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A word of sincere gratitude is of course due to the anonymous peer reviewers of the current issue.

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 October 2020, though submissions are welcomed at any time.

The editors

I came in here for an argument! The German Federal Constitutional Court's ruling on the PSPP programme and the authority of EU law

The judicial dialogue between the Bundesverfassungsgericht and the Court of Justice of the EU revolving around questions of constitutional identity has taken a new turn at an already very difficult time for Europe. On 5 May 2020, the Federal Constitutional Court of Germany (BVerfG) ruled that the Public Sector Purchase Programme (PSPP) of the European Central Bank (ECB) was contrary to the German Federal Constitution, the *Grundgesetz*.[1] The PSPP is, in simplified terms, a so-called quantitative easing programme involving the purchase of euro-denominated marketable debt securities issued by central governments of Eurozone Member States[2], a measure of substantial significance spinning out of ECB responses to the European sovereign debt crisis – it is in fact seen as the most important measure.[3]

If this weren't enough, what makes this ruling even more noteworthy is that it was passed following a preliminary ruling by the Court of Justice of the EU requested by the BVerfG in the course of the same national constitutional complaint procedure. The questions related essentially to whether the relevant decisions of the ECB amounted to *ultra vires* acts and were infringing German constitutional identity. In its *Weiss* preliminary ruling delivered in December 2018, the Court of Justice upheld the validity of the ECB decisions[4]; the Court *inter alia* conducted a proportionality analysis (in line with its previous findings in Gauweiler[5]) and found that Decision 2015/774 did not run counter to the proportionality principle.[6]

Yet in its 2020 judgment, the BVerfG found that the ECB measures did infringe the principle of conferral and the delimitation of competences between the EU and its Member States, and were thus *ultra vires*: in essence, the deciding issue was whether the PSPP could be seen as a monetary policy measure or a measure of economic policy – and as the ECB's competences related only to monetary policy, economic policy measures should be seen as falling outside the competence of the EU's central bank.[7] The BVerfG held that if the distinction between monetary policy and economic policy is to be made on the basis of the proportionality principle, then the *effects* of the ECB measures in question, i.e. the PSPP scheme (which may very well have economic effects) should be taken into account when assessing proportionality.[8] It is at this point that the BVerfG becomes rather critical in its ruling and frankly dismisses the proportionality analysis conducted by the CJEU in *Weiss* as unsatisfactory and "meaningless" for the attainment of the purpose (i.e. the abovementioned distinction) that it was apparently meant to serve.[9] The BVerfG stated that the CJEU afforded the ECB way too broad discretion and at the same time did not provide the standard of review that would have been necessary, thus by not scrutinizing this competence issue sufficiently, the CJEU authorised the ECB "to pursue its own economic policy agenda." This lead the German court to

[1] BVerfG, Judgment of the Second Senate of 05 May 2020 - 2 BvR 859/15. The Editorial comments rely on the English translation provided here: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2020/05/rs20200505_2bvr085915en.html (11 May 2020)

[2] Decision 2015/774/EU of the European Central Bank on a secondary markets public sector asset purchase programme (OJ 2015 L 121/20), Art. 3.

[3] M. Frangakis, *The ECB's Non-standard Monetary Policy Measures and the Greek Financial Crisis*, in The Internal Impact and External Influence of the Greek Financial Crisis, J. Marangos (Ed.), Palgrave Macmillan, 2017, p. 64.

[4] Case C-493/17 Weiss and Others [EU:C:2018:1000].

[5] Case C-62/14 Gauweiler and Others [EU:C:2015:40].

[6] Ibid. paras. 71-100.

[7] F. C. Mayer, *Auf dem Weg zum Richterfaustrecht? Zum PSPP-Urteil des BVerfG*, Verfassungsblog, 7 May 2020 https://verfassungsblog.de/auf-dem-weg-zum-richterfaustrecht/ (10 May 2020).

[8] 2 BvR 859/15, para. 139.

[9] Ibid. paras. 123-124.

the conclusion that the CJEU "acted ultra vires, which is why, in that respect, its Judgment has no binding force in Germany."[10] The Federal Constitutional Court proclaimed that no German state organ – including the Bundesbank – may participate in the development or implementation of *ultra vires* acts such as the PSPP.[11]

Much has been said in recent years about judicial dialogue and judicial comity (or the lack thereof) between national constitutional or supreme courts and the Court of Justice in the context of constitutional identity and *ultra vires* review. The interpretation of what constitutional identity actually means (or even what it should precisely be called) is itself debated.[12] Neither primacy over national constitutions, nor the relationship between the Court of Justice and national constitutional courts are clear cut issues, and this is certainly not the first sing of conflict – see, for recent examples the Dansk Industri[13] and Landtová[14] sagas.[15]

Even though the reference in the title of this editorial comment to the classic Monty Python sketch attempted to strike a humorous note regarding the back-and-forth between the BVerfG and the CJEU, the consequences of the judgment may be all the more serious. Firstly, in a theoretical sense: together with direct effect, the primacy of EU law over national law is an essential foundational concept of the EU's autonