretation of the applicable law, but also guide drafters and policy makers in the course of legislation and application of law. They are the legal and moral foundations of IHL, universal values to which military conduct is measured. The 26<sup>th</sup> International Conference of the Red Cross had mandated the ICRC to prepare a report on the customary rules of IHL. As a result of the work, a comprehensive study had been completed and published in 2005 (Customary International Humanitarian Law Volume I Rules).<sup>102</sup> Part II of the study deals with specifically protected persons and objects and three rules within Chapter 14 concern environmental protection during armed conflicts.

*“Rule 43. The general principles on the conduct of hostilities apply to the natural environment:*

*A. No part of the natural environment may be attacked, unless it is a military objective.*

*B. Destruction of any part of the natural environment is prohibited, unless required by imperative military necessity.*

*C. Launching an attack against a military objective which may be expected to cause incidental damage to the environment which would be excessive in relation to the concrete and direct military advantage anticipated is prohibited.”*

Rule 43 clearly reflects the principle of distinction (between military and civilian objects) and the requirement of military necessity as well as the principle of proportionality, i.e. according to the drafters, the general principles of IHL are applicable in case of protecting the environmental (as a civilian object). The protection accorded by Rule 43 A is not absolute however, as it logically follows from its wording that natural environment may be subject of attack if it is to be considered as a military objective.<sup>103</sup> It seems therefore that ICRC chose to insert a rule that leaves it to the military commander (or personnel) to regard environment as a military object in case it contributes to the adverse party's military efforts and certain military advantage can be obtained from its destruction, and by this deciding not to afford protection to the environment by virtue of its inherent values, only as a civilian object. However, the protection accorded to the environment as a civilian object can be stripped rather easily. Rule 43 B offers an equally relative protection when it gives green light to environment destruction in case of imperative military necessity. Although “imperative military necessity” seems to imply extreme cases of necessity, the term “imperative” is still rather intangible. Rule 43 C is similarly permissive, prohibiting only incidental damage to the environment (excessive in relation to the military advantage) but it enables not excessive incidental damage as a result of an attack. Again, balancing between excessive and not excessive is subject to human judgment and decision. This author is of the opinion that the application of general principles (distinction, military necessity, and proportionality) similarly to any other civilian object, afford the natural environment merely a relative protection.

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<sup>102</sup> Jean-Marie Henckaerts & Louise Doswald-Beck, Customary International Humanitarian Law Volume I: Rules, Cambridge University Press, Cambridge 2009 <https://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf> (26 August 2017).

<sup>103</sup> According to Art. 52 (2) of Additional Protocol I, these include objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction offers a definite military advantage.

*“Rule 44. Methods and means of warfare must be employed with due regard to the protection and preservation of the natural environment. In the conduct of military operations, all feasible precautions must be taken to avoid, and in any event to minimise, incidental damage to the environment. Lack of scientific certainty as to the effects on the environment of certain military operations does not absolve a party to the conflict from taking such precautions.”*

The focus of Rule 44 is on the possible prevention of environmental damage and the necessity of precaution. Some contemporary writers suggest precaution to be considered as an emerging principle as opposed to those who regard it as already existing one.<sup>104</sup> Normally, the requirement of precaution as understood under IHL is not to be mixed with the precautionary principle as applied by International Environmental Law. Under IHL, (feasible) precaution requires measures to avoid damage to civilian objects (including the environment), while the rather ill-defined precautionary principle as understood by IEL in most interpretations means a requirement to prevent harm to the environment even if no compelling scientific evidence exists regarding the effect of certain actions. According to Gardiner,<sup>105</sup> the principle has three important components: “threat of harm, uncertainty of impact and causality, precautionary response”. Unlike the IHL principle, the precautionary principle as understood by IEL stands closer to protecting the environment as such rather than understanding environment as a mere civilian object as is under IHL. Rule 44 seems to wash together (or at least bring closer) the two notions, which in Bothe’s opinion “amounts to a revolution.”<sup>106</sup> According to the study, there is a practice that supports that “this environmental principle applies to armed conflict.”<sup>107</sup> The ICRC experts cite the *Nuclear Tests* case<sup>108</sup> and the *Nuclear Weapons* Advisory Opinion to support the above statement, yet, this author believes that the difference between the notions shall not be blurred, rather, the right approach would be to recognize the substantive overlap and apply the principle of IEL in armed conflict in as much as it is consistent with the applicable law of armed conflict. This means that the precautionary principle under IEL shall conform to and strengthen the applicable rules of IHL.<sup>109</sup>

*“Rule 45. The use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment is prohibited. Destruction of the natural environment may not be used as a weapon.”*

Rule 45 is the reiteration of Article 35 (3) and 55 (1) of Additional Protocol I. As the drafters of the study highlight it, now there is sufficient state practice to support that this prohibition obtained customary nature.<sup>110</sup> Unlike the rather lightweight protection offered by Rule 43, Rule 45 provides a robust, absolute prohibition with no opportunity to derogate. Rule 45 contains a clear and specific prohibition compared to the rather weak formulation of Rule 43 but it also raises certain concerns. Under certain degree of damage the principles of distinction, military necessity and proportionality may also

<sup>104</sup> Gary D. Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, 2nd edn., Cambridge University Press, Cambridge 2016, p. 308.

<sup>105</sup> Stephen M. Gardiner, *A Core Precautionary Principle*, *The Journal of Political Philosophy*, Vol. 14, No. 1, 2006, p. 36.

<sup>106</sup> Michael Bothe & Carl Bruch & Jordan Diamond & David Jensen, *International law protecting the environment during armed conflict: Gaps and opportunities*, *International Review of the Red Cross*, Vol. 92, No. 879, 2010, p. 575.

<sup>107</sup> Henckaerts & Doswald-Beck 2009, p. 150.

<sup>108</sup> Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in the *Nuclear Tests (New Zealand v France)* case, Order [1995] ICJ Rep 288.

<sup>109</sup> Including the following provisions of Additional Protocol I: Basic Rules in Methods and Means of Warfare (Article 35), New Weapons (Article 36), Basic Rules in General Protection Against Effects of Hostilities (Article 48), Protection of civilian population (Article 51), General protection of civilian objects (Article 52), Protection of objects indispensable to the survival of the civilian population (Article 54), Protection of the natural environment (Article 55), Protection of works and installations containing dangerous forces (Article 56), Precautions in attack (Article 57), Precautions against the effects of attacks (Article 58).

<sup>110</sup> Henckaerts & Doswald-Beck 2009, p. 152.

be taken into account, but over the incredibly high (impractical and almost unfulfillable) threshold set by the cumulative criteria (widespread, long-term and severe damage) no such loophole (gap) is offered.

The second part of Rule 45 deals with the destruction of environment used as a weapon. The rule resonates to the protection offered by the ENMOD Convention<sup>111</sup> but its phrasing is more general; instead of deliberate environmental modification techniques, it refers to the use of environment destruction as a weapon. It does not include any requirement as to the possible effects, but it is rather a benefit than a disadvantage, as the categorical prohibition in the rule is not weakened by further criteria.<sup>112</sup>

### 3. United Nations Work Program

In 2013, the International Law Commission (ILC) resolved to add the subject of environment protection in relation to armed conflicts to its work programme.<sup>113</sup> The first concerning report<sup>114</sup> provided an overview of the environmental values and principles applicable in peacetime. The second report identified the existing principles and rules of armed conflict relevant to environment protection.<sup>115</sup> The third report ascertained the rules that are relevant to post-conflict situations.<sup>116</sup>

The ILC second report was adopted with the aim of identifying the existing rules of armed conflict directly relevant to environmental protection. When enumerating the principles applicable to armed conflict, the report reflects an important development: apart from the usual reference to the principle of distinction, proportionality and military necessity, it also mentions the precaution in attack as one of the “most fundamental principles of the law of armed conflict.”<sup>117</sup> Annex I of the Report proposed draft principles in order to enhance environment protection and minimize collateral damage to the environment during conflicts. The principles reconfirm the application of fundamental principles of IHL (Principle 2). It is also expressed that the natural environment is of civilian nature and may not be object of an attack (Principle 1). Environmental considerations shall be taken into account when assessing what is necessary and proportionate in pursuing lawful military objectives (Principle 3). Attack against the natural environment by way of reprisal is also prohibited (Principle 4). Finally, the Commission suggest for states to designate areas of major ecological importance as demilitarized zones at least at the outset of an armed conflict (Principle 5).

### 4. Nato Activities

Let us now turn our attention briefly to how the already mentioned customary principles have been translated into the language of North Atlantic Treaty Organization (NATO) documents regulating

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<sup>111</sup> 1976 Convention on the prohibition of military or any hostile use of environmental modification techniques.

<sup>112</sup> Art. I (1) of the ENMOD Convention established a much lower and realistic threshold, according to which “each State Party to this Convention undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, longlasting or severe effects as the means of destruction, damage or injury to any other State Party.”

<sup>113</sup> Summaries of the Work of the International Law Commission, 25 August 2017  
[http://legal.un.org/ilc/summaries/8\\_7.shtml](http://legal.un.org/ilc/summaries/8_7.shtml).

<sup>114</sup> A/CN.4/674 ILC Preliminary report on the protection of the environment in relation to armed conflicts, 30 May 2014.

<sup>115</sup> A/CN.4/685 ILC Second report on the protection of environment in relation to armed conflicts, 28 May 2015.

<sup>116</sup> A/CN.4/700 ILC Third report on the protection of environment in relation to armed conflicts, 3 June 2016.

<sup>117</sup> Second report 2015, p. 47.

activities that may have consequences to the natural environment. This can provide a useful example of how these principles work in the hands of nations, military authorities, and commanders.

Whether carrying out a specific mission or a military training, during implementation NATO and the troop contributing nations share a common responsibility with regards to environment protection, i.e. both NATO and its member states should attempt at eliminating or at least reduction the harmful effects of military activities on the natural environment. In order to protect the environment, NATO developed a number of standards and doctrines. According to Kustrová,<sup>118</sup> environment protection in NATO serves enhanced force protection, supports operations and saves money (*e.g.* on remediation or litigation).

In the net of NATO working groups contributing to the development of environmental policies and guidelines, the Environmental Protection Working Group (EPWG) plays the most important role. By the development standardization documents, guidelines and best practices, in the implementation of operation, it focuses on lessening the possible detrimental effects of military activities on the natural environment. The EPWG operates under the Military Committee Joint Standardization Board that reports to the Military Committee, which in turn reports to the North Atlantic Council (NAC).

The Military Committee's MC 469 NATO Military Principles and Policies for Environmental Protection document of 30 June 2003 requires military commanders to respect certain environmental principles during NATO-led activities. The document was updated (MC 469/1) in 2011<sup>119</sup> with the aim of facilitating the integration of environmental protection into NATO-led military activities consistently with operational imperatives. The updated document details the responsibilities of military commanders regarding environmental protection during the execution of military activities and acknowledges that harmonization of environmental principles and policies is needed for all NATO-led military activities. In order to reduce the impact on the natural environment, NATO commanders are to apply "best practicable and feasible environmental protection measures."<sup>120</sup> The document provides a dynamic protection by continuous situational awareness, coordination, information exchange and mission development. According to the document, military commanders shall respect inter alia the following principles during NATO-led activities:<sup>121</sup>

- Host Nation law: application of Host Nation law (in case there is no concerning Host Nation environmental law, theatre agreed environmental law protection standards apply)
- Responsibility: NATO and sending states" collective responsibility to protect the environment with each nation ultimately responsible for the actions of its own forces
- Authority: NATO commanders to establish mandatory environmental protection procedures
- Coordination between NATO military authorities, host nations and sending nation regarding environment protection
- Information Exchange between NATO military authorities, host nations and sending nations regarding environmental protection procedures, standards, concerns and agreements

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<sup>118</sup> Milota Kustrová, *The Legislative Background of Environmental Security During Military Activities and Armed Conflicts*, *Hadměrnök*, Vol. 9, No. 4, 2014, p. 117.

<sup>119</sup> [www.nato.int/cps/en/natohq/topics\\_91048.htm](http://www.nato.int/cps/en/natohq/topics_91048.htm) (25 August 2017).

<sup>120</sup> *Ibid.*

<sup>121</sup> NATO LEGAL DESKBOOK, 2nd edn., 2010, pp. 313-314 <https://publicintelligence.net/nato-legal-deskbook/> (25 August 2017).

- Transparency: informing host nation and the public of environmental damage and environmental protection measures
- Mission Development: as missions develop, regularly reviewing and updating environmental protection procedures and standards
- Environmental Expertise: NATO commanders' access to environmental protection expert advice and support

The adoption of MC 469 was followed by and complemented with a number NATO Standardization Agreements (STANAG) and Allied Joint Environmental Protection Publications (AJEPP) dealing with the same subject. These include but are not limited to the following documents which aim at specifying the principles set by MC 469:

- STANAG 2581 Environmental Protection Standards and Norms for Military Compounds in NATO Operations (AJEPP-1)
- STANAG 2582 Environmental Protection Best Practices and Standards for Military Camps in NATO-led Military Activities (AJEPP-2)
- STANAG 2583 Environmental Management System in NATO Operations (AJEPP-3)
- STANAG 7141 Joint NATO Doctrine for Environmental Protection during NATO-led Military Activities (AJEPP-4)

STANAG 7141<sup>122</sup> allows NATO “to operate effectively and efficiently together with partner nations as well as non-NATO nations on environmental protection functions during NATO led military activities.”<sup>123</sup> NATO commanders have to be aware how NATO-led military activities affect the environment in order to be able to take all reasonably achievable measures to protect the environment.<sup>124</sup> The STANAG also provides environmental planning guidelines for military activities in order to effectively integrate environmental considerations into military activities (e.g. identifying operational activities with a potential impact on the environment, feasible mitigation measures, pollution prevention or operational limits imposed by applicable environmental regulations).<sup>125</sup> In order to balance environmental protection with mission objectives, determining the elements of environmental risk management framework is of key importance. These elements include the Commander's guidance on environment protection, developing an environmental plan as part of the operations plan, assigning responsibilities and resources for environmental protection, periodic checking and taking corrective actions, and reporting the lessons learnt after action review.<sup>126</sup>

## 5. Conclusions and Future Prospects

What sort of conclusions and future prospects can be drawn from this short overview of shortcomings and challenges? Apparently, the importance of environment protection in peacetime and during armed

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<sup>122</sup> NATO Standardization Agency (NSA) STANAG 7141, Joint NATO Doctrine for Environmental protection during NATO-led Military Activities, Edition 6, 15 May 2014, NSA(JOINT)0603(2014)EP/7141 (AJEPP-4) [nso.nato.int/nso/zPublic/ap/AJEPP-4%20EDA%20V1%20E.pdf](http://nso.nato.int/nso/zPublic/ap/AJEPP-4%20EDA%20V1%20E.pdf) (25 August 2017).

<sup>123</sup> STANAG 7141 2014, p. 1.

<sup>124</sup> *Ibid* p 1-1.

<sup>125</sup> *Ibid* p 2-1.

<sup>126</sup> *Ibid* p 3-1 and 3-2.

conflicts becomes even more visible once looked at through the standards conveyed not only by International Humanitarian Law, but also by the generally accepted Human Rights. Among others, the Universal Declaration of Human Rights of 10 December 1948 adopted by the United Nations General Assembly confirms everyone's right to life (Article 3) and to "a standard of living adequate for the health and well-being of himself and of his family..." (Article 25). But are these relevant human rights (including the right to a healthy environment) really respected in practice? Not quite so, as observed through the example of the military operations conducted by NATO air forces in Yugoslavia between March and June 1999, where studies and reports agreed that the operations "will have a lasting impact on the health and quality of life of the populations,"<sup>127</sup> seeing that ecosystems, water reserves, air, soil and vegetation were severely contaminated during the operations. According to the report of the Committee on the Environment, Regional Planning and Local Authorities, as a result of extensive bombings and air strikes, a dangerous level of toxins and contaminants (such as nitrogen-oxide, ammonium perchlorate, sulphur or mercury to name a few) remained compromising directly flora, fauna and human health. By means of the NATO warfare, farming, livestock-breeding and fishing were affected, and this large-scale environment destruction eventually resulted in diminishing biodiversity, disrupted reproduction and migration. If not a deliberate disregard of Articles 55,<sup>128</sup> 56<sup>129</sup> and 58<sup>130</sup> of Additional Protocol I, it certainly was at least *magna negligentia* on the side of NATO forces (decision makers) to disobey the relevant regulations of Additional Protocol I, which should have made a strong basis for NATO's responsibility and liability. In only a 78-day air campaign it became obvious and undeniable that the existing legal regime to prevent environment destruction is vague and inadequate, and therefore offers only an ostensible protection for the natural environment.

Though many scholars (including Postiglione<sup>131</sup> and Falk<sup>132</sup>) support the idea of a new draft convention with regards to environment protection in times of armed conflict, the intention of ecocide being the fifth international crime against peace before the ICC is premature; what shall be done instead is a wider and more persuasive dissemination of the environment-related standards of the present IHL regime, a more convincing promotion of accession (especially to Additional Protocol I) for those states that have not done it yet and the improvement of state practice – with the aim of intensifying the desire of states to comply, as well as making deviation costly and regrettable. The "new convention approach" is intertwined and competing with Polly Higgins' proposal on ecocide to be considered as the "extensive destruction, damage to or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent, that peaceful enjoyment by the inhabitants of that territory has been severely diminished."<sup>133</sup>

<sup>127</sup> Parliamentary Assembly, Council of Europe: Doc 8925 of 10 January 2001 on the Environmental Impact of the War in Yugoslavia on South-East Europe (Report of the Committee on the Environment, Regional Planning and Local Authorities), p. 1., <http://www.assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewHTML.asp?FileID=9143&lang=EN> (25 August 2017).

<sup>128</sup> Protection of the natural environment.

<sup>129</sup> Protection of works and installations containing dangerous forces.

<sup>130</sup> Precautions against the effects of attacks.

<sup>131</sup> Amedeo Postiglione, A More Efficient International Law on the Environment and Setting Up an International Court for the Environment Within the United Nations, *Environmental Law*, Vol. 20, 1990, pp. 321-328.

<sup>132</sup> Richard Falk, The Inadequacy of the Existing Legal Approach to Environmental Protection in Wartime, in J.E. Austin & C. E. Bruch (Eds.), *The Environmental Consequences of War, Legal, Economic and Scientific Perspectives*, Cambridge University Press, Cambridge, 2000, pp. 137-155.

<sup>133</sup> Juliette Jowit, British Campaigner urges UN to accept „ecocide” as international crime, *The Guardian*, 9 April 2010 <https://www.theguardian.com/environment/2010/apr/09/ecocide-crime-genocide-un-environmental-damage> (25 August 2017).

But let me return to the NATO air campaign again and underpin the mentioned insufficiency of existing provisions by one of the main findings of the Regional Environmental Center for Central and Eastern Europe prepared for the European Commission on the environmental impacts of the military activities during the Yugoslavia conflict, according to which, “ ... [t]here is no evidence of a large-scale ecological catastrophe, but pollution is very severe in the vicinity of targeted industrial complexes, such as Pancevo, Prahovo or Novi Sad, and many valuable ecosystems were disturbed.”<sup>134</sup> The question arises, if the environmental consequences of the NATO air campaign in 1999 or the Gulf War (1990-91) do not qualify because of the extremely high threshold of Additional Protocol I, then what does? What sort of unimaginable conflict and environmental catastrophe do we need to change our attitude and persuade decision makers to lower (or reconsider) the present standards? The solutions may include the change of state practice or a Fifth Geneva Convention on environment protection in armed conflicts.<sup>135</sup>

Luckily, IHL is open to the influence of legal principles of other fields of International Law. Through the principle of humanity or the Martens Clause, green rights and considerations can enter the domain of IHL and inspire both law-making and practice.

Apart from the moral unease, the inevitability of punishment and improvement of implementation, further attention shall be paid to those bearing the long-term environmental consequences of warfare, namely members of yet unborn generations. Environmental development is one of the three pillars of sustainable development, which is according to the landmark statement of the 1987 Brundtland Report,<sup>136</sup> a “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.” Reducing the risk of the natural environment being destroyed and degraded by human impact during armed conflict calls for an improved recognition and respect for the needs and wants of future generations - implying positive social, economic and political changes.

I believe we can all agree with Pachouri, who emphasised in his Nobel lecture given in 2007 that “... [n]ext to reasonable politics, learning is in our world the true credible alternative to force.”<sup>137</sup> Learning from our mistakes and doing our utmost in order to avoid environmental catastrophes is indeed in our and the future generations’ best interest. According to the Sanskrit phrase of Vasudhaiva Kutumbakam, “the whole universe is but one family”, and this short statement genuinely expresses and promotes nonviolent conflict resolution and peaceful coexistence between humans and every other organism on the planet. We should start seeing the appearance and continuous existence of environmental concerns in legal regimes, on political agendas and news headlines as a final wakeup call and attempt to prevent, mitigate and reverse the harm we have done to the environment in less than a second of the history of Earth.

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<sup>134</sup> Regional Environmental Center for Central and Eastern Europe: Assessment of the Environmental Impact of Military Activities during the Yugoslavia Conflict, Prepared for the European Commission DG-XI Environment, Nuclear Safety and Civil Protection, Preliminary Findings, 1999, p. 1 <http://www.reliefweb.int/library/documents/unepbalk1.html> (25 August 2017).

<sup>135</sup> Károly Vég, International environmental legal approaches of the Yugoslavian wars 1991-1999, “And who will desalt Carthage’s grounds?” Debreceni Jogi Műhely, Vol. 2, 1 April 2005 [http://www.debrecenijogimuhely.hu/archivum/1\\_2005/ki\\_sotalanitja\\_karthago\\_foldjeit/](http://www.debrecenijogimuhely.hu/archivum/1_2005/ki_sotalanitja_karthago_foldjeit/) (21 September 2017).

<sup>136</sup> World Commission on Environment and Development: Our Common Future, 4 August 1987 <http://www.un-documents.net/our-common-future.pdf> (25 August 2017).

<sup>137</sup> R. K. Pachauri (Chairman of the Intergovernmental Panel on Climate Change and Nobel Peace Prize winner in 2007), Nobel lecture, Oslo, 10 December 2007. [https://www.nobelprize.org/nobel\\_prizes/peace/laureates/2007/ipcc-lecture\\_en.html](https://www.nobelprize.org/nobel_prizes/peace/laureates/2007/ipcc-lecture_en.html) (25 August 2017).



# EU Migration Law Shaping International Migration Law in the Field of Expulsion of Aliens: The Empire Strikes Back?

Tamás Molnár

*Assistant professor, Corvinus University of Budapest*

*Since the Treaty of Maastricht, EU law has become more open to international law and engaged with it in different forms of interactions. Influence of EU law on universal law-making finds its way through different legal channels and techniques. The article thoroughly scrutinizes the impact of EU return acquis on the development of the international law governing the ‘expulsion of aliens’, which can be best analysed through the work of the UN International Law Commission on the expulsion of aliens (2004-2014). For the ILC’s approach, it has come a long way from the mere ignorance of EU law and the EU’s submissions by the special rapporteur in the early stages of the codification work until gradually taking into account major EU migration law concepts in ILC reports and in the draft articles. The 2014 ILC draft articles on the expulsion of aliens have finally been in many aspects inspired and influenced by EU law, especially the Return Directive (2008/115/EC). This short piece meticulously explores the inroads EU return law made in relation to the ILC work on the expulsion of aliens, by identifying and critically evaluating the tangible impact of EU law on the UN codification project.*

*Keywords: expulsion of aliens, interactions between EU law and international law, International Law Commission, Return Directive*

## 1. Prologue

As a result of the so-called “multi-level” or “multi-layered governance” (hereinafter: MLG),<sup>1</sup> international migration law (hereinafter: IML) divides into global norms and fragmented features, including regional regulatory frames. This study deals with the interactions of two functionally differentiated normative layers, the *supranational level* (European Union law) and the *universal level* (especially law-making within the United Nations) in a specific field of IML, namely the *expulsion of aliens*. Since the Treaty of Maastricht (1992), the law of the European Union (EU) became more open to international law and engaged with it in different forms of interactions. Looking at those interactions from the *inside out perspective*, one can witness an ever-increasing treaty-making activity of the Union<sup>2</sup>

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<sup>1</sup> Amongst scholarly works conceptualising MLG see e.g. L. Hooghe & G. Marks, *Types of Multi-Level Governance*, June 2002, *Cahiers européens de Sciences Po* 3; I. Bache & M. Flinders (eds), *Multi-Level Governance*, OUP, Oxford 2004; T. Conzelmann, *Towards a new concept of multi-level governance?*, University of Maastricht, MLG Atelier, 10 September 2008; Th. Cottier, *Multilayered Governance, Pluralism, and Moral Conflict*, 2009, 16 *Indiana Journal of Global Legal Studies* 647-679; S. Piattoni, *The Theory of Multi-level Governance: Conceptual, Empirical, and Normative Challenges*, OUP, Oxford 2010.

<sup>2</sup> See e.g. the figures brought by J-S Bergé, *Les interactions entre le droit international et européen – Approche du phénomène en trois étapes dans le contexte européen*, *Aequitas Virtual*, Publicación de la Facultad de Ciencias Jurídicas, Universidad del

(it is enough to look at the European External Action Service database on international treaties to which the Union is a party)<sup>3</sup> and the EU's various attempts to shape the international legal order. This is the dimension of exporting EU law to international law or influencing the creation of international law more generally.<sup>4</sup> The Lisbon Treaty gravened this external norm-generating approach into primary law, too. *Article 3(5) of the Treaty on European Union*<sup>5</sup> (TEU) stipulates that “[i]n its relations with the wider world, the Union shall [...] contribute [...] to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.” This obligation is then complemented by *Article 21(1) TEU* which sets forth as an objective that the “Union's action on the international scene shall be guided by [...] the principles which have inspired its own creation, [including the] respect for the principles of the United Nations Charter and international law.” What is more, in pursuing this general objective, the EU shall “consolidate and support [...] the principles of international law” as ordered by the next paragraph of Article 21 TEU.

The active role of EU law in international law-making can now be perceived in various domains. The contribution of EU law to *influence universal legal norms* finds its way through different legal channels and techniques, e.g. within international organisations such as the United Nations and its specialised agencies, or the Council of Europe, in agenda setting in international fora, and during international conferences leading to the adoption of multilateral treaties, coupled with exporting its own approaches to the functioning of international law.<sup>6</sup> The paper thoroughly scrutinizes the impact of EU law on the conceptualization and the development of a particular field of international migration law. This is the rapidly growing international legal regime applicable to the ‘*expulsion of aliens*’ (term used by the UN International Law Commission (ILC)) or ‘*return law/policy*’ as called in the EU context. In international law, “expulsion” means a formal act or conduct attributable to a State by which a non-national is compelled to leave the territory of that State; but it does not include extradition to another State, surrender to an international criminal court, or the non-admission to a State.<sup>7</sup> EU law applies a similar, albeit more limited definition for expulsion, which has been baptised to “return decision”. It denotes “an administrative or judicial decision or act, stating or declaring the stay of a [non-EU national] to be illegal and imposing or stating an obligation to return”<sup>8</sup>, whereas “return” is defined as the process of a non-EU national going back, whether in voluntary compliance with a return decision, or enforced, to the country of origin, a transit country or any other third country willing to accept the returnee.<sup>9</sup> All these

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Salvador (República Argentina), 12

<http://p3.usal.edu.ar/index.php/aequitasvirtual/article/download/951/1134> (30 December 2016).

<sup>3</sup> See <http://ec.europa.eu/world/agreements/viewCollection.do> (30 December 2016).

<sup>4</sup> K. S. Ziegler, *International law and EU law: between asymmetric constitutionalisation and fragmentation* in A. Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law*, Edward Elgar, Cheltenham 2011, pp. 277, 310.

<sup>5</sup> *Treaty on European Union* (OJ C 115, 9.5.2008, 13).

<sup>6</sup> See e.g. J. Wouters & M. Hermez, *The EU's contribution to the 'strict observance' and development of international law in the UNGA Sixth Committee, 2016, Working Paper No. 177 – October 2016*, Leuven Centre for Global Governance Studies <https://ghum.kuleuven.be/ggs/wp177-wouters-hermez.pdf> (30 December 2016); D. Kochenov & F. Amtenbrink, *The European Union's Shaping of the International Legal Order*, CUP, Cambridge 2014; S. Basu, S. Schunz, H. Bruyninckx & J. Wouters, *The European Union's Participation in United Nations Human Rights and Environmental Governance: Key Concepts and Major Challenges*, in J. Wouters, H. Bruyninckx, S. Basu & S. Schunz (eds), *The European Union and Multilateral Governance: Assessing EU Participation in United Nations Human Rights and Environmental For a*, Palgrave Macmillan, Basingstoke 2012, pp. 3-22.

<sup>7</sup> *International Law Commission, Report on the Work of Its Sixty-Sixth Session, Draft Articles on the Expulsion of Aliens*, GAOR, 69<sup>th</sup> session, Supplement No. 10 (A/69/10) (2014), draft article 2 (a).

<sup>8</sup> *Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals* (OJ L 348, 12.24.2008) (hereinafter: “Return Directive”), Article 3(4).

<sup>9</sup> *Return Directive*, Article 3(3).

State prerogatives are rooted in the well-established principle of international law that States have the right to control the entry, residence and expulsion of aliens, subject to their treaty obligations and limitations stemming from customary international law.<sup>10</sup>

The Justice and Home Affairs field (since May 1999 it is officially called as the “Area of Freedom, Security and Justice”<sup>11</sup>) within the Union’s legal architecture, where return law and policy belong to, has happened to play the role of a kind of “laboratory” of innovative ideas and can thus be conceived as a forerunner in the further development of EU integration and the creation of new EU concepts. Along similar lines, those EU migration law concepts can be helpful and useful when codifying and progressively developing a given domain of IML.

The paper first examines terminological questions so as to construct a common vocabulary and mutual understanding of international law and EU law concepts (Part 2), and then it proceeds with outlining the patterns of interactions between the two legal orders in the field of migration law (Part 3). Subsequently, EU law contribution to the ILC’s work on the expulsion of aliens is mapped thoroughly (Part 4), which is followed by the analysis of the actual impact of EU law on the universal codification project called “expulsion of aliens” (Part 5), based on which some concluding remarks are phrased (Part 6).

## 2. Terminologies

Under *international law*, notably in light of the 2014 draft articles on the expulsion of aliens prepared by the UN International Law Commission,<sup>12</sup> the term “aliens” is quite a broad and all-encompassing notion, covering *all kinds of aliens* (i.e. individuals not holding the nationality of the State in whose territory they are present), who stay in a given country, irrespective of the their lawful or unlawful stay.<sup>13</sup> In the context of *EU law*, if one departs from the *summa divisio* based on the legality of stay of non-nationals, the category of “*lawfully staying aliens*”, on the one hand, covers a great variety of foreigners. It ranges from the diverse group of *EU-harmonised statuses* for third-country nationals (under the directives on family reunification<sup>14</sup>, long-term stay,<sup>15</sup> students, researchers, trainees and au pairs;<sup>16</sup> highly-skilled workers;<sup>17</sup> seasonal workers;<sup>18</sup> intra-corporate transferees;<sup>19</sup> holders of a single permit<sup>20</sup> as well as those travelling with a local border traffic permit<sup>21</sup> or on a Schengen visa<sup>22</sup>) through third-

<sup>10</sup> For instance, the jurisprudence of the European Court of Human Rights has repeatedly echoed that as a matter of international law (see e.g. *Üner v. the Netherlands* App no 410/99 (ECtHR, 18 October 2006), para. 54; *Boujlifa v. France* App no 25404/94 (ECtHR, 21 October 1997), para. 42; *Abdulaziz, Cabales and Balkandali v. the United Kingdom* App no 24888/94 (ECtHR, 28 May 1985), para. 67).

<sup>11</sup> The JHA cooperation was re-baptised to AFSJ by the Treaty of Amsterdam as of 1 May 1999.

<sup>12</sup> Expulsion of aliens – Text of the draft articles and commentaries thereto, Report of the International Law Commission, Sixty-sixth session, GAOR, 69<sup>th</sup> session, Supp. No 10, A/69/10 (2014).

<sup>13</sup> Cf. draft article 2(1) lit. (b), which stipulates that “alien” means an individual who does not have the nationality of the State in whose territory that individual is present, and the commentary to draft article 1 (para. 3), which makes explicit that “[t]he draft articles cover the expulsion of both aliens lawfully present and those unlawfully present in the territory of the expelling State...” (Expulsion of aliens – Text of the draft articles and commentaries thereto, n 8).

<sup>14</sup> Directive 2003/86/EC of the Council (OJ L 251, 3.10.2003, 12-18).

<sup>15</sup> Directive 2003/109/EC of the Council (OJ L 16, 23.1.2004, 44-53).

<sup>16</sup> Directive (EU) 2016/801 of the European Parliament and of the Council (OJ L 132, 21.5.2016, 21-57).

<sup>17</sup> Directive 2009/50/EC of the Council (OJ L 155, 18.6.2009, 17-29).

<sup>18</sup> Directive 2011/98/EU of the European Parliament and of the Council (OJ L 343, 23.12.2011, 1-9).

<sup>19</sup> Directive 2014/36/EU of the European Parliament and of the Council (OJ L 94, 28.3.2014, 375-390).

<sup>20</sup> Directive 2014/66/EU of the European Parliament and of the Council (OJ L 157, 27.5.2014, 1-22).

<sup>21</sup> Regulation (EC) No 1931/2006 of the European Parliament and of the Council (OJ L 405, 30.12.2006, 1-22).

<sup>22</sup> Regulation (EC) No 810/2009 of the European Parliament and of the Council (OJ L 243, 15.9.2009, 1-58).

country nationals covered by an *EU partnership, stability or association agreement* concluded with a third country (e.g. with Turkey or Tunisia)<sup>23</sup> to persons enjoying the *right of free movement within the European Economic Area (EEA)* (citizens of the EEA Member States and Switzerland and their family members, in line with Directive 2004/38/EC<sup>24</sup>). On the other hand, the term “*illegally staying*” or “*unlawfully present aliens*” make up also a heterogeneous group under EU law according to the reasons behind their situations. It consists of *third-country nationals* (i.e. those foreigners who do not hold the nationality of any Member State) who entered illegally into the territory of an EU Member State (either through the border crossing points or through “green” or “blue” borders by avoiding the control); overstayers; status changers; rejected asylum seekers, and, through the lenses of international law, even *persons having enjoyed the EU right of free movement* if they become an unreasonable burden to the social assistance system of the host Member State or for any other reason they lose the right to freedom of movement. The expulsion of these illegally staying non-nationals under EU law is regulated essentially by the so-called Return Directive (2008/115/EC)<sup>25</sup> and to a much lesser extent, concerning the last category (EU citizens and persons assimilated with them), in the Free Movement Directive (Directive 2004/38/EC)<sup>26</sup>.

The study will restrict itself to bring the “*third-country nationals*” and the rules relating to their expulsion under review in light of international law and EU law, namely how the Union has tried to influence the shaping of the legal norms of universal character with regard to this group of non-nationals. The reason behind this is that from the perspective of EU law, the concept of “third-country nationals” (in EU parlance they are persons who do not possess the nationality of an EU Member State) equals essentially with “aliens” as used in the work of the ILC. This makes the comparison between EU law and international law simpler and more accurate. This approach is also explained by the fact that the persons enjoying the right of free movement within the EU constitute a privileged, specific group for the expulsion of whom not the general rules apply (they are subject to enhanced protection and further guarantees against expulsion as stipulated by Directive 2004/38/EC). EU law operates a *clear distinction* between the legislation addressed to EU/EEA citizens and their family members on the one hand, and the legislation addressed to third-country nationals on the other hand, which legal distinction is also apparent from the consistent case-law of the CJEU.

### 3. Specific Interactions between EU Law and International Law in Field of Migration

The migration and asylum *acquis* of the European Union has always been drawing on a lot or has been considerably inspired by international migration and refugee law, although it is so far a largely

<sup>23</sup> See the Agreement creating an association between the European Economic Community and Turkey (OJ L 217, 29.12.1964, 3687) and the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part (OJ L 97, 30.03.1998, 2).

<sup>24</sup> Directive 2004/38/EC of the European Parliament and 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 (OJ L 158, 30.4.2004, 77-123) (hereinafter: “Free Movement Directive”).

<sup>25</sup> Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ L 348, 12.24.2008, 98-107) (hereinafter: “Return Directive”). For a comprehensive and meticulous, up-to-date analysis of the Return Directive, see F Lutz and S Mananashvili, ‘Return Directive 2008/115/EC’ in K Hailbronner and D Thym (eds), *EU Immigration and Asylum Law. A Commentary* (2<sup>nd</sup> edn, C.H.Beck/Hart/Nomos, Munich/Oxford/Baden-Baden 2016), 658-763.

<sup>26</sup> See notably Articles 15, 28, 31 and 33.

unexplored issue how EU migration law relates to international law.<sup>27</sup> As Peers put it, “[t]he development of immigration and asylum law within [...] the European Union (EU) [...] necessarily takes place within an international framework, since it principally concerns the regulation of foreign nationals moving to and from foreign countries.”<sup>28</sup> The influence of external legal norms has been either *explicit*, as in case of the 1951 Geneva Convention on the Status of Refugees and its 1967 New York Protocol<sup>29</sup> (the first mention of the former in the founding Treaties has been inserted by the Treaty of Maastricht,<sup>30</sup> while the latter has appeared first in the Treaty of Amsterdam<sup>31</sup> and now they also appear in the “Lisbonised” version of the Treaty on the functioning of the European Union (TFEU)<sup>32</sup>); or *implicit*, via the infiltration of the internationally protected human rights which are of particular significance for foreigners. The concept of the “general principles of EU law” provided a legal channel for the latter, of which fundamental rights form an integral part.<sup>33</sup> Regarding the sources of the fundamental rights protected by the EU legal order, including those applicable to third-country nationals (aliens), the CJEU stipulated: “international treaties for the protection of human rights on which the member states have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law”.<sup>34</sup> The international treaties include first and foremost the *European Convention on Human Rights* (ECHR) and its protocols, out of which *Protocol No. 4* lays down the prohibition of expulsion of nationals and the prohibition of collective expulsion of aliens,<sup>35</sup> while *Protocol No. 7* contains various procedural safeguards relating to expulsion of aliens<sup>36</sup>, which have been repeatedly interpreted and detailed in the case-law of the European Court of Human Rights (ECtHR).<sup>37</sup> Likewise, the *1966 International Covenant on Civil and Political Rights (ICCPR)*<sup>38</sup> is also a relevant treaty source of fundamental rights within the Union, to which all EU Member States

<sup>27</sup> M. Maes, D. Vanheule, J. Wouters & M-C Foblets, The international dimension of EU asylum and migration policy: framing the issues, in M Maes, M-C Foblets, Ph. De Bruycker, D. Vanheule & J. Wouters (eds), *External Dimensions of EU Migration and Asylum Law and Policy/Dimensions Externes du Droit et de la Politique d’Immigration et d’Asile de l’UE*, Bruylant, Bruxelles 2011, p. 50.

<sup>28</sup> S. Peers, International law, human rights law, and EU asylum and migration policy, in M Maes, M-C Foblets, Ph. De Bruycker, D. Vanheule & J. Wouters (eds), *External Dimensions of EU Migration and Asylum Law and Policy/Dimensions Externes du Droit et de la Politique d’Immigration et d’Asile de l’UE*, Bruylant, Bruxelles 2011, p. 64.

<sup>29</sup> Convention relating to the Status of Refugees of 28 June 1951 (UNTS No 2545, vol 189, 137); Protocol of 31 January 1967 Relating to the Status of Refugees (UNTS No 8791, vol 606, 267).

<sup>30</sup> In ex Article K.2 (1) of the original version of the Treaty on European Union.

<sup>31</sup> In ex-Article 63(1) of the Treaty establishing the European Community.

<sup>32</sup> OJ C 326, 26.10.2012, 47-390. Article 78 TFEU stipulates that the “Union shall develop a common policy on asylum, subsidiary protection and temporary protection [...] This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.” This formulation of the relevant international obligations (introduced by the Treaty of Maastricht, then expanded by the Treaty of Amsterdam), which indicates the international legal boundaries of EU norms on asylum, goes beyond the two principal instruments of international refugee law, since it makes reference to “other relevant treaties”, too (e.g. the 1984 UN Convention against Torture).

<sup>33</sup> The leading case in this respect is Case 11-70, *International Handelsgesellschaft v. Einfuhr- und Vorratsstelle Getreide*, Judgment of the Court of 17 December 1970, ECLI:EU:C:1970:114.

<sup>34</sup> Case 4/73, *J. Nold, Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities*, Judgment of the Court of 14 May 1974, ECLI:EU:C:1974:51.

<sup>35</sup> Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto (CETS No 46), Articles 3-4.

<sup>36</sup> Protocol No 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms (CETS No 117), Article 1.

<sup>37</sup> For an overview on that, see e.g. H. Lambert, *The position of aliens in relation to the European Convention on Human Rights*, Council of Europe Publishing, Strasbourg 2007,

[http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-08\(2007\).pdf](http://www.echr.coe.int/LibraryDocs/DG2/HRFILES/DG2-EN-HRFILES-08(2007).pdf) (30 December 2016); or on the changing dynamics in the expulsion related adjudication of the Strasbourg Court, A. Farahat, *Enhancing Constitutional Justice by Using External References: The European Court of Human Rights’ Reasoning on the Protection against Expulsion*, 2015, 28 *Leiden Journal of International Law*, pp. 303-322.

<sup>38</sup> *International Covenant on Civil and Political Rights* of 16 December 1966 (UNTS No 14668, vol 999, 171). For more on Article 13, see e.g. J. Wojnowska-Radzińska, *The Right of an Alien to be Protected against Arbitrary Expulsion in International Law*, Brill, Leiden 2015.

are parties. Specifically, it is Article 13 of the ICCPR that deals with the modalities of expelling lawfully staying aliens, as interpreted by the general comments and the quasi-jurisprudence of its treaty-body, the Human Rights Committee.<sup>39</sup> Further to that, *secondary EU legislation* on migration occasionally refers to *international treaties* and provides them priority vis-à-vis EU law, in so-called “without prejudice” or “non-affectation” clauses, which make the application of international law possible if they lay down more favourable provisions or conditions.<sup>40</sup>

The EU immigration and asylum law has been “communatarised” by the Treaty of Amsterdam as of 1 May 1999, which transferred the related fields of EU action from the third pillar into the first pillar of the Union. A new Title IV was inserted into the Treaty establishing the European Community (TEC) named as “Visas, asylum, immigration and other policies related to free movement of persons” within the “Area of Freedom, Security and Justice”. As a result, “*Community*” competence was extended to measures in the fields of asylum, immigration and safeguarding the rights of third-country nationals, external border controls and visa policy.

Therefore, this regulatory field, which might be broadly referred to as “aliens law”<sup>41</sup>, is a *relatively new one* in the Union legal edifice, which has been an EU policy domain for less than two decades. By contrast, international migration law has become by that time a robust body of law, although legal scholars still consider it as “substance without architecture”<sup>42</sup> or describe it as a “giant unassembled juridical jigsaw puzzle, [in which] the number of pieces is still uncertain and the grand design is still emerging”.<sup>43</sup> It is true that there exists no worldwide codification regulating all legal aspects of international migration, neither does the definition of the term “migrant” exist under general international law. Nonetheless, one can witness an ever-increasing, complex web of legal norms, with new treaties and soft law instruments emerging constantly as well as expanding migration-related international jurisprudence. In terms of the major *universal treaties* on migration and refugee law, they had already been adopted much before the EU has appeared on this scene, such as the 1951 Refugee Convention and its 1967 Protocol, and the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Their Family Members (ICPRMW)<sup>44</sup> as well as the core UN human rights conventions relevant for the rights of migrants (the ICCPR, the 1984 Convention Against Torture

<sup>39</sup> See e.g. *Maroufidou v Sweden*, CCPR/C/12/D/58/1979, 9 April 1981; or UN Human Rights Committee, CCPR General Comment No. 15: The Position of Aliens Under the Covenant, 41 UN GAOR, Supp. No. 40, UN Doc. A/41/40. Annex VI, 11 April 1986, para. 10. For more, consider e.g. S Joseph and M Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (3<sup>rd</sup> edn, OUP, Oxford 2013); M Nowak, *U.N. Covenant on Civil and Political Rights. CCPR Commentary* (2<sup>nd</sup> edn, N.P. Engel Publisher, Kehl 2005).

<sup>40</sup> See e.g. Article 4(1) of the Return Directive (“This Directive shall be without prejudice to more favourable provisions of: (a) bilateral or multilateral agreements between the Community or the Community and its Member States and one or more third countries; (b) bilateral or multilateral agreements between one or more Member States and one or more third countries”); or Article 3(3) of Directive 2003/109/EC (“This Directive shall apply without prejudice to more favourable provisions of: (a) bilateral and multilateral agreements between the Community or the Community and its Member States, on the one hand, and third countries, on the other; (b) bilateral agreements already concluded between a Member State and a third country before the date of entry into force of this Directive; (c) the European Convention on establishment of 13 December 1955, the European Social Charter of 18 October 1961, the amended European Social Charter of 3 May 1987 and the European Convention on the Legal Status of Migrant Workers of 24 November 1977.”).

<sup>41</sup> EU Statement – United Nations 6th Committee: ILC report on Expulsion of Aliens, New York, 29 October 2010 (hereinafter: “2010 EU Statement”), Part I. A).

<sup>42</sup> A. T. Aleinkoff, *International Legal Norms on Migration: Substance without Architecture*, in R. Cholewinski, R. Perruchoud & E. MacDonald (eds), *International Migration Law. Developing paradigms and Key Challenges*, T.M.C. Asser Press, The Hague 2007, pp. 467-480.

<sup>43</sup> R. B. Lillich, *The Human Rights of Aliens in Contemporary International Law*, Manchester University Press, Manchester 1984, p. 122.

<sup>44</sup> *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, of 18 December 1990 (UNTS No 39481, vol 2220, 3).

(CAT)<sup>45</sup> or the 1989 Convention on the Rights of the Child<sup>46</sup>(CRC)). These are coupled with various *regional instruments* (e.g. in Europe the ECHR and its Protocols Nos 4 and 7, other Council of Europe (CoE) conventions related to migration<sup>47</sup> and even soft law documents, for instance the Twenty Guidelines of the Committee of Ministers of the Council of Europe on Forced Return<sup>48</sup>). Against this backdrop, the European Union could not overlook those developments of international law either on the global or on the regional plane. Arguably, it was not even in the interests of the European integration project not to rely on those previously elaborated and more or less settled norms and standards which have been endorsed and followed by the Member States, and which served as obvious sources of inspiration and starting points for the EU standard setting activities. This is reflected in the above-mentioned attitude of EU law towards international migration and refugee law, reserving a place for its rules and principles in Union primary law and secondary law along the lines of the above discussed explicit or implicit legal techniques. All in all, for the initial period of building a common European immigration and asylum policy, relevant international legal rules, especially international refugee and human rights law, played the role of points of reference or minimum thresholds of protection.<sup>49</sup>

However, this line of conduct has changed in course of less than twenty years. The original approach of importing norms from international law has shifted to, or more precisely, was coupled with a new role: exporting EU norms to international law, trying to shape and to influence general international law-making and new codification projects relating to diverse branches of international law. The EU by now has become an active co-creator of international law (alongside with other actors).<sup>50</sup> This newly found norm-generator role has been endorsed by the above mentioned primary law provisions on the EU's objectives in relation to the development of international law, inserted into the TEU by the Treaty of Lisbon. The same holds true for the EU's interactions towards *international migration law*, notably to the *expulsion of aliens* in the last couple of years. The impact of EU return law on the international legal regime governing the expulsion of aliens can be best analysed through the *work of the International Law Commission* on the expulsion of aliens. Inspired by the metaphor used by Bruno Simma and Dirk Pulkowski, who described the relationship of the so-called self-contained regimes (including the EU) and general international law as "planets and the universe"<sup>51</sup>, I have put an extra spin on it and illustrate it with the Star Wars epic. Here the Galaxy symbolizes general international (migration) law and the Empire denotes the European Union, with its flagship instrument on expulsion, the Return Directive, which is also called as the "Directive of Shame".<sup>52</sup> Looking at EU law through these lenses, being a

<sup>45</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (UNTS No 24841, vol 1465, 8).

<sup>46</sup> Convention on the Rights of the Child of 20 November 1989 (UNTS No 27531, vol 1577, 3).

<sup>47</sup> E.g. the European Convention on establishment of 13 December 1955 (CETS No 19), the European Agreement on Regulations governing the Movement of Persons between Member States of the Council of Europe of 13 December 1957 (CETS No 25), or the European Convention on the Legal Status of Migrant Workers of 24 November 1977 (CETS No 93).

<sup>48</sup> Twenty Guidelines of the Committee of Ministers of the Council of Europe on Forced Return, adopted at the 925th Meeting of the Ministers' Deputies, Strasbourg, 4 May 2005  
[http://www.coe.int/t/dg3/migration/archives/Source/MalagaRegConf/20\\_Guidelines\\_Forced\\_Return\\_en.pdf](http://www.coe.int/t/dg3/migration/archives/Source/MalagaRegConf/20_Guidelines_Forced_Return_en.pdf) (30 December 2016).

<sup>49</sup> Similarly, see K. Hailbronner & D. Thym, Constitutional Framework and Principles for Interpretation, in K. Hailbronner & D. Thym (eds), *EU Immigration and Asylum Law. A Commentary* (2<sup>nd</sup> edn, C.H.Beck/Hart/Nomos, Munich/Oxford/Baden-Baden 2016), 25-27; M Maes, D Vanheule, J Wouters and M-C Foblets (n 24) 50.

<sup>50</sup> D. Kochenov & F. Amtenbrink (n 6), xiii. More generally, see e.g. B. Van Vooren, S. Blockmans & J. Wouters (eds), *The EU's Role in Global Governance: The Legal Dimension* (OUP, Oxford 2013).

<sup>51</sup> B. Simma & D. Pulkowski, *Of Planets and the Universe: Self-contained Regimes in International Law*, 2006, 17 *European Journal of International Law*, pp. 483-529.

<sup>52</sup> On the very harsh critiques of the Return Directive from Latin American countries see e.g. D Acosta Arcarazo, *Latin American Reactions to the Adoption of the Returns Directive*, CEPS Liberty and Security in Europe publication series,

regulatory framework once borrowing much from international migration law but much criticised because of the Return Directive's alleged deficiencies in protecting the rights of irregular migrants, now shaping international law as a major norm-exporter; one may wonder using the Star Wars metaphor: Has the Empire struck back? The Empire's principal ammunition here is the *Return Directive*, being the only "regional instrument under international law" on this subject-matter (if one takes the position of the classic and orthodox international lawyer) which is binding on 26 EU Member States, plus on the four Schengen Associated States as well as it constitutes a legal obligation for the candidate countries (Albania, the Former Yugoslav Republic of Macedonia, Montenegro, Serbia and Turkey) under their respective bilateral stabilisation and association or association agreements to harmonise their domestic laws as far as possible with its provisions. As the Legal Service of the European Commission argued before the ILC, "more than thirty states in Europe already have or will have in the near future provisions in their national legislation that contain standards that correspond at a minimum to the Union's Return [D]irective, which sets standards of treatment for non-EU nationals".<sup>53</sup> Therefore, the European Union legislation represents *significant regional practice* for international law-making of a universal character that should be taken into account by the ILC when trying to codify this area of international law called "expulsion of aliens". Further to that, EU Justice and Home Affairs Law, where return law and policy belong to, has happened to play the role of a kind of "laboratory" of innovative ideas and can thus be conceived as a forerunner in the further development of EU integration and the creation of new EU legal concepts. Along similar lines, the standards and safeguards of the Return Directive and other EU migration law concepts (e.g. derived from Directive 2003/109/EC) might be helpful and useful when codifying and progressively developing a given domain of international migration law.

The following section will examine first generally and then more specifically, what kind of influence the EU has exercised on the work of the Special Rapporteur of the topic as well as that of the International Law Commission in the consideration of the topic of expulsion of aliens.

## 4. The Contribution of EU Law to the ILC's Work on the Expulsion of Aliens (2005-2014)

### 4.1. Overview of the ILC's Work on the Expulsion of Aliens and its Outcome

Regarding the origins of the ILC activities on this subject matter, the Commission included this topic on its agenda in 2004 and appointed Maurice Kamto from Cameroon as Special Rapporteur. The work has actually started in 2005 when the Special Rapporteur submitted his preliminary report,<sup>54</sup> which was subsequently followed by further eight reports analysing various aspects of the law in this area and proposing a series of draft articles that partly codify and partly progressively develop international law.<sup>55</sup>

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November 2009 <https://www.ceps.eu/system/files/book/2009/11/latin-american-reactions-adoption-returns-directive.pdf> (30 December 2016).

<sup>53</sup> Statement on behalf of the European Union by Mr. Lucio Gussetti, Director, Legal Service, European Commission, at the UN General Assembly 6th Committee (Legal), 66th session on the Report of the International Law Commission on the work of its sixty-third session on Expulsion of Aliens and on Protection of Persons in the Event of Disasters, New York, 27 October 2011, 2 (hereinafter: "2011 EU Statement").

<sup>54</sup> Preliminary report on the expulsion of aliens, by Mr Maurice Kamto, Special Rapporteur, A/CN.4/554, 2 June 2005.

<sup>55</sup> See the ILC Analytical Guide on this topic at [http://legal.un.org/ilc/guide/9\\_12.shtml](http://legal.un.org/ilc/guide/9_12.shtml) (30 December 2016). For a summary of the ILC's work in scholarly journals, see e.g. S D Murphy, 'The Expulsion of Aliens and Other Topics: The Sixty-Fourth Session of the International Law Commission' (2013) 107 *American Journal of International Law*, 164; S D Murphy, 'The



After seven years of discussions in the ILC's plenary sessions and in its drafting committee, thirty-two draft articles were adopted on first reading in 2012, together with commentaries.<sup>56</sup> In 2014, the ILC revisited on "second reading" its work concerning the expulsion of aliens, so as to finalize thirty-one draft articles (with commentaries). The ILC has thus completed its work on the topic, and decided to recommend to the UN General Assembly (UNGA) the following two options: 1) to take note of the draft articles on the expulsion of aliens in a *resolution with annexing the articles* to the resolution (like in case of the Articles on the Responsibility of States for Internationally Wrongful Acts which were endorsed by the UNGA in 2001), and to encourage their widest possible dissemination; 2) or to consider, at a later stage, the *elaboration of a convention* on the basis of the draft articles (conventions codifying the law of diplomatic and consular relations, the law of the treaties etc. were born following this path). The UNGA welcomed the Commission's conclusion of work on the expulsion of aliens and the adoption of draft articles on the subject (with the detailed commentaries), and decided to further consider the Commission's recommendation on the matter at its seventy-second session, in 2017.<sup>57</sup>

The content of the draft articles will not be analysed here, since this is not the aim of the exercise. Nevertheless, it is worth giving an overview of the *structure* and the *principal legal* issues covered in the 2014 draft articles. In essence, the project endeavoured to strike the delicate balance between acknowledging the sovereign right of States to expel aliens from their territory, and to identify (pure codification) or to propose (progressive development of the law) the rules that States must follow with a view to protecting the human rights of the aliens.<sup>58</sup> The text is divided into *five main parts*. The first one deals with the scope *ratione materiae* and *personae* of the codification project and the modalities in exercising the right of expulsion by States (Part One – General Provisions). Then come the cases of prohibited expulsion (including the particular situation of refugees and stateless persons, the prohibition to deprive someone's nationality for the sole purpose of expulsion, or the prohibition of collective expulsion etc.) (Part Two). It is followed by the protection of the rights of aliens subject to expulsion (assuming that their expulsion is permitted) in Part Three. This section lays down some general provisions on respecting human dignity and human rights of aliens, comprising the principle of non-discrimination, and moves on with various aspects on the protection in the expelling State (e.g. prohibition of torture, conditions of detention), then the protection in the State of destination, and finally the protection in the transit State are dealt with. Part Four sets out the specific procedural rights enjoyed by the aliens subject to expulsion addressing matters such as the right to receive notice of and challenge the expulsion decision, the right to be represented, the right to free assistance of an interpreter, and the suspensive effect of the appeal against an expulsion decision. Finally, Part Five notes certain legal consequences of an unlawful expulsion, which may trigger a right of readmission for the alien, the responsibility of the expelling State, and a right of the alien's State of nationality to pursue diplomatic protection.

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Expulsion of Aliens (Revisited) and Other Topics: The Sixty-Sixth Session of the International Law Commission', GW Law School Public Law and Legal Theory Paper No. 2014-59 <http://ssrn.com/abstract=2540098> (30 December 2016).

<sup>56</sup> Report of the International Law Commission, Sixty-fourth session, GAOR, 67th session, Supp. No. 10, A/67/10 (2012) (hereinafter: "2012 ILC Report"), Chapter IV.

<sup>57</sup> Resolution adopted by the General Assembly on 10 December 2014 [on the report of the Sixth Committee (A/69/498)], 69/119. Expulsion of aliens, A/RES/69/119, paras. 1 and 3.

<sup>58</sup> Ch. Tomuschat, Expulsion of aliens: the International Law Commission draft articles, in G Jochum, W. Fritzemeyer & M. Kau (eds), *Grenzüberschreitendes Recht — Crossing Frontiers Festschrift für Kay Hailbronner*, C.F. Müller, Heidelberg 2013, 662; S D Murphy (n 52), 1.

## 4.2. General Comments Made by the EU on the Topic

The European Union, being an UN observer with enhanced status since 2011,<sup>59</sup> has first intervened before the Sixth (Legal) Committee of the UNGA on the subject of the ILC's work on the topic of expulsion of aliens in 2009, and then this practice became regular with written and oral submissions in the following years (2010-2012 and 2014).<sup>60</sup> The EU as an entity is usually referred to in ILC-related documents as a "community of States", like a regional grouping of UN Member States. Due to the fact that in addition to the EU Member States, the candidate countries as well as the countries of the Stabilization and Association Process and potential candidate countries (Ukraine, Moldova, Georgia) also align themselves with the EU statements on this matter, the position of the Union, that is represented before the Sixth Committee of the UNGA, reflects the view of almost forty UN Member States, which is a fairly significant share of the whole UN membership. As a preliminary remark, one might ask: Besides the EU general external policy considerations to contribute to the "strict observance and the development of international law", why the topic of the expulsion of aliens is so important for the EU substance-wise, that is to say, what kind of tangible benefits flow from the elaboration and universal acceptance of norms reflecting its own standards? A plausible answer is that first and foremost the European Union would expect that *EU citizens and their family members* (falling under the scope *ratione personae* of the Free Movement Directive), who would be subject to expulsion in a third country, be treated *in accordance with these legal standards*. Putting it in a broader context, the promotion of these standards might be in the interest of all States, and in a similar manner, of the EU, bearing in mind that nationals of any country (consequently, EU citizens, too) may find themselves in a situation of illegal stay and/or for other reasons they may qualify as undesirable person in another country (*e.g.* because of public security, public policy or national security considerations).<sup>61</sup> Borrowing Tomuschat words, "with regard to expulsion, every State can find itself on one or the other side, either as the expelling country or the country of destination".<sup>62</sup> Furthermore, this codification project has served as a great opportunity for the EU to *demonstrate to the outside world* that the once heavily criticized Return Directive (the "Directive of Shame"), even by the United Nations,<sup>63</sup> is indeed more progressive and human rights driven, setting thus higher protection standards, than any other international legal instrument.

As noted above, the European Union started contributing to this topic in autumn 2009, after the fifth report of the Special Rapporteur.<sup>64</sup> It should be recalled, however, that since the initial phase of the codification project, EU law and jurisprudence have already been reflected *proprio motu* in various ILC

<sup>59</sup> UNGA Resolution A/65/276 upgraded the observer status of the EU's participation in the UN to allow it to present common positions, make interventions, present proposals and participate in the general debate of the General Assembly. Further to that, as an observer with enhanced status, the Union has no vote but is party to more than 50 UN multilateral conventions as the only non-State participant. It has also obtained a special "full participant" status in a number of important UN conferences <http://www.consilium.europa.eu/en/policies/unga/> (30 December 2016).

<sup>60</sup> On behalf of the European Union, the Legal Service of the European Commission has prepared and presented the official submissions on the topic; with one exception in 2010, when the EU Delegation to the United Nations intervened before the UNGA Sixth Committee (on the basis of the position paper written by the Commission). The practice shows that the EU Commission has remained in the driving set in this respect even after the entry into force of the Lisbon Treaty, in the framework of which the Commission still ensures the Union's external representation as a matter of principle (Article 17(1) TEU).

<sup>61</sup> Cf. the Statement on behalf of the European Union by Lucio Gussetti, Director, European Commission Legal Service, at the United Nations 67th General Assembly Sixth Committee on the Report of the International Law Commission on the work of its sixty-fourth session on "Expulsion of Aliens", New York, 1 November 2012, para. 8 (hereinafter: "2012 EU Statement").

<sup>62</sup> Ch Tomuschat (n 55), 659.

<sup>63</sup> See *e.g.* the critics voiced by the UN Special Rapporteur on the Human Rights of Migrants, Mr François Crépeau (Regional Study: management of the external borders of the European Union and its impact on the human rights of migrants, A/HRC/23/46, 24 April 2013 (Human Rights Council, Twenty-third session, Agenda item 3), para. 47).

<sup>64</sup> Fifth report on the expulsion of aliens, by Mr Maurice Kamto, Special Rapporteur, A/CN.4/611, 27 March 2009.

documents, such as the 2006 Memorandum prepared by the ILC Secretariat,<sup>65</sup> and then in the *fifth and subsequent reports* (and its addenda) of the Special Rapporteur as well as in the *annual ILC Reports*. Developments under EU return law have not therefore remained unnoticed before the ILC, even without the intervention of the EU. The Special Rapporteur has taken the position that the level of substantial and procedural protection which ‘aliens’ receive under EU law could serve as an example for the international legal set of legal rules proposed by the International Law Commission,<sup>66</sup> and on a more general note, he added that regional law is part of international law and cannot be set aside.<sup>67</sup> Sometimes EU law has been used by the Special Rapporteur as a stepping stone for the progressive development of international law (e.g. with regard to the right to legal aid).

Below, I take stock of the general observations made by the Union (presented by the Legal Service of the European Commission or the EU Delegation to the United Nations in New York).

a) While the European Union welcomed the attention paid by various ILC documents to EU law and CJEU case-law, a recurring and horizontal remark of the Union was that in the ILC’s work insufficient attention has been paid to the *fundamental distinction* under EU law between *EU citizens* and their family members and the legal standards applicable to them, granting them a privileged status, on the one hand; and the *non-EU nationals*, or *third-country nationals* whose legal status falls under a different legal regime, on the other hand.<sup>68</sup> These two separate sets of laws are concurrent and mutually exclusive.<sup>69</sup> For the purposes of the ILC’s work, the EU rules on the expulsion of third-country nationals are of particular importance (and not those on the expulsion of the persons enjoying the EU right of free movement by virtue of Directive 2004/38/EC); given that the former group of foreigners is in a comparable situation with ‘aliens’ generally speaking in international law.

b) The EU also emphasized that contrary what has been suggested by the Special Rapporteur; there exists *no absolute prohibition of discrimination on the basis of nationality* in international law. In this regard, the European Court of Human Rights has explicitly recognized that the EU Member States are entitled to grant *preferential treatment* to nationals of other EU Member States, including in matters of expulsion. Further to that, the ECtHR has also recognized that EU Member States do not breach international law when they expel non-EU nationals in circumstances where they would not be allowed to expel EU citizens (and their family members). According to the Strasbourg Court, such preferential treatment does not entail a breach of the non-discrimination provision of Article 14 ECHR, since there is an *objective and reasonable justification* for such preferential treatment, namely that EU Member States belong to a special legal order, which has, in addition, established its own citizenship.<sup>70</sup> As a consequence, the different EU acquis and protection standards applicable to EU-citizens and their family members on the one hand and third-country nationals (non-EU nationals or ‘aliens’) on the other hand are in accordance with international law.

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<sup>65</sup> Expulsion of aliens, Memorandum by the Secretariat, International Law Commission, Fifty-eighth session, Geneva, 1 May-9 June and 3 July-11 August 2006, A/CN.4/565, 10 July 2006.

<sup>66</sup> 2010 EU Statement, 1.

<sup>67</sup> Ninth report on the expulsion of aliens, submitted by Mr Maurice Kamto, Special Rapporteur, A/CN.4/670, 25 March 2014, para. 19.

<sup>68</sup> Déclaration de la Commission Européenne – l’Assemblée Générale des Nations Unies : Rapport de la Commission du droit international – l’expulsion des étrangers, New York, le 27 octobre 2009 (hereinafter: “2009 EU Statement”); and repeated in the 2010 EU Statement and the 2011 EU Statement.

<sup>69</sup> S. Morano-Foadi & S. Andreadakis, The Convergence of the European Legal System in the Treatment of Third Country Nationals in Europe: The ECJ and ECtHR Jurisprudence (2011) 22 European Journal of International Law, 1075.

<sup>70</sup> Moustaqim v. Belgium (application no. 12313/86), Judgment of 18 February 1991, para. 49. This has been repeated and elaborated in subsequent ECtHR case-law, see C v. Belgium (application no. 21794/93), Judgment of 7 August 1996, para. 38; Ponomaryovi v. Bulgaria (application no. 5335/05), Judgment of 21 June 2011, para. 54.

c) In addition to that, another observation was formulated about the *non-applicability* of the specific standards governing the expulsion of EU citizens (and their family members) to *general international law-making*. The Special Rapporteur was supportive in this respect when he argued that although the examples taken from EU law and the case-law of the CJEU belong to the “special legal order of the European Community”, the relevant standards (notably the ones relating to expulsion on public order grounds) “could be safely applied to the expulsion of aliens within the more general framework of international law”.<sup>71</sup> The EU cautioned that this assumption did not appear safe.<sup>72</sup> First of all, even an automatic transposition of legal standards developed for EU citizens to third-country nationals finds *no legal basis in EU law and jurisprudence* (this does not exclude that certain categories of third-country nationals have the right to be treated on a par with nationals of EU Member States on particular subjects, notably where they enjoy equal treatment in labour market access, education and vocational training or the access to social security). Secondly, if this *mutatis mutandis* transplantation lacks within the “special legal order” of the EU, it would be even harder to argue that the reinforced safeguards against expulsion are capable of being transposed to the level of universal international law. To say the least, such a transposition would qualify for the extremely progressive development of international law, but by no means would constitute the codification of existing customary international norms on the matter. The EU’s opposition to elevate the higher standards elaborated for the expulsion of EU citizens (and their family members) onto the scale of general international law can be explained by the Union’s disinterest in reducing the added value of the freedom of movement within the EU borders and consequently, in losing a slice of the privileged status attached to EU citizenship.

d) Furthermore, the EU observed that treating *third-country nationals differently* on the basis of their nationality, also in matters of expulsion, may be allowed under international law if it is based on *well-founded reasons of public policy*. This differentiation is reflected in the *international treaty-making practice* of the Union.<sup>73</sup> The EU and its Member States have concluded a series of association, partnership and stabilization agreements with third States that grant persons benefiting from these agreements reinforced protection against expulsion, which is often an indirect result of treaty clauses granting economically active persons reciprocal equal treatment with nationals of EU Member States (typically in relation to access to labour market and working conditions).<sup>74</sup> As a result, for instance, the case-law of the CJEU on the EEC-Turkey Association Agreement has emphasized the length of residence of Turkish migrant workers in the host Member State as a decisive element to be taken into consideration in expulsion cases.<sup>75</sup> These agreements give the nationals of the third States concerned an elevated legal status that falls “*somewhere in between*” the legal status enjoyed by EU citizens (and their family members) and that of other legally staying third-country nationals in general, subject to the EU immigration acquis. In contrast with the preferential treatment under these agreements, nationals of other third-countries who have not concluded similar agreements with the EU are not able to rely on such extra safeguards against expulsion. Against this background, the European Commission red flagged in its statement before the UNGA Sixth Committee that some of the CJEU case law on the expulsion of third-country nationals, which has been discussed by the Special Rapporteur, fall under the *lex specialis* regime of an international agreement concluded between the EU and the third country concerned (e.g.

<sup>71</sup> Sixth report on the expulsion of aliens by Mr. Maurice Kamto, Special Rapporteur, A/CN.4/625, 19 March 2010, para. 116.

<sup>72</sup> 2010 EU Statement, 2.

<sup>73</sup> *Ibid.*, 3.

<sup>74</sup> *Ibid.*, 3. It was also recognized in the CJEU case-law; see e.g. Case C-340/97, *Nazli v. Stadt Nürnberg*, Judgment of the Court of 10 February 2000, ECLI:EU:C:2000:77 (relating to the 1963 Association Agreement with Turkey); or case C-97/05, *Mohamed Gattoussi v. Stadt Rüsselsheim*, Judgment of the Court of 14 December 2006, ECLI:EU:C:2006:780 (concerning the Euro-Mediterranean Association Agreement with Tunisia).

<sup>75</sup> S Morano-Foadi and S Andreadakis (n 66), 1079.

cases regarding Turkish nationals under the EEC-Turkey Association Agreement).<sup>76</sup> Therefore this specific case-law is quite misleading, since it does not reflect the main patterns and principles of general EU law on the expulsion of third-country nationals.

e) Finally, the *form of the final outcome* of the codification work was of utmost importance to the European Union. The EU, agreeing with those members of the ILC and some UN Member States who have repeatedly expressed doubts as to whether this topic should lead into the elaboration of a convention,<sup>77</sup> has not supported the adoption of draft articles that might serve the basis of a future international convention on the expulsion of aliens, but was continually favourable of elaborating *guidelines* or “*framework principles*”.<sup>78</sup> The EU has reiterated that progressive development in this area of international law would not be beneficial,<sup>79</sup> and confirmed its views in October 2014 that the incorporation of the draft articles into a convention on expulsion of aliens “is not appropriate at this stage”.<sup>80</sup>

### 4.3. Detailed Comments of the EU on the Reports Prepared by the Special Rapporteur and the Draft Articles

When contributing to the topic of expulsion of aliens before UN organs, the European Union has made detailed remarks on areas where it felt that the Special Rapporteur had insufficiently addressed or partly misunderstood EU law on the subject. To start with the detailed comments, a seemingly technical problem made difficult the understanding of EU law’s specificity and regulatory logic by the Special Rapporteur, namely that Mr Kamto had “a tendency to focus at times excessively on fairly dated EU documents, including on legislation that has been repealed and/or replaced”<sup>81</sup> (e.g. the predecessor legal acts of the Free Movement Directive; or only the proposal leading to the adoption of the Return Directive were mentioned).<sup>82</sup> References in the works of the ILC to *EU law and policy documents* that are *no longer current* obviously go against the authenticity and accuracy of this international codification project.

A related problem was that despite the significance of the *EU Return Directive*, which is the only legally binding and enforceable regional instrument in this field, it was *not really reflected* in the reports of the Special Rapporteur during the earlier stages of its work (it only changed with his eighth report in 2012).

<sup>76</sup> For example, Case C-467/02, *Inan Cetinkaya v. Land Baden-Württemberg*, Judgment of the Court of 11 November 2004, ECLI:EU:C:2004:708.

<sup>77</sup> See e.g. the Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-sixth session, prepared by the Secretariat (A/CN.4/650), 20 January 2012, para. 27; then the Eighth report on the expulsion of aliens, by Mr Maurice Kamto, Special Rapporteur, A/CN.4/651, 22 March 2012, paras. 55-57; and the Ninth report of the Special Rapporteur, para. 71.

<sup>78</sup> This “softer” form was chosen by the ILC in case of unilateral declarations of States [Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations (Report of the International Law Commission on the Work of its Fifty-eighth Session, 61 GAOR, Supp. No. 10 (A/61/10), 2006)] or the topic on the reservations to treaties [Guide to Practice on Reservations to Treaties (Report of the International Law Commission on the work of its Sixty-third Session, 66 GAOR, Supp. No. 10 (A/66/10), 2011, Chapter IV].

<sup>79</sup> 2012 EU Statement, para. 37.

<sup>80</sup> Statement on behalf of the European Union by Lucio Gussetti, Director, European Commission Legal Service, at the 69th United Nations General Assembly Sixth Committee on Agenda item 78 on Expulsion of Aliens, New York, 27 October 2014 (EUUN14-180EN) (hereinafter: “2014 EU Statement”).

<sup>81</sup> 2010 EU Statement, 3; then echoed in 2011 EU Statement, 1.

<sup>82</sup> See e.g. paras.103-114 and 274 of the Sixth Report prepared by the Special Rapporteur, or para. 2 of the Second Addendum thereto (A/CN.4/625/Add.2). It is striking that the commentaries to the 2014 draft articles still mention the 2005 Commission proposal on the Return Directive (!), and not the Return Directive itself (footnote 131).

By now further factors underpin the cardinal importance of this Directive, also for the universal international law-making. Not only do more than thirty European States have provisions in their national legislation that contain standards corresponding at a minimum to the provisions of the Directive,<sup>83</sup> but also a considerable *CJEU jurisprudence* has been developing in the last couple of years interpreting and elaborating more on various provisions of the Return Directive,<sup>84</sup> as a result of which now this judge-made body of law is comparable to the expulsion related case-law of the ECtHR. In addition, as a sort of a commentary to the Directive, a *Return Handbook* was recently published by the European Commission with the view to providing “guidance relating to the performance of duties of national authorities competent for carrying out return related tasks, including police, border guards, migration authorities, staff of detention facilities and monitoring bodies”.<sup>85</sup>

Before the adoption of the first version of the draft articles by the International Law Commission in 2012, the EU welcomed the first set of draft articles that were referred to the ILC drafting committee, and found that those draft articles expressing general principles correspond to the general principles set out in the Return Directive.<sup>86</sup> Nevertheless, according to the Union’s legal assessment, some of the draft articles referred to the drafting committee included detailed provisions which *went too far* and *did not reflect general customary international law*. For instance, in view of the Union, *detention of children* in the same conditions as an adult cannot be considered as necessarily constituting cruel, inhuman or degrading treatment under international law. The EU alleged that in certain cases it may be beneficial for children in detention to be accommodated together with their parents. Likewise, the then proposed list of *detailed procedural rights*<sup>87</sup> has set the bar too high, therefore some of these procedural guarantees do not reflect universal State practice and/or *opinio juris* on the subject,<sup>88</sup> as a result of which they can hardly find support in the large majority of the States.

<sup>83</sup> 2012 EU Statement, para. 5.

<sup>84</sup> See e.g. the following cases: C-357/09 PPU, Kadzoev, Judgment of 30 November 2009, ECLI:EU:C:2009:741 (detention – reasons for prolongation; link to asylum related detention); C-61/11 PPU, El Dridi, Judgment of 28 April 2011, ECLI:EU:C:2011:268 (penalisation of illegal stay by imprisonment); C-329/11, Achughabian, Judgment of 6 December 2011, ECLI:EU:C:2011:807 (penalisation of illegal stay by imprisonment); C-534/11, Arslan, Judgment of 30 May 2013, ECLI:EU:C:2013:343 (return versus asylum related detention); C-383/13 PPU, G. and R., Judgment of 10 September 2013, ECLI:EU:C:2013:533 (right to be heard before prolonging detention); C-297/12, Filev and Osmani, Judgment of 19 September 2013, ECLI:EU:C:2013:569 (entry bans – need to determine ex-officio length; historic entry bans); C-146/14 PPU, Mahdi, Judgment of 5 June 2014, ECLI:EU:C:2014:1320 (detention – reasons for prolongation and judicial supervision); C-473/13 and C-514/13, Bero and Bouzalmate, Judgment of 17 July 2014, ECLI:EU:C:2014:2095 (detention conditions – obligation to provide for specialised facilities); C-38/14, Zaizoune, Judgment of 23 April 2015, ECLI:EU:C:2015:260 (obligation to issue return decision); or C-554/13, Zh. and O., Judgment of 11 June 2015, ECLI:EU:C:2015:377 (criteria for determining voluntary departure period).

<sup>85</sup> Commission Recommendation of 1.10.2015 establishing a common “Return Handbook” to be used by Member States’ competent authorities when carrying out return related tasks C(2015) 6250 final, Brussels, 1.10.2015, Annex, 5.

<sup>86</sup> 2010 EU Statement, Part II.

<sup>87</sup> Revised draft article C1(1), which used to read as follows:

“An alien facing expulsion enjoys the following procedural rights:

- (a) The right to receive notice of the expulsion decision.
- (b) The right to challenge the expulsion [the expulsion decision].
- (c) The right to a hearing.
- (d) The right of access to effective remedies to challenge the expulsion decision without discrimination.
- (e) The right to consular protection.
- (f) The right to counsel.
- (g) The right to legal aid.
- (h) The right to interpretation and translation into a language he or she understands.”

<sup>88</sup> 2010 EU Statement, Part II.

In 2012, the EU prepared the bulk of its detailed comments and suggestions concentrating essentially on the *draft articles that were adopted at first reading* in the same year.<sup>89</sup> In the following, I go through those comments article by article which tried to influence the final outcome of the ILC's work.<sup>90</sup>

a) As for the specific rules pertaining to the *expulsion of refugees and stateless persons*, the EU suggested to make this provision more precise, notably that the rules to which reference was made should be those which are more favourable to the person subject to expulsion.

b) The EU recalled the need to insert the prohibition of *discrimination on the grounds of sexual orientation* within the scope of the obligation of non-discrimination, in line with Article 19 TFEU and Article 21 of the EU Charter of Fundamental Rights.<sup>91</sup>

c) In relation to the rights of vulnerable persons, *health considerations* were lacking from the text, which are nonetheless acknowledged by the Return Directive, so the EU suggested the addition of the state of the health of the aliens as a consideration to be taken into account into the text.

d) The EU's contribution concerning the *legality of immigration detention and the detention conditions* was of central importance. First, the Union suggested separating the questions of detention and its legality from those of the detention conditions (as it is done in the Return Directive). Detention conditions constitute a separate issue, not to be mixed up with the legal basis and permissible grounds for ordering it, which separate treatment was followed by the 2005 CoE Twenty Guidelines on Forced Return<sup>92</sup> and the Return Directive, too (Articles 16-17). As far as the *legal grounds* for ordering detention are concerned, the EU was of the view that with a view to preventing arbitrary detention, some further limitations should have been added. Similar ones as foreseen in the CoE Twenty Guidelines on Forced Return (Guideline no 6)<sup>93</sup> and in the Return Directive (authorities are allowed to recourse to detention only if other sufficient but less coercive measures cannot be applied effectively in a specific case, and only in order to prepare the return and/or carry out the removal process, as stipulated in Article 15(1)). Moreover, according to the EU, anyone in immigration detention should be entitled to a *speedy judicial review* on the lawfulness of the detention. This is not only an EU law requirement (under Article 15(2) of the Return Directive), but it equally stems from international human rights law, especially the 1966 ICCPR (Article 9(4)) and the 1950 ECHR (Article 5(4)). Reformulated draft articles, splitting the original draft provision into two, have been prepared by the EU, which aimed at strengthening the *safeguards on detention conditions*, too (e.g. inserting requirements on detention facilities and the separation of detainees from ordinary prisoners and men from women; ensuring access to legal advice and medical care as well as their right to communicate; reflecting the rights of children in detention).

e) Regarding the implementation of the expulsion order, the EU proposed modifications to the text so as to promote more clearly *voluntary departure of the returnee*, considering it a humane and dignified means to carry out an expulsion decisions (in line with the overall logic of the Return Directive). It

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<sup>89</sup> See the 2010 ILC Report, Chapter IV, para. 45.

<sup>90</sup> The below is largely based on the 2012 EU Statement before the UNGA Sixth Committee.

<sup>91</sup> Charter of Fundamental Rights of the European Union (OJ C 361, 26.10.2012, 391-407).

<sup>92</sup> Guidelines no 10-11.

<sup>93</sup> Guideline no 6 recommends: "1. A person may only be deprived of his/her liberty, with a view to ensuring that a removal order will be executed, if this is in accordance with a procedure prescribed by law and if, after a careful examination of the necessity of deprivation of liberty in each individual case, the authorities of the host state have concluded that compliance with the removal order cannot be ensured as effectively by resorting to non-custodial measures such as supervision systems, the requirement to report regularly to the authorities, bail or other guarantee systems. 2. The person detained shall be informed promptly, in a language which he/she understands, of the legal and factual reasons for his/her detention, and the possible remedies; he/she should be given the immediate possibility of contacting a lawyer, a doctor, and a person of his/her own choice to inform that person about his/her situation."

brings mutual advantages both for the returnee and the expelling State and it implies fewer risks with regard to respect for human rights.<sup>94</sup> The EU came forward with a modified draft article, inspired by Guideline no 1 of the CoE Twenty Guidelines on Forced Return, which was about the recognize voluntary departure as preferred over forced return and set forth specific circumstances on the basis of which a reasonable period for voluntary return should be calculated (these include e.g. the length of stay, children attending school, other family and social ties).

f) Stronger emphasis was proposed by the EU to be made on the *obligations of the receiving State*, namely that the duty of the State of destination to *readmit its own nationals* or aliens (third-country nationals) whom it has such an international obligation (e.g. based on a bilateral readmission agreement) should be explicitly set out in the draft articles.

g) When it comes to the *obligation not to expel an alien to a State where his or her life or freedom would be threatened*, the EU suggested a more precise drafting in order to avoid the impression that expulsions to countries exercising the death penalty are generally banned. The Union invoked that the constant jurisprudence of the ECtHR on Article 3 of the Convention requires an *individualised assessment* of the risk of death penalty in each case. Therefore the EU prepared a rearranged draft article making reference to this further precondition, i.e. no return is possible to such a State unless an assurance was previously given that death penalty will not be imposed, or if imposed, will not be carried out.

h) As far the *procedural rights of aliens* subject to expulsion are concerned, the EU articulated several comments, since the issue of procedural safeguards was considered as having outmost importance and it is already fairly developed under EU return law. First, it was suggested that the ILC should elaborate more on the “right to receive a legal notice” on expulsion, and thus to explicitly refer to the *right to receive written notice* of the expulsion decision and information about the *available legal remedies* (these standards are clearly recognised by the CoE Twenty Guidelines on Forced Return and the Return Directive).<sup>95</sup> Secondly, the Union underlined that *the right to be heard* by a competent authority does not necessarily imply the right to be heard in person but that the alien be provided with an opportunity to explain his/her situation and submit his/her own reasons before the competent authority. In some circumstances this means that written proceedings may satisfy the requirements of international law. Thirdly, the EU did not agree with those limitations of the procedural safeguards which would allow States to exclude from the scope of procedural rights aliens who have been *unlawfully present on their territory for less than six months*. This is capable of undermining in practice the minimum standards offered by the draft article concerned. Instead, the EU suggested to limit the possible derogation to “border cases” (when aliens are apprehended or intercepted by the competent authorities in connection with the illegal border crossing) as was applied in the Return Directive.<sup>96</sup>

i) Judicial remedies play a significant role in the upholding of the rule of law, a general objective that EU is pursuing, so the Union has contributed on this point. With regard to the *suspensive effect of an appeal* against an expulsion order, it was laid down in the 2012 draft articles as a general principle in case of lawfully staying aliens. Nevertheless, the Union was not convinced about the existence of a solid

<sup>94</sup> 2012 EU Statement, para. 20.

<sup>95</sup> See Guideline no 4 (“1. The removal order should be addressed in writing to the individual concerned either directly or through his/her authorised representative. If necessary, the addressee should be provided with an explanation of the order in a language he/she understands. The removal order shall indicate:

– the legal and factual grounds on which it is based;

– the remedies available, whether or not they have a suspensive effect, and the deadlines within which such remedies can be exercised.”) and Article 12(1) of the Return Directive (“Return decisions [...] shall be issued in writing and give reasons in fact and in law as well as information about available legal remedies.”).

<sup>96</sup> Return Directive, Article 2(2) lit. a).



basis of this guarantee under international law. The automatic suspensive effect of the judicial review in expulsion cases is not even a minimum standard by virtue of EU law. The Return Directive merely stipulates in its Article 13(1) that third-country nationals ('aliens' for the purpose of the ILC's work) "shall be afforded an effective remedy to appeal against or seek review of decisions related to return [...] before a competent judicial or administrative authority or a competent body composed of members who are impartial and who enjoy safeguards of independence". It is only coupled by the mild requirement that these competent bodies shall have *the power to temporarily suspend* the enforcement of the return decisions (Article 13(2)), nothing more than that, so the remedy *eo ipso* should not necessarily have suspensive effect<sup>97</sup> What is more, even for EU citizens and their family members there are exceptions to the suspensive effect of an appeal against expulsion decisions.<sup>98</sup> Standards of EU law applicable to aliens in this regard follow Guideline no 5 of the CoE Twenty Guidelines on Forced Return, which does not include a mandatory suspension but simply refers to the need for an effective remedy before a competent authority or body, being impartial and independent, which shall have the power to review the removal order, including the possibility of temporarily suspending its execution (it is not automatic at all, but falls within their margin of discretion). Further to that, such a generous approach, which would clearly constitute the progressive development of international law, could also be seen as an incitement to abusing expulsion and appeal procedures to the detriment of their genuine purpose – argued the EU.

j) The last detailed, rather minor remark concerned the *readmission to the expelling State* if expulsion was unlawful. Here the EU suggested a technical/linguistic clarification in the draft article concerned to avoid misunderstandings about which competent authorities are entitled to establish whether an unlawful expulsion has occurred (those of the expelling State).

## 5. The Actual Impact of EU Law on the ILC Draft Articles on the Expulsion of Aliens

After having presented in details the comments, remarks and concrete drafting suggestions of the EU, this section is devoted to examine the actual impact of EU law on the final draft articles, which have been ultimately adopted by the ILC in 2014 on second reading.

*Formally* speaking, the impact of EU law has become visible in a structured manner first in the eighth report of the Special Rapporteur, and then a separate section similarly dealt with EU law in his ninth report. Besides these, ILC annual reports occasionally discussed the role EU law could play in this codification project.<sup>99</sup> For the ILC's approach, it has come a long way from the *mere ignorance* of EU law and the EU Commission's submissions by the special rapporteur in the early stages of the codification work until *gradually taking into account* major EU return law concepts in ILC reports and in the draft articles. Let me mention an example illustrating the ILC's initial attitude: in response to specific questions put by the ILC in its 2009 report and in order to assist with the examination of EU

<sup>97</sup> Nevertheless, it is noteworthy of indicating that the CJEU recently took the position, following the line of the ECtHR case-law, that there are cases when the competent authorities do not have discretion in this regard, but they are bound to order suspensive effect automatically. Such a case is if the illegally staying third-country national suffers from a serious illness and the enforcement of the return decision may expose the person to a serious risk of grave and irreversible deterioration of his state of health (see C-562/13, *Abdida*, judgment of the Court (Grand Chamber) of 18 December 2014, ECLI:EU:C:2014:2453, paras. 48-53). Cf. also *F Lutz and S Mananashvili* (n 22), 725.

<sup>98</sup> Directive 2004/38/EC, Article 31.

<sup>99</sup> See e.g. the Report of the International Law Commission, Sixty-second session (3 May-4 June and 5 July-6 August 2010), GAOR 65th session, Supp. No. 10, A/65/10, paras.130, 145 and 149.

law, the Legal Service of the European Commission sent a detailed letter with explanations on EU law and jurisprudence,<sup>100</sup> but it was neither distributed to the ILC members, nor considered by the special rapporteur until 2012 (before his eighth report).<sup>101</sup> Finally, the commentaries attached to the 2014 draft articles show also direct or indirect signs of influence of EU law.

Substance-wise, the European Union has always recommended the ILC *to take EU return law and jurisprudence into consideration* as much as possible. Although the European Union was aware of views expressed within the ILC according to which “the practices and precedents derived from special regimes, such as European Union law should be treated with caution”<sup>102</sup>, it consistently argued that EU return law “represents a significant regional practice that should be taken into account by the International Law Commission in its consideration of the topic of Expulsion of Aliens”.<sup>103</sup> Furthermore, while sharing the view on the special character of EU law, the EU believed that certain guarantees applicable to the expulsion of EU citizens and their family members may also be relevant for the formation of international law.<sup>104</sup>

The below table, not being exhaustive, showcases which of the *individual EU comments or suggestions* have been adopted by the ILC and which have not (or at least reference was made to them in the commentaries).

EU comments/suggestions	Direct influence on the 2014 draft articles	Reflected in the commentaries	No impact
fundamental distinction between <i>EU citizens</i> (and their family members) and <i>non-EU nationals</i> (third-country nationals) granting <i>privileged treatment</i> for EU citizens, who enjoy the freedom of movement within the Union, does not amount to discrimination under international law	yes (draft article 14)	yes (commentary to draft article 1, para. 7; commentary to draft article 14, para. 5 <sup>105</sup> )	
<i>specific references</i> to the more favourable conditions applicable to the expulsion of <i>refugees and stateless persons</i>	yes (draft articles 6 and 7)		
inclusion of <i>sexual orientation</i> as a ground for non-discrimination	no	yes (commentary to draft article 14, para. 4)	
taking into account <i>health considerations</i> in case of vulnerable persons	no	yes (commentary to draft article 15, para. 3)	
further modalities to decide on the <i>extension of the duration of detention</i>	<i>partially yes</i> (with the insertion of category of “another competent authority”, whose decision is subject to judicial review) (draft article 19(2) lit. (b))	no	other suggestions have been set aside in the Ninth Report of the Special Rapporteur (paras. 51-52)

<sup>100</sup> JUR (2010) 50059, 22 February 2010 addressed to Mrs Patricia O'Brien, UN Legal Counsel.

<sup>101</sup> 2011 EU Statement, Part I.A.

<sup>102</sup> 2010 Report of the ILC, para. 149.

<sup>103</sup> 2011 EU Statement, 2 (Part I. B).

<sup>104</sup> Ibid.

<sup>105</sup> “The reference in the draft article to “any other ground impermissible under international law” [...] also preserves the possibility for States to establish among themselves special legal regimes based on the principle of freedom of movement for their citizens such as the regime of the European Union.” (highlighted by the author – T.M).

requiring <i>speedy judicial review</i> on the lawfulness of the detention	<i>no</i>	<i>no</i>	not discussed at all by Special Rapporteur or the ILC
conceiving <i>voluntary departure</i> of the returnee as the <i>preferred option</i> over forcible implementation of the expulsion decision	<i>no</i>	<i>yes</i> (commentary to draft article 21, para. 2 and footnote 131)	
insisting on the duties of the receiving State to <i>readmit its own nationals</i>	<i>no</i>	<i>yes</i> (commentary to draft article 22, para. 1; also recalled by the Ninth Report of the Special Rapporteur, para. 55)	
more precise drafting of the <i>obligation not to expel an alien to a State where his or her life or freedom would be threatened</i>	<i>yes</i> (draft article 23(2))	<i>no</i> (references are made to the practice of the Human Rights Committee)	
the right to <i>receive a written expulsion decision</i> and the right to information about <i>available legal remedies</i>	<i>no</i>	<i>no</i>	discussed by the Ninth Report of Special Rapporteur, which suggested a reference to be included in the commentaries on adopting the expulsion decision in writing (para. 61), but it was not finally taken up
limiting the derogations from procedural safeguards to “ <i>border cases</i> ”	<i>partially yes</i> (implicitly, by way of a compromise wording <sup>106</sup> ) (draft article 26(4))	<i>yes</i> (implicitly, referring to this as an exercise in the progressive development of international law) (commentary to draft article 26, para. 11)	
<i>no automatic suspensive effect</i> of an appeal against an expulsion decision	<i>yes</i> (implicitly, by narrowing down the material scope of this rule in the draft article concerned <sup>107</sup> ) (draft article 27)	<i>yes</i> (commentary to draft article 27, para. 1)	
technical rectification in respect of the <i>readmission to the expelling State</i>	<i>no</i>	<i>no</i>	this technical rectification was not addressed at all

Further to the above overview of the EU’s impact over substantive points in the text, the *final outcome* of the ILC’s work on the topic was highly debated, in relation to which the EU and several States have also expressed a position. A few States clearly supported the adoption of an *international convention* (e.g. Belarus, Congo, Peru), while others, like the EU, favoured the form of *non-binding document*, such as “guidelines”, “guiding principles”, or “best practices of policy guidelines” etc.<sup>108</sup> Further to that, a few States felt the final form of this codification project should be determined at a later stage (e.g. Israel, Malaysia).<sup>109</sup> In the Special Rapporteur’s view, “very few topics of the Commission’s agenda have such

<sup>106</sup> “The procedural rights provided for in this article are without prejudice to the application of any legislation of the expelling State concerning the expulsion of aliens who have been unlawfully present in its territory for a brief duration.” (highlighted by the author – T.M).

<sup>107</sup> “An appeal lodged by an alien [...] shall have a suspensive effect on the expulsion decision when there is a real risk of serious irreversible harm” (highlighted by the author – T.M).

<sup>108</sup> Ninth Report of the Special Rapporteur, para. 71. and footnote 214.

<sup>109</sup> *Ibid.*, and footnote 223.

a solid grounding in international law as does the expulsion of aliens”<sup>110</sup> and other topics “that have been considered by the Commission and have resulted in draft articles, rather than directives, guidelines or principles, were not based on such abundant legal material”.<sup>111</sup> Therefore, he expressed his clear preference that the ILC should adopt draft articles and then on the basis of that, a convention should emerge. The EU’s insistence on some soft law document is not completely lost: the ILC left all options open, since even if *draft articles* were finally adopted, it is now up to the UNGA to decide what kind of normativity and bindingness it wishes to attribute to the text. Certain (so far unanswered) questions arise concerning the issue of why the EU has preferred a soft law document while it has continuously insisted on having its own norms be adopted (as a norm-entrepreneur)? Has the “soft law” ambition been the consequence of its partial success? Or does the EU really wish to maintain a double standard with high protection from expulsion for the privileged EU citizens (and their third-country national family members enjoying the EU right of free movement) but smooth removal of all non-EU citizens (third-country nationals)?

To evaluate the EU’s actual impact and influence on the ILC’s codification work on the matter, it is the “the glass is half full or half empty” dilemma, since much depends on the perspective or the position of the one making assessment. The *European Union* obviously regretted that the final outcome on the topic did not reflect some of its concrete suggestions, and that the normative value of the codification instrument is able to go beyond pure guidelines. It voiced its disappointment through the lenses of human rights protection when it underscored that a number of the unsuccessful suggestions have strong human rights character (e.g. the inclusion of sexual orientation as ground for non-discrimination, the right to speedy judicial review of the lawfulness of detention, the right to receive a written decision, the right to information about available legal remedies or recognizing voluntary departure as the preferred option over forced return). Despite the fact that these EU proposals could not finally be put through the mechanisms of international law-making, the EU officially called on “all UN Member States to take appropriate actions in order to guarantee these rights in cases of expulsion of aliens”.<sup>112</sup> Yet, the Union noted with satisfaction that according to the ILC, its conclusions on this topic were inspired by the EU’s own policy and legislation.<sup>113</sup> *Some States*, to the contrary, criticized the Special Rapporteur for codifying EU law, so even this moderate influence was considered too much by some (e.g. the United States).<sup>114</sup> As for the *Special Rapporteur*, he acknowledged that the Return Directive “contains extremely progressive provisions on such matters that are far more advanced than the norms found in other regions of the world. Although these provisions are applicable to some [thirty] States, it appears difficult to establish them as universal norms”.<sup>115</sup> In other words, the contents of the Return Directive cannot be said to be well established in general international law.<sup>116</sup> This too progressive character of the Return Directive partly explains the limits of its impact on the ILC’s work. The other side of the coin is the *somewhat different material scope* of the Return Directive and/or generally EU law on expulsion as compared to the draft articles. First, EU law does not have specific, explicit rules concerning the return of an expelled alien to the expelling State (if that measure was originally unlawful). Secondly, EU legislation does not deal explicitly with the legal relations between the expelling State and the transit State(s), although this issue is addressed in the readmission agreements concluded

<sup>110</sup> *Ibid.*, para. 74.

<sup>111</sup> Eighth report of the Special Rapporteur, para. 56.

<sup>112</sup> 2014 EU Statement.

<sup>113</sup> *Ibid.*

<sup>114</sup> Eighth report of the Special Rapporteur, para. 42.

<sup>115</sup> *Ibid.*

<sup>116</sup> Second addendum to the Sixth Report of the Special Rapporteur, A/CN.4/625/Add.2, 9 July 2010, para.15.

between the Union and third-countries (there are 17 bilateral EU-level readmission agreements currently in force,<sup>117</sup> not mentioning certain multilateral agreements concluded by the Union with third-countries containing a readmission clause such as the Cotonou Agreement<sup>118</sup>). As a result, this constitutes essentially an area of bilateral cooperation, where the EU and third States are free to agree on rules that they wish to apply in their bilateral relations, provided that these norms of *jus dispositivum* do not violate the peremptory norms of international law (*jus cogens*).<sup>119</sup> The treaty practice reflected in the readmission agreements concluded by the EU was not thus suitable for universal codification, and no other general rules can be deduced or no uniform practice can be determined either from the ever-growing web of readmission agreements.<sup>120</sup>

## 6. Conclusions

Co-shaping international law has been essential for the EU from the very beginning of the integration process, which tenet holds particularly true through the lenses of the EU's strategically exercised normative influence on international migration law in the field of expulsion of aliens. Remarkably, however, the analysis of the EU's contribution to the conceptualization and development of this specific branch of IML, either on the universal or the regional level, has not yet received much academic attention.

When it comes to assessing the inroads EU return law made in the *universal law-making*, notably with regard to the *2014 ILC draft articles* on the expulsion of aliens, the effectiveness of this normative influence might be debated, but some tangible results as depicted above cannot be denied. It is beyond doubt that the European Union has placed itself in the UN context as a serious global player and norm-creator in the subject matter of expulsion of aliens. Likewise, the whole exercise, coupled with other EU interventions on topics discussed by the ILC (cf. the responsibility of international organizations or the protection of persons in the event of disasters) filled Articles 3(5) and 21(1) TEU with content and contributed to improving the Union's image as a respected and committed partner for a more coherent multi-layered migration governance with the view to projecting converging legal standards. At the end of the day, both Union law and the ILC draft articles serve to pursue the same goals and defend the same values, namely that "any person who is subject to expulsion measures should be treated with respect for that person's human dignity and in accordance with agreed minimum standards, based on the rule of law."<sup>121</sup>

It is worth noting that this is not the first time the EU attempted to exercise normative influence on an international codification in the making related to migration. For instance, when drafting the 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air and the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children during the UN diplomatic conference in Vienna, their almost identical provision establishing the liability of commercial carriers if they do not ascertain that all passengers are in possession of the required travel documents (Article

<sup>117</sup> For an overview of the 17 bilateral EU-level readmission agreements that are in force, see <http://www.consilium.europa.eu/en/documents-publications/agreements-conventions/search-results/?dl=EN&title=readmission&from=0&to=0> (30 December 2016).

<sup>118</sup> Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 (OJ L 317, 15.12.2000, 3), Article 13.

<sup>119</sup> Eighth report of the Special Rapporteur, para. 48; Ninth report of the Special Rapporteur, para. 19.

<sup>120</sup> See e.g. the MIREM project <http://rsc.eui.eu/RDP/research/analyses/ra/> (30 December 2016).

<sup>121</sup> 2012 EU Statement, para. 7.

11(3) in both protocols) were inspired by the relevant provisions of the 1990 Convention implementing the Schengen Agreement (Article 26 (1)).<sup>122</sup>

Looking at the future, the EU will likely to continue exporting its norms also regionally, *in the Council of Europe framework*, whose standard-setting activities have already been tangibly influenced and shaped by EU developments in this area of law, too. Following a call from the European Commission addressed to the Council of Europe early 2014,<sup>123</sup> the CoE has now engaged in the elaboration of *European Immigration Detention Rules* by the end of 2017 under the aegis the European Committee on Legal Co-operation (CDCJ), within which an expert group on the administrative detention of migrants (CJ-DAM) has recently been created.<sup>124</sup> This project, which aims at embarking on Europe-wide standard setting, will admittedly build upon EU norms in a large extent. Hence a new occasion is going to present itself to conduct a similar analysis, this time on the regional level. After the end of this project within the CoE, the outcome of it should be the subject of a new study in the quest of exploring how far (regional) international law becomes Europeanised by interaction with EU law. This might also open up the discourse to evaluate, from the point of view of MLG, *at which level of regulation* issues related to the expulsion of aliens would best be addressed. Stay tuned!

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<sup>122</sup> See the suggestions of the European Community within the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, eleventh session, Vienna, 2-27 October 2000, A/AC.254/5/Add.28, 8. It is also mentioned by D. Fisher et al, *Migration and Security in International Law*, in A T. Aleinikoff & V. Chetail (eds), *Migration and International Legal Norms* (T.M.C. Asser Press, The Hague 2003), pp. 92-93.

<sup>123</sup> Communication from the Commission to the Council and the European Parliament on EU Return Policy (COM(2014) 199 final, Brussels, 28.3.2014), where the Commission gently requested the Council of Europe “to codify a set of detailed immigration detention rules based on existing international and regional human rights standards applicable to deprivation of liberty on the grounds of immigration status” (Part III. 2.).

<sup>124</sup> See

[http://www.coe.int/t/dghl/standardsetting/cdcj/Administrative%20detention%20of%20migrants/administration\\_detention\\_migrants\\_en.asp](http://www.coe.int/t/dghl/standardsetting/cdcj/Administrative%20detention%20of%20migrants/administration_detention_migrants_en.asp) (30 December 2016).

# Criminal Responsibility of Legal Persons Introduced by the Special Tribunal for Lebanon

Lukáš Mareček

*PhD Student of International Law, Institute of International Law and European Law, P. J. Šafárik University in Košice, Slovakia*

*In the first part of the paper, the author introduces decisions of the Special Tribunal for Lebanon, which, in the end, led to acknowledging the criminal responsibility of legal person for the first time in history of international criminal law. In the second part, the author comments on distinct decision and he considers whether this decision was abrupt and arbitrary or not. Finally, the paper suggests possible implications of the judgement for further development of international criminal law and judiciary.*

*Keywords: criminal responsibility of legal persons; criminal responsibility of corporations; judicial creativity; Special Tribunal for Lebanon; development of international criminal law*

## 1. Introduction

The Special Tribunal for Lebanon (hereinafter only “STL”) was created upon an agreement between the United Nations and the Lebanese Republic. According to art. 1 of STL’s Statute, jurisdiction (*ratione personae*) of STL is only over persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafik Hariri and in the death or injury of other persons (crime of terrorism).<sup>1</sup> However, according to art. 60bis of Rules of Procedure and Evidence (adopted by judges of STL themselves, hereinafter only “Rules”) STL, in addition to the jurisdiction given to it by its Statute, STL has also jurisdiction over contempt and obstruction of justice. This extension of jurisdiction has arisen from common law system doctrine of inherent powers where a court may or-in some cases-even must exercise jurisdiction that is ancillary or incidental to its primary jurisdiction and is necessary to ensure a good and fair administration of justice.<sup>2</sup>

On 31 January 2014, Ms Karma Mohamed Tahsin Al Khayat and Al Jadeed S. A. L. (TV Station)<sup>3</sup> as well as Mr Ibrahim Mohamed Ali Al Amin and Akhbar Beirut S. A. L. (TV Station)<sup>4</sup> were charged, in sum with three counts, of contempt and obstruction of justice.

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<sup>1</sup> See more *e.g.* Gillett & M. Schuster, *Fast-track Justice: The Special Tribunal for Lebanon Defines Terrorism* In *Journal of International Criminal Justice.*, vol. 9, no 5, 2011; B. Saul: *Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism* In *Leiden Journal of International Law.* 2011. Available online: <https://ssrn.com/abstract=1865564> (09 October 2017); or L. Mareček: *Terrorism as a crime under international customary law?* In: *The Lawyer Quarterly.* vol 7, no 2., 2017, pp. 73-86. Available online: <https://tlq.ilaw.cas.cz/index.php/tlq/article/view/231> (09 October 2017).

<sup>2</sup> Case no. STL-14-05/PT/CJ/F0054/20140724/R001208-R001242/EN/dm. Decision of Contempt Judge, 24. July 2014. paras. 29-30.

<sup>3</sup> Case no. STL-14-05.

<sup>4</sup> Case no. STL-14-06.

These TV stations were informing public about facts that were not supposed to become publicly known (*in concreto* - information regarding the identities of individuals alleged to be witnesses before the Tribunal). As the Tribunal stated, the freedom of expression, which carries special duties and responsibilities, is not without restrictions. There is a need to safeguard the integrity of STL's proceedings (which includes protecting its witnesses) and so the Tribunal has inherent jurisdiction over contempt and obstruction of justice, whether or not Rules cover such (secondary but inherent) jurisdiction. In other words, "its substance and legitimacy is not derived from Rule 60 bis *per se* but rather Rule 60 bis is a manifestation of this power and not its source."<sup>5</sup>

On the other hand, the Contempt Judge (in case no. STL-14-05) held that Rule 60 bis applies to natural persons only. The Contempt Judge considers that the wording of the Statute makes clear that the Statute does not apply to legal persons (corporate entities), due to the *societas delinquere non potest* principle, for which an explicit expression of such intent of the drafter of the Statute would be required for legal persons to be criminal responsible. Moreover, Statute at several places is using masculine (he/his) or feminine (she/her) gender, but it is not using neutral gender (it/its) anywhere.<sup>6</sup> As STL's Contempt Judge said, "however preferable *de lege ferenda* it might be to have corporations answer to charges of contempt, this preference does not suffice to solidly ground the Tribunal's jurisdiction *de lege lata*."<sup>7</sup>

Rules of Procedure and Evidence dictates that the rules shall be interpreted in a manner consonant with the spirit of the Statute and, in order of precedence:

- a) the principles of interpretation laid down in customary international law as codified in Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties (1969),
- b) international standards on human rights,
- c) the general principles of international criminal law and procedure, and, as appropriate,
- d) the Lebanese Code of Criminal Procedure.<sup>8</sup>

Therefore, the Contempt Judge was also analysing the issue according to these rules of interpretation and was examining if STL does not have such power implicitly, because (as he noted) such explicit power could not be found in Statute of STL.

The Contempt Judge said that according to the Vienna Convention (1969), the rules must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".<sup>9</sup>

There are situations where a judge must overcome silence of a legislator (in this case Lebanon government and the UN), but this is a situation, where such a broader interpretation would be against common meaning of a term "person" in international as well as in a domestic criminal law usage. No institution of international criminal justice ever decided to sentence a legal person. Although international criminal law neither consists of a rule that explicitly excludes such criminal responsibility of a legal person.

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<sup>5</sup> *New TV S.A.L., Karma Mohamed Tahsin Al Khayat* Case no. STL-14-05/PT/AP/AR126.1 Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, Appeals Panel, 02. October 2014. para. 32.

<sup>6</sup> *New TV S.A.L., Karma Mohamed Tahsin Al Khayat* Case no. STL-14-05/PT/CJ/F0054/20140724/R001208-R001242/EN/dm. Decision of Contempt Judge, 24. July 2014. para. 63.

<sup>7</sup> *Ibidem*, par. 68.

<sup>8</sup> Rule 3 (A) STL RPE.

<sup>9</sup> *Ibidem*, paras. 70-71.



With respect to domestic legal systems, it is true that there is a trend towards bringing corporate entities to criminal justice, but on the other hand, this trend is not world widely common and many of important legal systems do not hold this attitude (the Contempt Judge used examples of Italy and Germany).<sup>10</sup> A strong argument in favour of a criminal responsibility of legal persons is that they might be responsible also under Lebanese criminal law, so its responsibility is foreseeable for them. The Contempt Judge had certified the issue for an appellate resolution, despite of that he was clearly of mind that: “the express language of Articles 3 and 16, and the lack of reference to an "it" with respect to an accused, in light of the lack of consensus in the international system and among domestic systems on corporate criminal liability, compel a finding that corporate liability under Lebanese law is inapplicable here.”<sup>11</sup> It should also be noted that in case of two possible interpretations an issue should be solved according to the principle *in dubio pro reo*, as a one of general principles of criminal justice.<sup>12</sup>

## 2. Opinion of Appeals Panel in its Interlocutory Decision

Appeals Panel issued a different legal opinion about a legal responsibility of legal persons in its decision on an interlocutory appeal, which was certified by the contempt judge. The aim of second part of the article is to present its arguments.

It is necessary to interpret law in a such manner as to render them effective and operational. Appeals Panel distinguished interpretation in a spirit of the law and in a letter of the law. The first one is prescribed by Rule 3 (A) of Rules of Evidence and Procedure and by art. 31 and 32 of Vienna Convention (1969). Rule 3 (B) prescribes the second one and it should be applied only when a usage of previous interpretation had no satisfying outcome. Appeals Panel used teleological interpretation of distinct provisions of the Statute of STL. Hence, there was no need for rule 3 (B) to be applied and that resulted to the principle of effectiveness overriding the principle *in dubio mitius* in such case.<sup>13</sup>

As was noted above, there are, in total, four partial rules for an interpretation of distinct provisions before principle *in dubio mitius* (*in dubio pro reo* or *in favour rei*), expressed in the rule 3 (B), might be applied.

a) Interpretation according to the Vienna Convention on Law of Treaties (1969). Rules are using mere word “person” and there is nothing in Rules that limits ordinary meaning of person only to natural persons. On contrary, ordinary meaning of a term “person” in the legal context consists of both natural and legal persons. If drafters of the Rules wanted to exclude legal persons, they would do it explicitly, as they did so in case of victims in Rule 2 of the Rules. Narrower interpretation of the term “person”, due to the usage of word like him or her in the Statute, is erroneous interpretation in a letter of the law, rather than adequate interpretation in a spirit of the law. Furthermore, Arabic and French language version of the Statute is genderless. The fact that other bodies of international criminal justice constituted by UN Security Council have not prosecuted any of legal persons just means nothing more than that there was no need to adjudicate such issue before. Appeals Panel also disagreed with Contempt Judge on that the maxim *societas delinquere non potest* is still actual regarding comparison of domestic criminal systems.<sup>14</sup>

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<sup>10</sup> *Ibidem*, paras. 74-75.

<sup>11</sup> *Ibidem*, para. 83.

<sup>12</sup> Rule 3 (B) STL RPE.

<sup>13</sup> *New TV S.A.L., Karma Mohamed Tahsin Al Khayat* Case no. STL-14-05/PT/AP/AR126.1 Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, Appeals Panel, 02. October 2014. paras. 27-29.

<sup>14</sup> *Ibidem*, paras. 36-44.

- b) Interpretation according to the International Standards on Human Rights. There is a trend of extension of human rights standards and positive obligations applicable to legal entities. Appeals Panel is cognizing efforts in this area and that is an indicator of an evolving practice in relation to corporations at the global level, with respect, in particular, to remedies for their transgressions. These judicial remedies might have also character of a criminal prosecution. So Appeals Panel concluded, that “judicial remedies are not barred against a legal person on account that some national laws limit the applicability of criminal law to legal persons”,<sup>15</sup> but on contrary, “...most jurisdictions appear to recognise the possibility of corporate criminal responsibility...”<sup>16</sup> Appeals Panel even disagrees with examples of Italy and German referred by Contempt Judge. In case of Germany, it is possible to impose sanctions on companies even though it is not a direct criminal responsibility. In addition, also in Germany such trend could be observed as federal state of North Rhine-Westphalia drafted a law on criminal responsibility of corporate entities. In Italy, proceedings against companies (even though not criminal in *stricto sensu*, e.g. administrative vicarious liability or administrative sanctions) might have similar practical effects.<sup>17</sup>
- c) Interpretation according to the General Principles of International Criminal Law and Procedure. IMT in its obiter dictum dismissed a notion of criminal responsibility of legal entities; nevertheless, this finding was only in its obiter dictum. Whereupon Appeals Panel recognized that, there is no decision of the international criminal body that imposed a criminal responsibility on a legal subject. Appeals Chamber is respecting also the Rome Statute of International Criminal Court that explicitly excludes legal persons in art. 25 par. 1 from *ratione personae* of International Criminal Court. However, the intend of drafters was not to codify an existing customary international law (art. 10 of Rome Statute). This narrower expression of *ratione personae* should be considered as a lack of rather political than a legal consensus. In summary, there was no decision of body of international criminal justice that was imposing the criminal responsibility, but this fact itself does not mean that STL has no authority to prosecute legal persons, as any international tribunal did not decide otherwise.<sup>18</sup>
- d) Interpretation according to the Lebanese Code of Procedure. This source of interpretation derives from a specific, hybrid character of STL. Despite of that the Rules are referring only to the Lebanese Code of Procedure (which is not actual for this issue as a source of domestic procedural law) the Appeals Panel was examining the Lebanese Criminal Code (as a source of a domestic substantive law). It is doing so regarding the art. 2 of the Statute, that stipulates Lebanese Criminal Code is applicable law, but only in a restricted manner and this article does not cover a crime of contempt. However, Appeals Panel used it in its interpretative considerations, as legal persons might be held responsible under Lebanese criminal law. Therefore, such criminal liability for contempt and obstruction of justice is foreseeable for corporations (*et ide* TV Stations) under Lebanese law.<sup>19</sup>

As was stated before, STL had have some inherent powers, in other word powers that had arisen from requirements of an effective justice. In spite of previous analysis there was no need for solving the issue with regard to the *in favour rei* principle as the issue could be solved with regard to interpretation methods that were (according to the Rules) supposed to be used. Furthermore, previous analysis had shown that neither Statute nor international law was prohibiting interpretation that concluded that legal

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<sup>15</sup> *Ibidem*, para. 48.

<sup>16</sup> J. Zerk, *Corporate Liability for Gross Human Rights Abuses: Towards a Fairer and More Effective System of Domestic Law Remedies*, 2014, p. 32.

<sup>17</sup> *New TV S.A.L., Karma Mohamed Tahsin Al Khayat* Case no. STL-14-05/PT/AP/AR126.1 Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, Appeals Panel, 02. October 2014. paras. 45-60.

<sup>18</sup> *Ibidem*, paras. 61-67.

<sup>19</sup> *Ibidem*, paras. 68-71.

persons might be held responsible in criminal manner. Hence, if such prosecution should be carried out, the STL has inherent power to do so.

This decision was not taken unanimously but in the ratio two against one with appended dissenting opinion. Dissenting Judge agrees with majority, that STL indeed had jurisdiction over contempt (extension of *ratione materiae*) due to the needs of an effective justice (doctrine of inherent powers). However, it doesn't agree that it has also jurisdiction over legal persons (extension of *ratione personae*). Such interpretation would be breach of several fundamental principles of criminal justice, namely *nullum crimen sine lege scripta, stricta* and *in dubio pro reo*.<sup>20</sup> STL is obliged to fulfil its objectives with regard to the highest standards of international criminal justice.<sup>21</sup> These standards must be understood as aimed mainly at protecting the rights of accused, in other words to ensure a fair trial. "This means that in considering the spirit of the Statute we must not only act so as not to frustrate ... the fight against impunity, but we must do so in the spirit and under the guiding light of international standards of human rights."<sup>22</sup>

Potential exclusion of legal persons from *ratione personae* does not mean that STL has no power to punish (and therefore to prevent) contempt, as there is no legal obstacle in prosecuting its employees or directors. The cases at STL are example of such case where, beside of legal persons, natural persons were prosecuted too. Therefore, suspension of the proceedings against legal persons does not supposed to mean also suspension of the proceedings in distinct cases as such.

As dissenting Judge stated, even in examples of domestic legal systems where the criminal responsibility of legal persons was actual, an explicit expression of intend of legislator to cover legal persons into field of criminal responsibility was present. According to the field of international law, the international criminal law was closest to developing a criminal responsibility for legal persons with issue of so-called criminal organizations at IMT. Even then, only natural persons could have been held criminal responsible, not organization per se.<sup>23</sup>

Dissenting judge ended with following statement:

"There is a fine line, but a line nevertheless, between a creative interpretation of the law and a violation of the rights of the accused. In the circumstances of the present case, I believe that line has been impermissibly crossed."<sup>24</sup>

The Special Tribunal for Lebanon also determined *conditions for criminal responsibility* of a legal person as the prosecutor must:

- a) „establish the criminal responsibility of a specific natural person;
- b) demonstrate that, at the relevant time, such natural person was a director, member of the administration, representative (someone authorized by the legal person to act in its name) or an employee/worker (who must have been provided by the legal body with explicit authorization to act in its name) of the corporate Accused; and

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<sup>20</sup> *Ibidem*, dissent para. 2.

<sup>21</sup> UN Secretary-General Report, UN Doc. S/2006/893, 15 November 2006, paras. 2, 7, 31, 36.

<sup>22</sup> *New TV S.A.L., Karma Mohamed Tahsin Al Khayat* Case no. STL-14-05/PT/AP/AR126.1 Decision on Interlocutory Appeal Concerning Personal Jurisdiction in Contempt Proceedings, Appeals Panel, 02. October 2014. dissent para. 7.

<sup>23</sup> *Ibidem*, dissent paras. 17, 19.

<sup>24</sup> *Ibidem*, dissent para. 29.

- c) prove that the natural person's criminal conduct was done either (a) on behalf of or (b) using the means of the corporate Accused.<sup>25</sup>

In case in which an interlocutory appeal was filed a legal person was not after all sentenced, as the TV station (Al Jadeed) was not found guilty under above-mentioned conditions.<sup>26</sup> However in second case of contempt, with regard to such decision on interlocutory appeal, the TV station (Akhbar Beirut) was sentenced for a fine of 6000 € (alongside with fine to journalist), with taking in account the fact, that this is the first case of sentencing of legal person and therefore its level of foreseeability.<sup>27</sup>

### 3. Discussion

STL extended its jurisdiction (*ratione personae*) also over legal persons because of the necessity of effective justice. It is doubtful if such extension in this case was proportional in comparison to the principle of legality (*nullum crimen sine lege*). In a distinct case letting legal person unpunished would not mean, that offence of contempt had to be unpunished as such. Also in the analysed case, there was also a natural person, which was punished beside TV station.

A significant importance for the issue of the responsibility of members of corporations has a doctrine of a superior responsibility, which could be used to punish not only concrete perpetrators but also their superiors (such as managers of corporations, if of course, criteria are met).<sup>28</sup> Prosecutor of ICC in its report said, that „those who direct mining operations, sell diamond or gold, extracted in the conditions ... could also be authors of the crimes, even if they are based in other countries,<sup>29</sup> hence, ICC indeed cannot condemn corporation as such (as its *ratione personae* its explicitly formulated in narrower scope, to natural persons only) but among accused could be also e.g. managers of such corporation. Such attitude was applied in so called Media Case (International Criminal Tribunal for Rwanda), where „hate radio and hate-spewing magazine ... helped incite the Rwandan genocide ... and it is significant that the ICTR brought the executives of these media outlets – but not the corporate entities themselves – to justice on ground of superior responsibility.<sup>30</sup>

Traditional argument against it is that legal persons have “neither bodies to be punished, nor souls to be condemned.”<sup>31</sup> Among other arguments (more modern ones), fact that fining the legal persons responsible could lead to commoditizing of moral values (*e. g.* economic reasoning between fines and benefits from crimes) is pointed out. On the other hand, there are also reasons for which it would be

<sup>25</sup> Case no. STL-14-05/T/CJ/F0176/PRV/20150918/R005223-R005280/EN/dm, Public redacted version of Judgement of Contempt Judge, 18. September 2015. par. 72.

<sup>26</sup> Case no. STL-14-05.

<sup>27</sup> Case no. STL-14-06/S/CJ/F0265/20160905/R008239-R008247/EN/dm, Reasons for sentencing Judgement of Contempt Judge, 05. September 2016.

<sup>28</sup> That means managers shall be criminal responsible beside of corporation if following criteria will be met: a crimes were committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where a) the superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes; b) the crimes concerned activities that were within the effective responsibility and control of the superior; and c) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

<sup>29</sup> Second Assembly of States Parties to the Rome Statute of the International Criminal Court Report of the Prosecutor of the ICC, Mr Luis Moreno-Ocampo 8 September 2003. Available online: [https://www.icc-cpi.int/NR/rdonlyres/C073586C-7D46-4CBE-B901-0672908E8639/143656/LMO\\_20030908\\_En.pdf](https://www.icc-cpi.int/NR/rdonlyres/C073586C-7D46-4CBE-B901-0672908E8639/143656/LMO_20030908_En.pdf) (09 October 2017).

<sup>30</sup> C. Kaeb, The Shifting Sands of Corporate Liability under International Criminal Law In: *George Washington International Law Review*, vol. 49, no. 2, 2016. pp. 375-376.

<sup>31</sup> Baron Edward Thurlow (1844) cited in *Ibidem*, pp. 352-353.

beneficial to punish legal person beside of natural one. „Imposing criminal penalties on the corporate entity itself achieves retribution for the collective action and provides incentives for structural change at the firm level, “<sup>32</sup> since prosecuting only the responsible individuals might fail to change corporate culture that in some cases even encourage illegal behaviour.<sup>33</sup>

It is indeed true, that there is a trend of criminalizing of legal persons behaviour, so the society of states (or at least not marginal part of it) is concerning such attitude as beneficial. Nevertheless, such trend is not overwhelming yet. *Constatation* that punishing of legal persons has its reason and is therefore desirable is opinion about how the law should be (opinion *de lege ferenda*) and it should not be confused with a duty of judge to decide upon the law, as it is (to form an opinion *de lege lata*). In an area of criminal justice, it is necessary to have a strict approach to the issue of judicial creativity, regarding a specific function of criminal law, hence its methods. The methods which criminal law uses for achieving its aims are of the most serious ones and for that very reason, they had its form of *ultima ratio*.

Such arguments, as had the defendants, could also be found in the United States Court of Appeals decision, as it decided that it cannot punish company Royal Dutch Petroleum, as (in its words) such rule of international law is not only absent, but such concept was even refused.<sup>34</sup> As the Second circuit Appeals Court of USA said, there is no explicit notion in international law about rules that are imposing criminal responsibility to a legal person, rather otherwise.

Closest to drawing of such responsibility was the IMT but it did not do that. It is possible to allege, that at least at time of its decision, such rule was absent in international criminal law. It is true, that in times when IMT was deciding its cases, there was no such trend of imposing criminal responsibility to legal persons. This leads to question – “when such rule was formulated?” In none of international treaties was such explicit notion, although such rule might have customary form. Where one could find its essential elements (opinion *iuris necessitates* and *usus longaeus*) if there was no trend on international level and praxis on national level is not still overwhelming and unanimous (it is rather a mixture of criminal, civil or administrative responsibility systems from one to another legal system)? Answer to this question is not to be found in STL’s decision. Author of this paper suppose, that in case of criminal responsibility of distinct TV stations it is rather a matter of judicial creativity than a matter of finding of customary rule and that is (in criminal context) necessarily in conflict with principle of legality.

Attitude that argue in favour to sentencing the legal persons on grounds that in others branches of international law responsibility of these is drawn (in particular in international human rights law) is not sound, forasmuch as it results in legal syncretism, where takes place mixing of methods of different branches of law. This does not take into an account that different branches have a different purpose, historical context, basis and nature of remedies. International law jurist should take into account that international law is not a monolith but (similarly to national law) rather a complex system of rules and its connections and so he/she should approach to it accordingly.

Aforesaid results into two comments. Whether decision of STL was just or not it is effective, it is contribution to the mosaic of international criminal judiciary, and as such, it will be likely important for resolving the issue of the criminal responsibility of legal persons on international level in the future.

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<sup>32</sup> C. Kaeb, A New Penalty Structure for Corporate Involvement in Atrocity Crimes: About Prosecutors and Monitors In: *Harvard International Law Journal*, vol 57, 2016. pp. 21.

<sup>33</sup> C. Kaeb, The Shifting Sands of Corporate Liability under International Criminal Law In: *George Washington International Law Review*, vol. 49, no. 2, 2016. p. 370-371.

<sup>34</sup> Customary international law has steadfastly rejected the notion of corporate liability for international crimes, and no international [criminal] tribunal has ever held a corporation liable for a violation of the law of nations.“ *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 120 (2d Cir. 2010). For sake of completeness it is necessary to add, that this rejecting attitude was not adapted by other circuits and the Supreme court did not considered this issue at all.

Such prediction is not a mere opinion of the author, but its decisions are to be found also in actual activities of International Law Commission.<sup>35</sup> It is likely that it might be used as one of arguments for predictability, hence justness, in next cases of the criminal responsibility of legal persons in the future. Either by STL or by other institutions of the international criminal justice.

Secondly, if a distinct decision was not only a matter of admissible judicial creativity, but it was the case of arbitrariness, then this decision (presumably) will not be respected by the international society, respectively it will be rejected by other international criminal tribunals as a dead-end that violated the principle of legality.<sup>36</sup> There is a trend of rooting of the principle of legality also in international criminal law, even though it is still more flexible, than it is typical on national level (mainly in continental legal family).<sup>37</sup> This principle dictates that an explicit expression of the criminal legal responsibility of legal persons is required, as its presence is not without further natural for criminal law in general. Such explicit expression is also typical for countries that included such concept in their legal systems.

If the international society will depart to course towards drawing not only a civil, but also a criminal responsibility of legal persons, it will gain a powerful tool for influence on supranational corporations, which affects international course of events. Even currently, it is possible to see that responsibility of legal persons for breaching of rules of international human rights law is already present.<sup>38</sup> Disregarding of human rights, may fulfil (in serious cases as part of systematic or widespread attack against civilian population) definition of the crime against humanity. Therefore, the criminal responsibility of corporation might be viewed as a sequenced extension of their responsibility system.

It is only desirable if supranational corporations would be aware of possibility of an eventual criminal responsibility for such behaviour, hence, effects that results from criminal responsibility under international law, among other application of a principle of universality. The principle of universality dictates the obligation (and either authorisation as well) to prosecute perpetrator of crimes under international law.

Common penalty for legal persons is e.g. the confiscation of its property (as a whole or partially), or the dissolving of legal person as such. According to the previously mentioned principle, any state has an obligation to prosecute and if appropriate to punish them, including state of their domicile or state in which they have property. In other words, they should stop counting on drawing only of a civil responsibility on the national level, which is firstly appropriate to caused damages (*i.e.* compensation, whereas punishment has different function – retribution *a. o.*, hence, in terms of financial expenses for corporations, total sum of expenses for a criminal behaviour arises rapidly, not mentioning aforesaid possibility of dissolving of company). Secondly, drawing of the responsibility from national level onto

<sup>35</sup> Its analysis is beyond the scope of this paper, but ILC takes and moderate approach and is not acknowledges only criminal responsibility of legal person, but rather on contrary, it is creating a place for discretion for states to choose its own attitude (criminal, civil or administrative). From that is could be concluded, that criminal responsibility is still not part of international criminal law, even after STL's decision. For links to STL's decisions see *Report on the work of the sixty-eighth session (2016)*, 2 May-10 June and 4 July-12 August 2016. General Assembly Official Records Seventy-first session Supplement No. 10 (A/71/10), pp. 262, 265. Available online <http://legal.un.org/docs/?path=../ilc/reports/2016/english/chp7.pdf&lang=EFSRAC> (09 October 2017), see also Draft Articles on Crimes Against Humanity *Report of the International Law Commission Sixty-ninth session*, 1 May-2 June and 3 July-4 August 2017. General Assembly Official Records Seventy-second Session Supplement No. 10 (A/72/10). Available online: [http://legal.un.org/docs/?path=../ilc/reports/2017/english/a\\_72\\_10.pdf&lang=EFSRAC](http://legal.un.org/docs/?path=../ilc/reports/2017/english/a_72_10.pdf&lang=EFSRAC) (09 October 2017).

<sup>36</sup> As was noted in citation above, there was no consensus of international society on this issue not only before STL's decision, but it is not present alike nowadays. See *ibidem*.

<sup>37</sup> Also O. Svaček, *International Criminal Law*. Olomouc: Univerzita Palavského v Olomouci, 2012. p. 32.

<sup>38</sup> E. g. also in cited case *Kiobel v. Dutch Petroleum* the corporate liability concerned Royal Dutch Petroleum's alleged complicity in human rights violations in their extractive operations in Nigeria. See C. Kaeb, *The Shifting Sands of Corporate Liability under International Criminal Law In: George Washington International Law Review*, vol. 49, no. 2, 2016. p. 360.

supranational corporation might encounter with factual problems, even more in cases of less influential members of the international society, where the principle of universality is able to overcome also this issue.

For these reasons, they should start accounting also with the principle of universal criminal responsibility, which is (unlike of civil sanctions) not based on grounds of restitution, compensation or satisfaction, but on grounds of repression, prevention and of retribution. Severity of criminal sanction, therefore, is not necessarily appropriate to a caused damage or injury, as its proportionality is compared with functions of criminal law, achievement of which also justifies the imposition of significantly stricter sanctions.

## 4. Conclusion

In the contemporary international law, a legal subjectivity of individual is widely accepted, where in a field of human rights a tendency of its extension towards legal persons is to be seen. Similar tendency was not possible to be identified in branch of the international criminal law.

Legal persons (or their units) were subjects of interest of IMT, but not in a sense of taking them criminal responsible under international law. Hence, it is not possible to suggest that IMT constituted such individual criminal responsibility of legal persons; rather it is an example of breaching of *nulla poena sine culpa* principle, as a result of application of IMT's Charter in a connection with a subsequent national legislation that was reflected in its judgement.

Milestone can be dated not sooner than to autumn 2016, when a sentencing judgement of STL came into force. STL was first institution of international criminal justice (of hybrid character) that acknowledged its jurisdiction over legal persons.

STL formerly hesitated to extend its *ratione personae* also to legal persons, even though it had no such problem in matter of its *ratione materiae* extension to offences of contempt and obstruction of justice.<sup>39</sup> Different attitude is brought by Appeals panel, that with a reference to Lebanese law, as well as to general rules of interpretation of international law, brings a different and more extensive interpretation of distinct provisions of STL's Statute.

Whether the legal situation before STL's judgement was different or not, this might become an important impulse for further development of international criminal law, a base stone, even if at the beginning of that would be decision that was not in a conformity with the law. STL's judgement is indeed the breaking point in development of the international criminal law as this judgement was already reflected in an actual work of International Law Commission, but description and analysis this activity is beyond the scope of this paper. Other institutions of international criminal justice will be in front of a choice either to refuse concept of the criminal responsibility of legal persons under international law or to accept it and argue in favour to existence of such rule in the international criminal law (possibly also) with a reference to this decision.

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<sup>39</sup> Case no. STL-14-05/PT/CJ - F0054/20 140724/ROO 1208-ROO 1242/EN/dm. para. 65.

# International and Foreign Trends Regulating the Freedom of Artistic Expression

Zsolt Cseporán

*Assistant lecturer, University of Pécs Faculty of Law*

*Since the middle of the second decade of the 21st century, it can be observed that the concept of the role of the state in the cultural sphere is changing again, especially in light of the growing demands by individuals as consumers of culture. The constitutional regulation of art reflects the current directions, the formulated aims and the professed values of cultural policy. This implies that the legal regulation of culture and arts shows different models at the international and national levels as well.*

*Keywords: freedom of artistic expression, cultural life, fundamental rights, international law, constitutional trends*

## 1. The Development of the Protection of Art under International Law

### 1.1. Introduction: Human Rights in International Law

In the process of recognising human rights, a major component was the appearance of these norms in international law. The definition of the types, content, assurances, limitations and enforceability of human rights became decisive after World War II.<sup>1</sup>

Following World War II, the *international protection* of human rights played an increasingly important role and responsibility, which – beyond the general documents – led to the birth of separate international conventions on the individual groups of human rights. The principal characteristic of the development of documents on international human rights was that initially, they were derived from national fundamental rights catalogues<sup>2</sup> – *i.e.* constitutions of individual states – which, especially in the early stages of development – inevitably, due to the historical, moral-philosophical background – stemmed the approach and conception on natural law.<sup>3</sup> This tendency can also be currently observed in the way states adopt a novel interpretation to certain human rights or introduce entirely new fundamental rights in their constitutions. However, it is more characteristic for the current mode of action that human rights recognised on international level affect national legal systems.<sup>4</sup> A major element of this process is the manner in which national constitutional courts consider the relevant decisions of international legal

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<sup>1</sup> J. Petrétei, *Az alkotmányos demokrácia alapintézményei*, Dialóg Campus, Budapest-Pécs, 2011, pp. 419.

<sup>2</sup> Z. Péteri, *Az emberi és állampolgári jogok történetéhez*, Jogtudományi Közlöny, Vol. 1998, No. 12, pp. 651.

<sup>3</sup> q.v. A. Sajó, *Szabadság, emberi jog, alkotmányosság*, Magyar Tudomány, Vol. 1996, No. 1., pp. 3.

<sup>4</sup> cf. Françoise Dreyfus, *Les droits économiques et sociaux dans quelques constitutions récentes*, In *L'Etat de droit. Mélanges en l'honneur de Guy Braibant*, Éditions Dalloz, Paris, 1996, pp. 170.



platforms – and their reasoning – as norms. Thus, human rights included in international documents *interact* with fundamental rights of constitutions both in the sense of ontology and implementation.<sup>5</sup>

In universal international law, the first reference to human rights can be found in the Charter of the United Nations signed in 1945, however, this document did not define these rights. The clear aim of international cooperation is the promotion of and support for respecting human rights and fundamental freedoms. The first systematic source of human rights is the *Universal Declaration of Human Rights* proclaimed by the 3<sup>rd</sup> United Nations General Assembly (10 December 1948) which is considered to be an international catalogue and standard of the relevant rights<sup>6</sup>, yet it does not possess legal binding nature and can be considered a soft law instrument – but nonetheless of huge significance.

The proclamation of the Universal Declaration had many consequences relevant to international law. On one hand, the declaration became the *authentic standard of interpretation* for the human rights-related provisions of the UN Charter; on the other hand, the fundamental principle that human rights are *universal* became an intrinsic part of international law. Moreover, the declaration is considered to be a *common denominator* for evaluating the human rights-related behaviour of the member states, and it had an effect on international lawmaking in human rights.<sup>7</sup>

Subsequently, the General Assembly of the United Nations adopted two conventions: the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*.<sup>8</sup> The former contains the oldest, so-called “*first generation*” human rights, while the latter states the so-called “*second generation*” rights.

The development process of the European continent in this field represents a unique branch in the international recognition of human rights. The European system of human rights protection is tied primarily (though not exclusively) to the activities of the Council of Europe, whose highlighted goal is the protection of ideas and values of the common European heritage as well as their implementation.<sup>9</sup> Until today the Council of Europe has initiated 221 international conventions, the most important of which is currently the Convention for the Protection of Human Rights and Fundamental Freedoms (*also known as European Convention on Human Rights*) of 1950 which encompasses classic rights and political freedoms.

The international appearance of human rights had far-reaching consequences, evoking quality changes in the structure of international law, as it questioned the exclusive inter-state character of international law by making natural persons the subjects of law and jurisdiction in a legal system separate from national law.<sup>10</sup>

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<sup>5</sup> T. Drinóczi, A művészet szabadságának összehasonlító jogi elemzése, In M. Kocsis & P. Tilk (Eds.), *A művészet szabadsága – alkotmányjogi megközelítésben*, Kodifikátor Alapítvány, Pécs 2013, pp. 101.

<sup>6</sup> Although the declaration remained a General Assembly resolution, which is not a binding instrument of international law, the rights contained therein have become fully recognised.

<sup>7</sup> G. Kardos, Az emberi jogokat védő nemzetközi jogintézmények, In G. Halmai & A. G. Tóth (Eds.): *Emberi jogok*, Osiris Kiadó, Budapest, 2003, pp. 144.

<sup>8</sup> The two conventions were implemented in Hungary in 1976 by law orders No. 8. and 9. – thus becoming part of the domestic law.

<sup>9</sup> For more details on the legal character of this heritage, q.v. J. Bruhács, *Nemzetközi jog II.*, Dialóg Campus, Budapest-Pécs, 1999, pp. 208.

<sup>10</sup> cf. Bruhács, i. m. pp. 192.

## 1.2. Recognition of Cultural Rights and Art by International Law

The recognition and definition of cultural rights lagged behind the declaration of civil, economic and social rights on the international level and thus on the national level as well. Despite slow beginnings, the activities of human rights bodies greatly contributed to the clarification of such human rights, the components of which make it possible for individuals to take part in cultural life. Such are the following fundamental rights, principles and prohibitions: equality, the principle of non-discrimination, the freedom of non-intervention into the enjoyment of cultural life, the freedom to create, the freedom to contribute to cultural life, the freedom to choose to take part in cultural life, the freedom of distribution, the freedom of international cooperation, the freedom to participate in the definition and implementation of cultural policies. All of these show that cultural rights are inseparable parts of human rights – despite the fact that not all of the above can be qualified as fundamental rights.<sup>11</sup>

### 1.2.1. *The Universal Declaration of Human Rights*

Primarily, the Universal Declaration of Human Rights shall be examined as the first relevant document, to consider whether the freedom of art was recognised upon the international appearance of human rights – *i.e.* in the mid-20<sup>th</sup> century.

The answer to the question is clear from the text. Article 22 of the declaration contains the following regulation: “*Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.*”<sup>12</sup>

I wish to draw attention to two elements of the wording in the regulation cited above. The first comes from a strictly textual approach: the document does not contain *expressis verbis* the freedom of art, it only mentions cultural rights, the meaning of which in the given historical context was identical to the characteristics of minority rights.<sup>13</sup> The second is the expression “*entitled to*” which does not recognise the protected values in question in the form of their subjective, vested right and thus ultimately, are not compelling or enforceable.

Apart from Article 22, the matter is also regulated in Article 27: “*(1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.*”<sup>14</sup>

With this article the declaration came one step closer to stating the protection of art in international law, however its recognition as a human right was still yet to come. On one hand, the regulation provides no protection for the creative process of art, but rather the right to enjoy art, which is the *passive, receptive side* of artistic life. On the other hand, the text of the second sentence focuses on the result of the relevant activity, thus the artwork itself, phrasing it as a market term (“*product*”), highlighting therefore its use – the expressions of moral and material interests clearly refer to copyright protection. On the other hand,

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<sup>11</sup> In detail *q.v.* Drinóczy, *i. m.* pp. 102.

<sup>12</sup> Art. 22 of the Universal Declaration of Human Rights.

<sup>13</sup> *i.b.*

<sup>14</sup> Art. 27 of the Universal Declaration of Human Rights.

the freedom of art does not appear in either the object of the regulation or the type of the norm, as these would require the characteristics of a fundamental right – yet Article 27 attaches no such significance to the creative process.

### *1.2.2. The International Covenant on Civil and Political Rights*

The status set forth in the Universal Declaration of Human Rights remained unchanged until the adoption of the International Covenant on Civil and Political Rights. With said document, however, a clear development of law could be observed, as the freedom of artistic expression appeared imbedded into the freedom of expression: “2. *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.*”<sup>15</sup>

In this way, the International Covenant on Civil and Political Rights took the first step towards the recognition of the freedom of art. The covenant provides for the explicit fundamental rights protection of the relevant right within the framework of one of the most important first generation human rights, the freedom of expression. However, beyond stating legal protection, the document regulates not only the content but also the standards of limitation: “3. *The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals.*”<sup>16</sup>

Firstly, I wish to point out the declaration of the responsibility tied to the freedom: apart from an individual autonomy, the UN General Assembly prescribed a safeguard obligation to the benefit of the subjects of law, in the case of a lack of public authority non-intervention. It is important to note the formal precondition of the limitation, which prescribes the necessity to legally regulate public intervention. Finally, artistic opinion must be deferred in two cases: on one hand, in respect to the rights of other people, and on the other hand *vis-à-vis* public order and morals. Thus, the limitation of the freedom of expression and art is tied to the application of the fundamental rights test.

### *1.2.3. The International Covenant on Economic, Social and Cultural Rights*

Simultaneously and parallel to the International Covenant on Civil and Political Rights, the UN General Assembly created – specifically for the purpose of regulating cultural rights – the International Covenant on Economic, Social and Cultural Rights as well. On the formulation of the fundamental rights characteristic of art, the document – due to its nature – must meet certain criteria: “1. *The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life; (b) To enjoy the benefits of scientific progress and its applications; (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.* 2. *The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science*

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<sup>15</sup> Art. 2 of the International Covenant on Civil and Political Rights.

<sup>16</sup> Art. 3 of the International Covenant on Civil and Political Rights.

*and culture. 3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.”<sup>17</sup>*

Through this regulatory scheme, the covenant assumed a direction unlike any other international norm. Article 15 is able to encompass almost all aspects of the constitutional models of art. On one hand, item no. 1 adopts the ownership-like approach of artistic activity from Article 27 of the Universal Declaration of Human Rights. Although this measure is not synonymous with the fundamental rights protection outlined above, it is still considered a freedom-type regulation. On the other hand, item no. 2 requires active participation from the states in relation to issues of culture, however this can be indirectly assumed to extend to art as well. Finally, item no. 3 regulates the *status negativus* behaviour of the state towards respecting the freedom of artistic activity, which directly reinforces its freedom-like nature and may be regarded as an implicit forerunner of the principle of state neutrality.

## 2. The European Curve of the Recognition of Art as a Fundamental Right

### 2.1. The European Convention on Human Rights and the Case-law of the European Court of Human Rights

The European Convention on Human Rights (hereafter ECHR) and the activities of the European Court of Human Rights (hereafter ECtHR) belong to the previously outlined developments. Article 10 of the above-mentioned convention is to be applied for the protection of artistic expression: *“Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.”<sup>18</sup>*

It is absolutely clear from the text of the international convention that the norm lacks the individual protection of art, therefore its human rights protection shall be secured within the framework of the freedom of expression.<sup>19</sup> This enhances the role of the European Court of Human Rights in the European protection of the fundamental rights of artists.

It is apparent from the case-law of the ECtHR that artistic expression prevails within the boundaries of the freedom of expression – as an indication that the document does not qualify the freedom of art as a independent human right. As a rule of thumb, it can be stated that the ECtHR provides a relatively broad field for discretion of the member states.<sup>20</sup> Additionally, it is noteworthy that in the case-law of the court, the higher level of protection of the freedom of art in relation to the freedom of expression was mainly ruled in flagrant cases, when artists were punished with imprisonment for their works of art.<sup>21</sup>

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<sup>17</sup> Art. 1-3 of the International Covenant on Economic, Social and Cultural Rights.

<sup>18</sup> Art. 10 of ECHR.

<sup>19</sup> cf. H.J. Blanke, Kommunikative und politische Rechte, In D. Merten & H.J. Papier (Eds.), Handbuch der Grundrechte in Deutschland und Europa, Band VI/1 Europäische Grundrechte I, C. F. Müller, Heidelberg, 2010, pp. 233.

<sup>20</sup> A. Grád & M. Weller, A strasbourgi emberi jogi bírászkodás kézikönyve, HVG-ORAC, Budapest, 2011, pp. 570.

<sup>21</sup> q.v. Handyside v. the United Kingdom judgment of 7 December 1976, Series A no. 24; Müller and Others v. Switzerland judgment of 24 May 1988, Series A no. 133; Scherer v. Switzerland judgment of 25 March 1994, Series A no. 287; Otto-

## 2.2. Arts in European Union law: the Charter of Fundamental Rights of the European Union

The mechanism of protecting fundamental rights of the European Union is closely related to the Charter of Fundamental Rights of the European Union<sup>22</sup> (hereafter: Charter) therefore, prior to the assessment of artistic aspects, it is required to discourse on the nature and application thereof.

Although the Treaty of Lisbon has raised the Charter to the level of the Treaties, it was prepared to be a declaration only and not an applicable, contractual text. Thus, it lists the rights, yet the restrictions and content of the rights cannot be determined in advance *in abstracto*.<sup>23</sup> Furthermore, the member states sought to determine the application of the Charter based on interpretative rules. These appear in the following general provisions.<sup>24</sup>

Firstly, in the scope of application, Art. 51(1) of the Charter states that, in accordance with the principle of subsidiarity, the Charter is addressed to the institutions, bodies, offices and agencies of the Union. At the same time, it can be ascertained that the requirement to respect fundamental rights defined in the context of the Union is only binding when the member state applies Union law.<sup>25</sup> This in turn means that the Charter does not ensure the protection of fundamental rights in general and sets the boundaries of the protection of fundamental rights, *rationae materiae*,<sup>26</sup> by the European Union. Secondly, the Charter may not extend the scope of the European Union law beyond the competence of the European Union, and it may not establish new competencies or modify the existing rights in any event.<sup>27</sup> Thirdly, regarding the effect and interpretation of the rights and principles declared in the Charter, Art. 52, on one hand, contains the rules on the limitation of the rights and principles with particular emphasis on the principle of proportionality; on the other hand, it provides for consistency between the Charter and the ECHR by ensuring more extensive protection of rights; finally, it refers to taking national law into account. Fourthly, by determining the level of protection, Art. 53 states that the interpretation of the Charter may not result in the restriction of the content of human rights and fundamental freedoms. Based on this, the principle of “the most favourable provision” must be applied: the level of protection provided

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Preminger-Institut v. Austria judgment of 20 September 1994, Series A no. 295-A; Karatas v. Turkey judgment of 8 July 1999, no. 23168/94; Polat v. Turkey judgment of 8 July 1999, no. 23500/94.

<sup>22</sup> At the time of the establishment of the European Economic Community, the founding fathers omitted the catalogue of human rights from the foundational treaty, and initially the attitude of the Court of Justice of the European Union was also moderate in the elaboration of human rights as part of Community law. However, this approach has later been reversed so that the national courts and constitutional courts would not be entitled to override the provisions of Community law on grounds of the protection of fundamental rights. Thereafter, the Charter of Fundamental Rights was the next milestone concerning the incorporation of fundamental rights into EU law, though until 2009 it constituted only soft law and not a rule binding for the member states.

cf. E. Szalayné Sándor, Gondolatok az Európai Unió alapjogi rendszerének metamorfózisáról, *Európai jog*, Vol. 2003, No. 2, pp. 9-16.; M. Weller, Az Európai Unió Alapjogi Kartája, *Acta Humana*, Vol. 2001, No. 43, pp. 31-44.; and F. Gárdos-Orosz, Az Európai Unió alapjogvédelmi rendszere és az Emberi Jogok Európai Bírósága – A kettős európai alapjogvédelem és a magyar alkotmányjog, *Jog – Állam – Politika*, Vol. 2011, No. 4, pp. 80-82.

<sup>23</sup> L. Blutman, *Az Európai Unió joga a gyakorlatban*, HVG-ORAC, Budapest, 2013, pp. 523.

<sup>24</sup> q.v. M. Niedobitek, *Die Grundrechte charta der Europäischen Union*, In D. Merten & H.J. Papier (Eds.), *Handbuch der Grundrechte in Deutschland und Europa*, Band VI/1 Europäische Grundrechte I, C. F. Müller, Heidelberg, 2010, pp. 970-976.

<sup>25</sup> A. Osztovits (Ed.), *Az Európai Unióról és az Európai Unió Működéséről szóló szerződések magyarázata 1.*, CompLex Kiadó, Budapest, 2011, pp. 569.

<sup>26</sup> Blutman, *op. cit.* pp. 83.

<sup>27</sup> Art. 51 (2) of the Charter of Fundamental Rights.

by the Charter may not be lower than the protection afforded by the ECHR.<sup>28</sup> Finally, Art. 54 contains the prohibition of the abuse of rights which emphasises the conditional nature of this principle: the breach thereof is always accompanied by the breach of some other right or freedom.<sup>29</sup>

In light of the above, the artistic element of the protection of fundamental rights by the European Union is incorporated in Art. 13 of the Charter, where the freedom of the arts is *expressis verbis* declared: “Article 13 - Freedom of the arts and science  
*The arts and scientific research shall be free of constraint. Academic freedom shall be respected.*”<sup>30</sup> This text treats the elements relating to artistic works specifically and as an independent human right, when stipulating the nature thereof as a freedom.

The European Union’s accession to the ECHR is intended to bind the latter two levels of the three-level fundamental rights protection, i.e. the three levels being the national constitutional, Union and international law levels,<sup>31</sup> the relationship of which is markedly expressed in the interpretative rules of the Charter.<sup>32</sup>

As the case-law of the Court of Justice of the European Union does not include interpretative standards concerning the content of the freedom of art, the succinct wording of the provision simply suggests that the Charter considers the human rights institution of art a freedom implying the definition of the individual right as broadly as possible.<sup>33</sup> Moreover, the freedom of art is the fundamental rights core of the freedom of expression, thus regarding this institutional context – as confirmed by the literature<sup>34</sup> – the restriction of arts can be closely related to the freedom of expression.<sup>35</sup>

Furthermore, the institutional contexts of the freedom of arts should be considered: the content and the scope of this right are identical to the content and the scope of the rights provided for in Art. 10 of the ECHR, as the latter is identical to Art. 11 of the Charter on the freedom of expression. The intellectual property protection should also be emphasised as a form of the right to property which is specifically mentioned in Art. 17.<sup>36</sup>

In summary, the fundamental rights foundation of arts in international law has been the outcome of a lengthy process: it was not declared in any convention other than the Charter as a direct and independent human right. For the sake of completeness, it must be stated that although this is not true in the case of the freedom of artistic activity, the expression- or property-based concept of art is contained in all international documents.

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<sup>28</sup> Osztovits (Ed.), op. cit. pp. 575.

<sup>29</sup> Osztovits (Ed.), op. cit. pp. 576.

<sup>30</sup> Art. 13 of the Charter of Fundamental Rights.

<sup>31</sup> q.v. E. Szalayné Sándor, Alapjogok (európai) válaszüton – Lisszabon után, Jogtudományi Közlöny, Vol. 2013, No 1, pp.15-27.

<sup>32</sup> q.v., in particular, Art. 52 and 53 of the Charter of Fundamental Rights

<sup>33</sup> In relation to this, q.v. the issue of fundamental right-related legal capacity in the freedom of arts. Zs. Cseporán Zsolt, Művészet és emberi jogok, Jura, Vol. 2015 No. 2, pp. 20-27.

<sup>34</sup> q.v. A. Koltay, A művészet szabadsága: a nem létező alapjog, Pázmány Law Working Papers, Vol 2016, No. 4.

<sup>35</sup> Osztovits (Ed.), op. cit., pp. 494.

<sup>36</sup> q.v. Drinóczi, op. cit., pp. 105.

### 3. Trends of national legislation

In the remainder of the paper, I will abandon the solutions of international law and aim to assess the basic laws of other countries, where the focus of the analysis is based on the constitutional triad model of arts.

#### 3.1. The system of national legislations

##### 3.1.1. *The depths of constitutional provisions*

The depth of the provisions indicates the level of detail of the analysed state's constitution in relation to the given subject. In this regard, the key aspects to be examined are the structure of the state (federal or unitary), the characteristics of the state arising from its historical limitations (multi-ethnic, multilingual or other), the era of the adoption of the constitution (19<sup>th</sup>, 20<sup>th</sup> or 21<sup>st</sup> century), and the possibility to amend the constitution (inflexible or flexible). These factors have a significant impact, on the structure of the constitution and also the elaboration thereof in the light of the specific provision.<sup>37</sup>

In the case of federal states, it is the cardinal task of the constituent organ to provide for the distribution of powers between the federal state and the (member) states (Bunds, cantons, communities, etc.). This also applies to states with autonomous communities or territorial units with a special status, since these can be typically linked to specific minorities. The distribution of powers shall, in particular, mean the demarcation of the legislative and the executive competencies: such states determine at the constitutional level the exclusive powers of the federal state and the state parliament. Specifically: which are the functions that may be performed by the federal state jointly with the territorial units and which are fields in which decisions may be made only at local level. In practice, in the case of federal states, culture and arts are regulated at local level, while the protection of the national cultural heritage falls within the competence of the state.<sup>38</sup> Conversely, the constitutions of *multi-ethnic or multilingual states* state in greater detail the rights of minorities to identity, cultural autonomy and language.<sup>39</sup>

##### 3.1.2. *The content of constitutions*

When examining the content of the constitutions, the legal value in focus – in this case, the freedom of arts – in certain states is not mentioned *expressis verbis*, but rather the freedom of speech together with the prohibition of censorship constitute the content of the constitution. These legal systems broadly interpret the relevant constitutional provision and consider arts as the integrated part of the freedom of expression.

When we examine how the freedom of arts is reflected in the constitutions of certain states and what kind of correlations it indicates, we may find the following expressions: 1) the protection of cultural

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<sup>37</sup> Drinóczi, op. cit., pp. 106.

<sup>38</sup> In detail q.v. Drinóczi: op. cit., pp. 107.

<sup>39</sup> Ibid.

wealth and the right to culture,<sup>40</sup> 2) freedom of arts, 3) protection of intellectual property,<sup>41</sup> and 4) the promotion, support of culture and/or arts.<sup>42</sup>

### 3.2. The models of certain states

I shall demonstrate the foreign legislation in relation to the freedom of arts through the analysis of the constitutional practice of non-randomly chosen states. In regards to the states detailed below, I considered their legal systems, constitutional traditions, geographical locations and historical limitations. Therefore, I shall demonstrate the two main types of European continental law,<sup>43</sup> the German and Latin schools through the legislation of Germany and Italy. Furthermore, I shall analyse the basic laws of Sweden from the Nordic region and the Czech Republic from the Central European region, while I will demonstrate the tendencies of the Mediterranean and the Balkan region through the example of Croatia and Greece. Finally, I shall analyse the characteristics of the overseas legal system in light of the Constitution of the United States of America.

#### 3.2.1. Germany

Art. 5 of the Constitution of the Federal Republic of Germany (1949 *Grundgesetz-GG*) provides for the protection of fundamental rights related to the means of expression in three separate Sections. Accordingly, the first Section covers the freedom of expression and the freedom of press with special reference to the means of expression and the prohibition of censorship. The second section states the restriction test of these rights, while the third Section declares the cultural rights – namely the freedom of arts, science and teaching. The Federal Constitutional Court and the Federal Administrative Court argue that the order within the Article was not a coincidence as the second section (the rule on the restriction) only applies to the freedom of expression and press.<sup>44</sup>

The wording of the third Section relevant to the theme is the following: “Arts and sciences, research and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution.”<sup>45</sup>

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<sup>40</sup> q.v. Art. 23 of the Constitution of the Kingdom of Belgium, Art. 9 of the Constitution of the Italian Republic, Art 8 of the Constitution of Malta, the Preambles of the Constitutions of the Kingdom of the Netherlands and Spain, Art. 61 and 71 of the Constitution of the Republic of Slovenia, Art. 42.1 of the Constitution of the Republic of Lithuania. Moreover, the Constitution of the Portuguese Republic contains the right to cultural enjoyment and creation (Art. 78), the freedom to access the products and values of culture and the right to access culture is provided for in the Constitution of Romania (Art. 33) and in the Polish basic law (Art. 6).

<sup>41</sup> Constitutionally determining the protection of intellectual property is the solution of the more recent constitutions. Art. 113 of the Constitution of the Republic of Latvia and Art. 39 of the Constitution of the Republic of Estonia protect the copyrights and patent rights, while Art. 60 of the Slovenian basic law guarantees other rights deriving from artistic, scientific, research, and invention activities.

<sup>42</sup> In detail q.v. Drinóczy, op. cit., pp.108-109.

<sup>43</sup> Constitutionally determining the protection of intellectual property is the solution of the more recent constitutions. Art. 113 of the Constitution of the Republic of Latvia and Art. 39 of the Constitution of the Republic of Estonia protect the copyrights and patent rights, while Art. 60 of the Slovenian basic law guarantees other rights deriving from artistic, scientific, research, and invention activities.

<sup>44</sup> Drinóczy, op. cit., pp.115.

<sup>45</sup> Art. 5 (3) of the Constitution of the Federal Republic of Germany.



The German solution clearly shows that it applies the universal model of the protection of arts at the constitutional level: “*arts shall be free*”. The laconic wording of the GG leaves much room for such interpretation of the constitution which clarifies the content of the provision. First and foremost, the emphasis of the character of an individual right is obvious as this is what can be first inferred from the attributive “*free*”. The quality of being a direct fundamental right is the backbone of the constitutional norm: it conferred public prerogatives on individuals. However, this allowed the German Federal Constitutional Court to identify several safeguards that are state-side criteria apparent from the provision. This includes the relationship between arts and the cultural state as the objective aspect of the fundamental right.<sup>46</sup> However, the neutrality of state considered to be the third model of arts does not strongly appear in an independent form in the German constitutional mindset, instead the objective obligation of institutional protection is typically emphasised.

### 3.2.2. Italy

The Constitution of the Republic of Italy (1948 *Costituzione della Repubblica Italiana*) provides for the freedom of arts in a unique way. The basic law recognizes the constitutional value at hand as an independent fundamental right, however, while it declares the freedom of expression among the civil rights, the freedom of arts is declared in Chapter Two, thus in moral and social relationships.

Accordingly, Sec. 33 (1) of the Constitution applies the following terminology: “*The Republic guarantees the freedom of the arts and sciences, which may be freely taught.*”<sup>47</sup>

The Italian constitutional body also applied the general definition of declaring arts a fundamental right which gives room for complex interpretation. However, the individual right aspect should, by all means, be highlighted. Furthermore, the *expressis verbis* declaration of the teaching of arts among the freedoms is also a unique solution. The special significance of this resides in the fact that not only does the Italian basic law provide a parallel listing of cultural rights – that is the right to education, the freedom of science and arts – but also treats them as an inseparable entity. In the light of arts, this also means that through the right to education the infrastructural background thereof is elaborately outlined. However, the commentaries on Art. 33, which declares the freedom of arts and science, did not provide clear answers to the interpretation of the term ‘arts’, contrary to the detailed description of ‘science’. When interpreting the free expression of the works and values of art, Art. 21 of the Constitution declaring the freedom of expression is generally referred to, which allows for the free manifestation of thoughts orally or in writing. However, the canon related to the artistic value of these “products”, the form of manifestation or the criteria of their assessment remain unclear.<sup>48</sup>

### 3.2.3. Sweden

Following World War II, the Constitution of the Kingdom of Sweden (1991) was significantly altered as a result of the constitutional process of 1975 and the expansion of the catalogue of human rights. In contrast, the Swedish basic law does not grant individual fundamental rights protection to the freedom of arts: under Art. 13 (2), the protection of artists applies only within the context of the freedom of expression. As far as the fundamental right at hand is concerned, none of the elements of the triad model

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<sup>46</sup> q.v. BVerfGE 35, 79 (331).

<sup>47</sup> Sec. 33 (1) of the Constitution of the Republic of Italy.

<sup>48</sup> q.v. Drinóczi, op. cit. pp. 120.

of arts is recognized in Sweden: “*In judging what restrictions may be made by virtue of Paragraph (1), particular regard shall be paid to the importance of the widest possible freedom of expression and freedom of information in political, religious, professional, scientific and cultural matters.*”<sup>49</sup>

The Swedish constitutional body did not consider the separate declaration of the freedom of arts to be important, but within the freedom of expression, as part of the category of cultural matters, the freedom of arts can be considered implicitly protected. Additionally, the freedom of arts is protected in such a way that the degree of state interference was noticeably restricted compared to the freedom of expression. Furthermore, Art. 19 states that “*Authors, artists and photographers shall own the rights to their works in accordance with provisions laid down in law.*”<sup>50</sup> Therefore, apart from the opinion-based concept, the Swedish system of protection of fundamental rights treats private law (copyright) protection as a guarantee provided for in the constitution – supplementing the scope of the fundamental rights guarantee.

### 3.2.4. *The Czech Republic*

The Constitution of The Czech Republic (1992) does not contain the catalogue of fundamental rights with the Charter of Fundamental Rights and Freedoms as the source thereof. Under Art. 112 (1) of the Constitution, the latter collection of norms forms a part of the constitutional order of the state.<sup>51</sup> The Charter contains the specific fundamental rights classified, in relation to which we can also conclude that the freedom of arts is provided for, not only separately from the freedom of expression but also in a separate chapter. While the latter can be found in Art. 17 among the political rights of the chapter entitled “*Human rights and fundamental freedoms*”, the former is stated amongst economic, social and cultural rights. Accordingly, Art. 34 (1) of the Charter should be reviewed, the wording of which is the following: “*The rights to the fruits of one’s creative intellectual activity shall be protected by law.*”<sup>52</sup>

The term of “*the fruits of one’s creative intellectual activity*” of the basic law allows us to draw three conclusions. Firstly, by applying the attribute “*intellectual*”, not only the artistic but also the scientific products are granted constitutional protection, including all the “*products*” of cultural rights in a broader sense. Secondly, the Czech constitution does not provide for the traditional character of the freedom of arts, that is the protection of creative work as specific expression, either. It focuses instead on the result thereof, the works of art or science. Thirdly, the level of legislation on the protection of the fruits of one’s creative intellectual activity is noteworthy, as the normative text makes it clear that it safeguards the right within the framework of laws and not within a direct constitutional framework. Moreover, the protection of artistic work may be expressed through the right to freedom of expression, as a specific auxiliary solution.

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<sup>49</sup> Art. 13 (2) of the Constitution of the Kingdom of Sweden.

<sup>50</sup> Ibid. 919.

<sup>51</sup> It must be noted that the Charter – resulting from the historical limitations of its adaptation – is the persistence of the Czechoslovakian constitutional order. In detail q.v. J. Pauer, *Vom Gebrauch des Rechts. Die Tschechische Republik auf dem Weg zum Rechtsstaat* In W. Eichwede (Ed.), *Recht und Kultur in Ostmitteleuropa (Analysezur Kultur und Gesellschaft imöstlichen Europa. Band 8)*, Forschungstelle Osteuropa – Edition Temmel, Bremen, 1998, pp. 312-316.

<sup>52</sup> Art. 34 (1) of the Charter of Fundamental Rights and Freedoms.

### 3.2.5. Croatia

In relation to the recognition of cultural rights, the provisions of the Constitution of the Republic of Croatia (2010) support the assumption of the literature that the basic laws of the Eastern bloc states – due to their late adoption – contain detailed provisions on economic, social and cultural rights.<sup>53</sup> This also applies to the complex recognition of the freedom of arts, compared to the solutions of Western states. Art. 69 of the constitution of Croatia states the protection of cultural rights, thus the declaration of the fundamental rights protection of arts: „*The freedom of scientific, cultural and artistic creativity shall be guaranteed. The state shall encourage and support the development of science, culture and the arts. The state shall protect scientific, cultural and artistic assets as national spiritual values. The protection of moral and material rights deriving from scientific, cultural, artistic, intellectual and other creative efforts shall be guaranteed.*”<sup>54</sup>

The constitutional body provides three-way protection to the freedom of arts. Firstly, it recognizes the fundamental rights quality of the freedom of arts when mentioning the freedom of artistic creativity as the substance of the fundamental right. Secondly, it sets forth the state’s unique active role within the framework of its objective institutional protection obligation by using the term ‘support’ in connection with the development of arts. Thirdly, it explicitly refers to the products of artistic activities – i.e. artistic works – and it also indicates the reason thereof: namely, the intellectual values of the Croatian people. Moreover, the protection of copyrights – moral and material rights – stemming from the right to property can be detected here as well.

Through this solution, the Croatian constitution incorporates two elements of the triad model of the freedom of arts *expressis verbis* into the scope of the constitutional protection – thus providing a more complex protection for the individuals and the art scene compared to the states listed above.

### 3.2.6. Greece

The current Greek constitution (*Constitution of the Hellenic Republic*) was adopted in 1975 and it has been amended only three times since then. Nevertheless, the protection of arts – or cultural rights, in a broader sense – has an extensive protection system. The constitutional body provided for the issue of the freedom of arts in Part Two of the basic law, among the individual and social rights, in Art. 16 (1). Pursuant to this “*art and science, research and teaching shall be free and their development and promotion shall be an obligation of the State.*”<sup>55</sup>

On one hand, the constitution declares the general definition of the freedom of arts by placing the freedom at the beginning of the paragraph. Just as in the case of the previously discussed states, this results in the freedom of the individual, maintaining the public authority *status negativus*. On the other hand, similarly to the Croatian solution, the constitutional body specifically provides for the active obligation of the state concerning the development of arts – this constitutes the objective side of the fundamental right. Nevertheless, the order of the cultural rights in the Greek constitution may be of interest: art is at the forefront of the provision, preceding the right to the freedom of science and the right to education.

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<sup>53</sup> q.v. Drinóczi, op. cit., pp. 101.

<sup>54</sup> Art. 69 of the Constitution of the Republic of Croatia.

<sup>55</sup> Art. 16 (1) of Constitution of the Hellenic Republic.

### 3.2.7. The United States of America

The First and Fourteenth Amendments of the Constitution of the United States of America protect the works of art – regardless of the medium of its conveyance or the content, the quality or the unpopular nature thereof.<sup>56</sup> Accordingly, the process of artistic creation and the result thereof are granted constitutional protection, at the same level of completeness as verbally uttered or printed words, as art is also “*speech*”.<sup>57</sup> This means that the solution of the United States also fails to recognize the freedom of arts as an independent fundamental right,<sup>58</sup> yet this isn’t necessary as the freedom of speech has prominence in its constitutional system<sup>59</sup> within which artistic expression is also granted protection.<sup>60</sup>

In this respect, the Supreme Court has not given – and could not give – a precise definition of what it considers art (creative art, artistic performances), rather choosing to decided on a case-by-case basis.<sup>61</sup> What is certain is that art which contains political opinion always falls under constitutional protection. However, it seems as though in some cases “*purely artistic*” art has less worth.<sup>62</sup>

## 4. Summary

After reviewing the fundamental rights provisions of international conventions, it can be established that the human rights quality of the freedom of arts *expressis verbis* is solely characteristic of the Charter of Fundamental Rights of the European Union. In general, the other relevant and significant international conventions provide for artistic expression within the scope of the freedom of expression, in some cases supplementing this protection with the property right protection of artistic products.

The various national solutions paint a rather heterogeneous picture. The model constitutions of the German and Latin branches of European continental law recognize the freedom of arts as a subjective right, but the objective side may only be inferred from the case law of the constitutional courts. Neither the Swedish nor the Czech constitutional bodies declared the independent protection of the freedom of arts: the former refers to the extensive protection of cultural rights within the freedom of expression, whilst the latter highlights the result of artistic expression. However, the two states of the Mediterranean and Balkan region reviewed above play a pioneering role in terms of fundamental rights protection – at least compared to the former constitutional terminologies. The Croatian and Greek constitutions protect the art scene, concerning both its subjective and objective aspects – additionally, it provides a particularly active attitude in relation to the latter component.

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<sup>56</sup> Drinóczy, op. cit., pp. 121.

<sup>57</sup> R. M. O’Neil, Artistic freedom and academic freedom, *Law and Contemporary Problems*, Vol. 1990, No. 3, pp. 177-178.; J.E. Rothman, Freedom of Speech and True Threats, *Harvard Journal of Law & Public Policy*, Vol. 2001, No. 25, pp. 283.

<sup>58</sup> q.v. R.P. Bezanson, Art and the Constitution, *University of Iowa Legal Studies Research Paper*, Vol. 2008, No. 08-12.

<sup>59</sup> R.A. Sedler, Freedom of Speech: The United States versus the Rest of the World, *Wayne State University Law School Research Paper*, Vol. 2006, No. 07-21.

<sup>60</sup> J.G. Murphy, Freedom of Expression and the Arts, *Arizona State Law Journal*, Vol. 1997, No. 29, pp. 549.

<sup>61</sup> In detail q.v. R.P. Bezanson, *Art and Freedom of Speech*, University of Illinois Press, 2009.

<sup>62</sup> O’Neil, op. cit., pp. 178., 179., 181.

# Dublin III and Beyond: Between Burden-sharing and Human Rights Protection

Andrei Dragan

*Central European University, Human Rights Master of Law, Budapest*

*The main purpose of this paper is to point out briefly the deficiencies of the present-day Dublin system and to outline one of the proposals that seeks to offer a solution that would make burden-sharing between the Member States possible and desirable and also protect human rights.*

*Keywords: Dublin III Regulation, burden-sharing, EU Commission, reform.*

Enacted as an instrument seeking to establish clear guidelines on determining the Member State responsible for examining an application for international protection, the Dublin Regulation,<sup>1</sup> presently in its third generation (after the previous Dublin Convention and Dublin II Regulation,<sup>2</sup> the latter being repealed by the present Regulation), is considered to be the cornerstone of the EU's Common European Asylum System, or CEAS. While many of its principles, such as its overall emphasis on family reunification,<sup>3</sup> prevention of forum-shopping or of the so-called "orbit cases", in which there is no Member State which takes responsibility for refugees or asylum-seekers,<sup>4</sup> are to be regarded as essential aspects of any asylum system, it is also true that the Dublin System, in its drive towards a speedy system of establishing the responsible Member State, also has very serious deficiencies. Consequently, this paper aims to present some of the defects of the Dublin System, as well as some ideas on which a reform of the system should be based.

The main issue with the Dublin System is the fact that, in practice, it does not offer an efficient framework for burden-sharing,<sup>5</sup> mainly leaving the border states (such as Greece, Italy or Hungary)<sup>6</sup> to deal with a disproportionate amount of refugees and asylum-seekers. This is in principle due to the philosophy that underpins the whole Dublin System. According to the Dublin III Regulation, the

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<sup>1</sup> Regulation (EU) No. 604/2013 of the European Parliament and Council, OJ L 180, hereinafter "Dublin III Regulation".

<sup>2</sup> Regulation (EU) No. 343/2003 of the European Parliament and Council, OJ L 50/2, hereinafter "Dublin II Regulation".

<sup>3</sup> Recital 14 of the Dublin III Regulation preamble emphasizes this point: "In accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms and with the Charter of Fundamental Rights of the European Union, respect for family life should be a primary consideration of Member States when applying this Regulation."

<sup>4</sup> For the purposes of this essay, I am using the term "refugee" to refer to those persons seeking international protection who have been officially recognized as such by the authorities of one Member State, while the term "asylum-seeker" will refer to those individuals which have not yet been recognized as refugees. It has to be borne in mind that, in the letter and spirit of the 1951 Geneva Convention on the status of refugees, upon which the Dublin System heavily relies, the status of refugee exists from the moment an individual meets the criteria set forth by the Convention and not from the moment of official recognition. In any case, refugee status is not granted, as it exists independently of state recognition.

<sup>5</sup> Even though the CJEU recognized that Greece was faced in 2010 with a "disproportionate burden being borne by it compared to other Member States and the inability to cope with the situation in practice". See the joined cases of N. S. (C-411/10) v Secretary of State for the Home Department and M. E. and Others (C-493/10) v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform, [2010] ECLI:EU:C:2011:865, para. 87.

<sup>6</sup> Jesus Fernandez-Huertas Moragay & Hillel Rapoport: Tradable Refugee-admission Quotas and EU Asylum Policy, in CESifo Economic Studies, Vol. 61, 3/2015, 638–672, p. 639.

principle of authorization,<sup>7</sup> as established by article 3(1), entails that only one Member State shall be responsible for the application procedure. Afterwards, the Regulation sets up a hierarchy of criteria under which the responsible state is to be determined, including family unity,<sup>8</sup> the best interest of the child,<sup>9</sup> the place where the applicant first lodged his/her application<sup>10</sup> etc. All in all, “responsibility for examining an application for international protection lies primarily with the Member State which played the greatest part in the applicant's entry into or residence on the territories of the Member States, subject to exceptions designed to protect family unity”.<sup>11</sup> Thus, the rationale for the present Recast Dublin Regulation is the same as the previous one.

However, in a 2015 report prepared by ICF International for the European Commission, it is pointed out that the Dublin System has limited distributive effect,<sup>12</sup> with many Member States (including Greece, Estonia, Croatia, Luxembourg, Latvia, Romania and Slovenia) having net transfers close to zero, meaning that the number of refugees or asylum-seekers they transfer is nearly identical to the number they receive.<sup>13</sup> Ironically, the report also notes that the hierarchy of criteria for the allocation of responsibility does not take into consideration Member States' capacity to provide protection and was not designed to distribute responsibility evenly.<sup>14</sup> Neither does the primacy of the principle of family unity over other criteria reflect in reality, as the criteria most used are related to documentation and entry reasons.<sup>15</sup>

Moreover, the Dublin System is seen as being based on the assumption that all Member States are complying with EU law and providing for quick and efficient asylum application procedures which are respecting a common set of standards.<sup>16</sup> In practice, on the other hand, reception conditions and recognition rates vary greatly from one Member State to another.<sup>17</sup> For example, the Italian Refugee Council reported that by the end of 2014, only 64'625 asylum seekers filed their applications in Italy from a total number of around 170'000,<sup>18</sup> which would suggest that many asylum seekers are moving on to other countries searching to file their applications there instead. It has been rightfully suggested that instead of seeing this movement as forum shopping, it should be viewed as a search for efficient and quick asylum procedures, as EU law *should* be guaranteeing, especially since the fact is that the Italian bureaucracy has been often criticised for being slow in registering asylum applications.<sup>19</sup>

<sup>7</sup> Zelalem Mogessie Teferra: *The Dublin System of Refugee Admission: A Law and Economics Analysis* (9 November 2014). Available at SSRN: <https://ssrn.com/abstract=2521180> or <http://dx.doi.org/10.2139/ssrn.2521180> (3 October 2017).

<sup>8</sup> Dublin III Regulation, articles 6-11 all make reference to family members of the asylum-seeker.

<sup>9</sup> *Ibid*, Article 8 (1).

<sup>10</sup> *Ibid*, Article 7 (2).

<sup>11</sup> See the Commission's proposal COM(2008) 825 final, OJ C 317, p. 6.

<sup>12</sup> ICF International, *Evaluation of the Dublin III Regulation*. Final report, 4 December 2015.

<sup>13</sup> *Ibid*, p. 10.

<sup>14</sup> *Ibid*, p. 11.

<sup>15</sup> *Ibid*.

<sup>16</sup> Vincent Chetail: *The Common European Asylum System: Bric-à-brac or System?*, in *Reforming the Common European Asylum System: The New European Refugee Law*, V. Chetail, P. De Bruycker & F. Maiani, eds, Martinus Nijhoff, 2016, pp. 3-38, *Criminal Justice, Borders and Citizenship Research Paper No. 2564990*, p. 34.

<sup>17</sup> *Enhancing the Common European Asylum System and alternatives to Dublin*, a study by the Directorate General for Internal policies, Policy department C: Citizen's rights and constitutional affairs, Brussels, 2015, p. 55.

<sup>18</sup> *Ibid*.

<sup>19</sup> See <http://the-ipf.com/2016/11/09/asylum-seekers-reception-italy/> (3 October 2017) and the UNHCR's *Recommendations on important aspects of refugee protection in Italy, 2013*, p. 11: “The delays are the result of structural gaps and lack of capacity in the existing reception system, slow administrative procedures and problems in the registration of the asylum applications”.

With this in mind, it is essential to note that the EU asylum system is based on a principle which resides at the core of EU law itself, namely the principle of mutual trust, which presupposes that each Member State presume, save in exceptional situations, that all other Member States are complying with EU law, especially with fundamental rights.<sup>20</sup> The issue with mutual trust is that the CJEU's understanding of it could conflict with human rights' protection, particularly in the case in which, by implementing the Dublin III Regulation, a Member State which is not responsible for an individual application decides to transfer an asylum-seeker to the responsible Member State. This was the case in *N.S. and M.E.*,<sup>21</sup> where the CJEU found an obligation for the Member State not responsible, but on whose territory the asylum-seeker was to be found, to nevertheless examine an asylum application if the asylum-seeker would face inhuman or degrading treatment in the Member State where he would be transferred (the responsible state).<sup>22</sup> The CJEU's decision follows a previous ECtHR decision, *M.S.S. v Belgium and Greece*,<sup>23</sup> where the latter established that article 3 of the ECHR (prohibiting inhuman or degrading treatment and torture) would be violated if there is a "real risk" that a person might endure poor living conditions in the state where he/she might be transferred or if that person would face a "real risk" or *refoulement* to the country of origin.<sup>24</sup> However, even though the CJEU mentioned *M.S.S.* in its judgment of *N.S. and M.E.* and uses the ECtHR's "real risk" threshold, it nevertheless understands "real risk" as being the result of "systemic deficiencies" in a Member State's asylum procedures.<sup>25</sup> Thus, the EU standard is higher, requiring that there be "systemic deficiencies". It is easy to see that this reading of the Dublin II Regulation holds on to mutual trust as much as possible and only obliges non-responsible Member States to take charge of the application procedure if there are "systemic deficiencies" in the asylum procedures of the responsible Member State. This high threshold has been criticised for not taking into consideration less institutional and more individual situations in which a "real risk" of inhuman or degrading treatment might exist, but without "systemic deficiencies".<sup>26</sup> It was nevertheless expressly included in the text of the Dublin III Regulation, in article 3(2), which talks of "systemic flaws".

Mutual trust might seem a logical underlying principle in areas where EU law is harmonized and, thus, one should expect a universal standard to be applied in all Member States, but it can lead to perverse results. As in the case of the above mentioned Italian asylum system, while in theory conditions ought to be the same in all EU Member States, in practice they are not. It seems that, by requiring such a high threshold, mutual trust is locking the system into a collision course with the more human rights-friendly ECHR standard. Of course, in more cases such as *C.K., H.F., A.S. v. Slovenia* [2017],<sup>27</sup> the CJEU seems to have abandoned the "systemic deficiencies" requirement, relying just on "real risk", but it might also be the case that this later decision is a *lex specialis* to the general rule established by *N.S. and M.E.* After all, the CJEU still mentioned "systemic deficiencies", even though in the particular situation of *C.K., H.F., A.S.*, the threshold did not apply. However it might be interpreted, it is a sign that the Court has realized the unfair nature of the Dublin system and has moved closer to the ECHR standard. Seeing how

<sup>20</sup> Opinion 2/13 [2014], ECLI:EU:C:2014:2454, para. 191.

<sup>21</sup> See supra note 5.

<sup>22</sup> Ibid, paras. 98 and 108.

<sup>23</sup> *M.S.S. v. Belgium and Greece* (App. No. 30696/09) ECtHR (2011).

<sup>24</sup> Ibid, para. 358.

<sup>25</sup> *N.S. and M.E.*, [2010] ECLI:EU:C:2011:865, see supra note 5, para. 94.

<sup>26</sup> Hemme Battjes & Evelien Brouwer: *The Dublin Regulation and Mutual Trust: Judicial Coherence in EU Asylum Law?*, in *Review of European Administrative Law*, vol. 8, no. 2, 183-214, Paris legal publishers, 2015, p. 190.

<sup>27</sup> *C-578/16 PPU C.K., H.F., A.S. v. Slovenia*, [2017] ECLI:EU:C:2017:127, para. 98. Here, the CJEU held that "even where there are no substantial grounds for believing that there are systemic flaws in the Member State responsible for examining the application for asylum, the transfer of an asylum-seeker within the framework of Regulation No. 604/2013 can take place only in conditions which exclude the possibility that that transfer might result in a real and proven risk of the person concerned suffering inhuman or degrading treatment, within the meaning of that article".

a similar relaxing of the mutual trust principle has occurred also in the case of European Arrest Warrants,<sup>28</sup> it might not be a singular change of paradigm, but a general tilt of the CJEU towards a more human rights-friendly system.

However, from a human rights perspective, it is evident that the Dublin system still leaves much to be desired as it allows states a large margin of discretion of whether to resort to the inherently discretionary sovereignty and humanitarian clauses. While the CJEU has stepped in and tilted slightly towards the ECHR standard, it still needs to be pointed out that this “correction” occurred precisely because the Dublin Regulation was unclear. Moreover, I would like to point out to those cases in which an asylum-seeker or refugee pending transfer to another Member State would not suffer inhuman or degrading treatment, at least as it is understood by the ECtHR or the CJEU, but would nevertheless be subjected to distress. A more humane system, which takes more account of the asylum-seekers’ or refugees’ personal situation and needs is required, one which also entails burden-sharing, a principle which is presently not envisaged by the present legal framework.

But in finding an alternative to the present system, stakeholders’ views should be taken into consideration. Thus, human rights advocates tend to minimise the importance of States’ interest and economic capabilities of receiving refugees, while governments, on the other hand, for various and complex reasons, tend to overlook human rights violations when establishing their migration policies. Even though one side might have a better point to make than the other, it is still obvious that the two, sometimes opposing, interests exist and must be reconciled. Any reform of the Dublin system should start with this basic assumption. Sometimes, even if governments would desire to contribute more by offering more resources or accepting more refugees or asylum-seekers, they are still under the pressure of public opinion, which, in most cases, turns out to be more or less uninterested on the whole in receiving more refugees or asylum-seekers. The situation is indeed very complex and it has not only legal and humanitarian undertones, but also political and economic ones. And all must be taken into consideration when discussing state responsibility for refugees and asylum-seekers.

One interesting approach, for example, comes from a law and economics perspective and offers a market-based solution.<sup>29</sup> A market of refugees and asylum-seekers would be created and it would operate based on Tradable Refugee Quotas (TRQs),<sup>30</sup> where Member States of the EU would be incentivised to contribute more to the market by taking in more refugees and asylum-seekers than initially promised (assuming that, in the initial phase, Member States would agree to take in a certain number of refugees and asylum-seekers).<sup>31</sup> The incentive would be under the form of funding for complying with the quota initially agreed upon, with the countries accepting more refugees and asylum-seekers receiving extra funding.<sup>32</sup> On the other hand, countries not living up to the initial promised quotas would pay for accepting fewer refugees and asylum-seekers than initially agreed upon.<sup>33</sup> This market would then be supplemented by a matching system which would take into consideration refugees’ and asylum-seekers’ preferences for certain Member States.<sup>34</sup> It is noteworthy that, presently, the Dublin III Regulation does

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<sup>28</sup> In the joined cases of *Aranyosi and Căldăraru*, the CJEU held that a real risk of inhuman or degrading treatment can require a Member State to refuse extradition under a European Arrest Warrant. Thus, even in the case of a harmonized area of EU law, mutual trust can give way to the respect of fundamental rights. See *Joined Cases C-404/15 and C-659/15 PPU Pál Aranyosi and Robert Căldăraru*, [2016] ECLI:EU:C:2016:198.

<sup>29</sup> *Moragay and Rapoport* 2015, see *supra* note 6.

<sup>30</sup> *Ibid.*, p. 640.

<sup>31</sup> *Ibid.*, p. 651.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*, p. 653.



not require Member States to take into consideration asylum-seekers' consent, except in the case of the humanitarian discretionary clause under Article 17 (2).

According to this proposal, Member States would be penalised for not taking in the promised quotas and would, thus, be incentivised to improve their asylum conditions and attract more refugees and asylum-seekers in order to fill in the promised quotas.<sup>35</sup> On the other hand, Member States' preferences should also be taken into consideration and where there is a more or less good match between individual refugees' and asylum-seekers' preferences and those of a specific country, the transfer should operate.<sup>36</sup>

This proposal is loosely based on the European Relocation from Malta (EUREMA) program in 2009, in which 12 EU Member States participated voluntarily in order to alleviate the burden Malta had incurred due to high numbers of refugees and asylum-seekers. According to the European Asylum Support Office (EASO), while some Member States did not conform to the initial quotas promised, out of the 253 individuals envisaged for relocation, 227 benefited from this pilot project and were transferred from Malta.<sup>37</sup> The project was extended and EUREMA II, which operated from 2012 until 2013, managed to transfer 217 of the envisaged 306 refugees and asylum-seekers.<sup>38</sup> Although the pilot project was limited in number, it does provide for a strong alternative to the Dublin System.

If the Dublin System is to receive an overhaul, burden-sharing should be the basis of the new reform. Indeed, the European Commission has recently proposed (yet another) recast Dublin Regulation in 2016.<sup>39</sup> According to the proposal, "the new Dublin scheme will be based on a European reference system from the start of its implementation with an automatically triggered corrective solidarity mechanism as soon as a Member State carries a disproportionate burden".<sup>40</sup> However, it keeps the old criteria and setting, while the main addition is a corrective allocation mechanism<sup>41</sup> which would be triggered when a particular Member State is faced with disproportionate numbers of applications for international protection for which that Member State is responsible.<sup>42</sup> Member States not participating in the allocation procedure would be obliged to make a solidarity contribution of 250,000 Euros per each applicant who would have otherwise been allocated to that Member State.<sup>43</sup>

There is definitely a striking resemblance between the law and economics solution described earlier and the above proposal by the Commission. However, it has been criticised in a very recent European Parliament briefing<sup>44</sup> for not providing a complete overhaul of the system and not instead creating, as the Parliament had previously suggested<sup>45</sup>, a centralised EU system for collecting applications and

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<sup>35</sup> Ibid, p. 655.

<sup>36</sup> Ibid, pp. 655-656.

<sup>37</sup> European Asylum Support Office (2013), Annual Report on the Situation of Asylum in the European Union 2012, Publications Office of the European Union, Luxembourg.

<sup>38</sup> European Asylum Support Office (2012), EASO Fact Finding Report on Intra-EU Relocation Activities from Malta.

<sup>39</sup> Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), COM(2016) 270 final, Brussels, 4.5.2016.

<sup>40</sup> Ibid, p. 4.

<sup>41</sup> Ibid, Article 34, p. 67.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid, Article 37 (3), p. 69.

<sup>44</sup> Reform of the Dublin System, 10 March 2017, available online at: [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/586639/EPRS\\_BRI\(2016\)586639\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/586639/EPRS_BRI(2016)586639_EN.pdf) (6 May 2017).

<sup>45</sup> European Parliament resolution of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration (2015/2095(INI)), para. 38.

allocating responsibility. The proposal has also been criticised by the Committee of Regions,<sup>46</sup> the European Economic and Social Committee,<sup>47</sup> national parliaments,<sup>48</sup> the European Council on Refugees and Exiles<sup>49</sup> and the EU Agency for Fundamental Rights,<sup>50</sup> amongst others, citing lack of emphasis on refugees' and asylum-seekers' individual situations and on the child's best interests. The corrective allocation mechanism, on the other hand, has been welcomed as a major improvement. It is now to be seen whether this new revised instrument will, if it comes into force in this form, overcome the faults of its predecessors and whether it will protect human rights accordingly.

The success of a potential Dublin IV Regulation would, of course, also depend on the Court's jurisprudential output on the matter and on its interpretation of this future instrument. However, in the light of the Court's recent judgment<sup>51</sup> concerning Slovakia's and Hungary's challenge of the 2015 Council Decision<sup>52</sup> to relocate migrants and refugees from Italy and Greece to other EU Member States, it seems that the Court is already laying the groundworks for the future recast Regulation in what concerns one decisive aspect – the principle of solidarity. The Court finally found that the principle of solidarity, found in article 80 TFEU, is a source of legally enforceable obligations for EU Member States.<sup>53</sup> Thus, at least in the case of solidarity, the issue has been clarified and a solidarity mechanism such as that described above can benefit from the Court's jurisprudential support.

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<sup>46</sup> Opinion factsheet available online at: <http://cor.europa.eu/en/activities/opinions/pages/opinion-factsheet.aspx?OpinionNumber=CDR%203267/2016> (6 May 2017).

<sup>47</sup> The opinion is available online at: <http://www.eesc.europa.eu/?i=portal.en.soc-opinions.39248> (6 May 2017).

<sup>48</sup> Six Member States (Hungary, Slovakia, Czechia, Poland, Romania, and Italy) have submitted reasoned opinions that the proposal does not comply with the principle of subsidiarity. They are available online at: <http://www.ipex.eu/IPEXL-WEB/dossier/document/COM20160270.do#dossier-COD20160133> (6 May 2017).

<sup>49</sup> ECRE Comments on the Commission Proposal for a Dublin IV Regulation, October 2016, available online at: <https://www.ecre.org/wp-content/uploads/2016/10/ECRE-Comments-Dublin-IV.pdf> (6 May 2017).

<sup>50</sup> Opinion of the European Union Agency for Fundamental Rights on the impact on children of the proposal for a revised Dublin Regulation (COM(2016)270 final; 2016/0133 COD), available online at: <http://fra.europa.eu/en/opinion/2016/fra-opinion-impact-children-proposal-revised-dublin-regulation> (6 May 2017).

<sup>51</sup> Joined cases C-643/15 and C-647/15 Slovakia and Hungary v. the Council, [2017] ECLI:EU:C:2017:631.

<sup>52</sup> Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L 248/80.

<sup>53</sup> For an analysis of the decision, see Daniela Obradovic, Cases C-643 and C-647/15: Enforcing solidarity in EU migration policy, European Law Blog, 2 October 2017, available online at: <http://europeanlawblog.eu/2017/10/02/cases-c-643-and-c-64715-enforcing-solidarity-in-eu-migration-policy/> (6 May 2017).

## Review

# Steven L. B. Jensen: The Making of International Human Rights: The 1960s, Decolonization, and the Reconstruction of Global Values

Bettina Németh

*Master student in Economic Law, Sciences Po Paris, Law School*  
*Law student, University of Pécs, Faculty of Law*

The history of the development and evolution of human rights and their increasing role in international law have been examined and studied by many scholars. The general perspective that is taken on the matter is a European or more Western-centred point of view. This viewpoint considers the UN Charter (1945) and the Universal Declaration of Human Rights (1948) to mark the beginning of the development of human rights and also gives priority of place to the achievements of the 1970s, including diplomatic breakthroughs like the Helsinki Final Act in 1975 and activist work by Non-Governmental Organisations (e.g. Amnesty International's work in the field). Steven L. B. Jensen in his book, *The Making of International Human Rights: The 1960s, Decolonization, and the Reconstruction of Global Values*, takes an approach that is complementary to the general view to the evolution of human rights. He places an emphasis on the 1960s and in particular on the effects of decolonisation that lead to the events that are widely seen as ground-breaking during the 1970s. Moreover, he uncovers the key role that actors from the Global South played during this time period in lobbying for the further advancement of the human rights project and asserts that they "made not just an important but a transformative contribution that would influence the shaping of European détente through the Helsinki Final Act."<sup>1</sup> In order to fully examine these events and relations, the book is composed of eight chapters and has two main objectives. On the one hand Jensen aims to reveal and examine the historical and political events that shaped the evolution of human rights during the 1960s, on the other hand he attempts to "integrate the developments of the 1960s into the human rights historiography."<sup>2</sup>

Steven L. B. Jensen is a researcher at the Danish Institute of Human Rights. He has specialized in the link between HIV/AIDS and human rights, human rights education and contemporary history and politics.<sup>3</sup> He has also worked extensively with national human rights institutions. Thanks to his background in research, history and the practical side of human rights,<sup>4</sup> Jensen is an expert on the issue and his work is very promising as a response to the imbalanced historical approach that experts tend to take when analysing the evolution of human rights in the international legal field.

First, Jensen points out that despite the general understanding and statement of the emergence of Human Rights, they did not emerge with the formation of the UN and the UDHR during the 1940s. Jensen

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<sup>1</sup> S. L. B. Jensen, *The Making of International Human Rights: The 1960s, Decolonization, and the Reconstruction of Global Values*, Cambridge University Press, Cambridge 2016, pp. 277-278.

<sup>2</sup> *Ibid.*, pp. 16.

<sup>3</sup> S. L. B. Jensen, *The Danish Institute for Human Rights*, 2017, available at: <https://www.humanrights.dk/staff/steven-l-b-jensen> (19 October 2017).

<sup>4</sup> *Ibid.*

concedes that this was significant but argues that the real revolution started during the 1960s when decolonisation occurred. This is because beforehand all Western countries with colonies were against the development of a universal human rights system as they did not want the principle of self-determination to be declared and included into the international legal system. The cause of human rights was highly supported by countries from the Global South and they were the ones who started diplomatic negotiations for their universality. Jensen states that “in the hierarchical world of empire, human rights had only a limited opportunity to shape global politics. The notion of universality was anathema to this world system,”<sup>5</sup> thus putting an emphasis on the importance of this process of decolonisation.

In the second chapter, Jensen draws the reader's attention to the political turmoil that took place during the beginning of the 1960s. On the one hand, the Soviet Union, the US and other European countries appeared to take the lead on more fully integrating human rights into international law but this was largely motivated by Cold War rivalry. In reality the issue was problematic for them as the question of decolonisation and the effective development of human rights “was comparable to debating a new UN Charter outlining the future purpose of the organisation.”<sup>6</sup>

On the other hand, the Global South managed to put forward the Declaration pushing for the decolonisation process. The re-launch of human rights as an international legal issue started again thanks to the diplomatic lead of Jamaica, Ghana, Nigeria, Liberia, and the Philippines as well as other countries, but numerous conflicts reared their heads in Africa (such as the Congo Crisis of 1960-65 and the Algerian War of Independence and its aftermath). The author shows that these events pushed for the diplomatic negotiations about human rights back on the right track as they were previously neglected after the 1940s.

During the 1960s, two critical matters were discussed which pushed the negotiations over human rights forward: race and religion. These issues are described by Jensen as “political Achilles’ heels for the two superpowers,”<sup>7</sup> implying that further development would have been impossible without a shift of power and a change in policy over the course of these debates. Firstly, Jensen examines the debate over race, which was at its peak in the United States. The first three major human rights conventions (The International Convention on Elimination of All Forms of Racial Discrimination [1965], the Covenant on Civil and Political Rights [1966], and the Covenant on Economic, Social and Cultural Rights [1966]) were the result of shifting power struggles during the Cold War and Decolonisation. They adopted to reflect the creation of new legal meaning of race and discrimination which Robert Cover calls *jurisgenesis*.<sup>8</sup> This was the first time the Cold War superpowers realised that these issues could not be ignored anymore.

Whilst the focus on racial discrimination was considered to be a successful breakthrough in human rights during the 1960s, the focus on religion was equally important. This issue was the so-called Achilles’ heel of the other superpower, the Soviet Union. Global South actors, like Liberia, Pakistan, Sri Lanka, and Venezuela took the lead in negotiations but ultimately the Convention on Elimination of All Forms of Religious Intolerance was not successful. Jensen argues this point to show the escalation and intensity of the human rights debates in the 1960s that led to the success of the 1970s in the field. The Soviet Union reacted to international criticism of its domestic policies on religion with the consolidation and hardening of these views by restraining religious activities. This was the complete opposite of the reaction of the United States to international debates over issues of racial discrimination. The came to a

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<sup>5</sup> Jensen, *i.m.* 1, pp. 3.

<sup>6</sup> *Ibid.*, pp. 51.

<sup>7</sup> *Ibid.*, pp. 138.

<sup>8</sup> *Ibid.*, pp. 136.

head with the Six Day War, where Jensen describes “Jerusalem symboliz[ing] war, religious conflict, Zionism, displacement and battles over sovereignty. These symbolic meanings were exploited by the communist states as an attack on the Convention itself.”<sup>9</sup> By the end of 1967, the question of religion and tolerance was largely removed from the agenda of the international community and defined a limit to the human rights debate as the Convention on Elimination of All Forms of Religious Intolerance had failed to be adopted.

Jensen examines the Tehran International Conference on Human Rights in 1968, which was the first global conference to focus exclusively on human rights. Mrs. Aase Lionaes, the Chairman of the Nobel Committee described the year of 1968 in her nomination speech for the Nobel Peace Prize award as “so bitter a year for human rights.”<sup>10</sup> Jensen takes up the challenge and proves that despite the fact that 1968 was supposed to be the International Human Rights Year due to the political turmoil taking place in the world and the bitter memory of the failed religion debate, the issue of human right was overshadowed. There was, however, one positive outcome in that the Convention on Elimination of All Forms of Racial Discrimination entered into force, meaning that “human rights had formally become international law.”<sup>11</sup>

Finally, Jensen turns towards the events of the 1970s. Firstly, he states that between 1962 and 1968 “the most important foundations were laid for contemporary international human rights work. These foundations did not merely originate with the so-called human rights revolution in the 1970s. While the emphasis on the latter may fit into a Western-oriented historical interpretation, it is a too limit view and interpretation.”<sup>12</sup> This section sheds light on the way we perceive and think about the history of human rights thanks to the significant background history Jensen provides of the Helsinki Final Act that originated in the 1960s. The approach during the 1970s changed and the European détente meant addressing human right internationally,<sup>13</sup> which shifted human rights toward a more central role in global politics.<sup>14</sup> The last chapter feels disconnected from the rest of the book, however, as Jensen examines the impact of the 1960s in events of the late 20th century. He looks at the changing role of the United Nations that has been criticised due to its credibility and selectivity,<sup>15</sup> as NGOs took the leading role in the human rights debates of the 1970s. Jensen claims that the role of NGOs was to bridge the 1960s and 70s as the strategy to give priority to human rights fact-finding developed.<sup>16</sup> Jensen provides insight into the fundamental path of those debates starting in the 1960s and presents them as crucial factors in debates during later international events such as the Vienna Conference and the Programme of Action.

Jensen’s work is pioneering in its approach to how we look at and analyse the development of human rights and has significant potential to reshape the scope of the field and contribute to a better understand to the complexity of international diplomatic relations during the 20th century. It is fascinating to get such a complex description of the “other side of the story” and it is the strongest take-away of the book. However, this is its biggest weakness as well in terms of accessibility as the author assumes that the reader is completely familiar with the general European and Western-centred approach that is usually taken by diplomatic historians. Jensen’s argument about the active role of the Global South is very

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<sup>9</sup> *Ibid.*, pp. 165.

<sup>10</sup> A Lionaes, *Award Ceremony Speech*, available at: [https://www.nobelprize.org/nobel\\_prizes/peace/laureates/1968/press.html](https://www.nobelprize.org/nobel_prizes/peace/laureates/1968/press.html) (19 October 2017).

<sup>11</sup> Jensen, *i.m.* 1, pp. 208.

<sup>12</sup> *Ibid.*, pp. 209.

<sup>13</sup> *Ibid.*, pp. 210.

<sup>14</sup> *Ibid.*, pp. 236.

<sup>15</sup> *Ibid.*, pp. 240.

<sup>16</sup> *Ibid.*, pp. 239.

persuasive due to his usage of archive collections, and its grounding in previous works on the diplomatic history of human rights. By intertwining these elements, Jensen convincingly presents the success of the Global South in using human rights as a tool during international diplomatic negotiations and points out the importance of this as providing a counterbalance to the Cold War and the US-Soviet 'binary' of the period. As was mentioned earlier, Jensen's work requires a certain level of knowledge in order to understand the contrast and his references throughout the book, but it is nonetheless a very interesting read that fosters a lot of thinking and potentially a reevaluation of the way we view the history and evolution of human rights in the international legal sphere. Due to the fact that the book's central focus is not the law itself but the history of it, it raises issues that might be just as interesting and broaden the diplomatic historical spectrum of anyone who is interested in the field of human rights.

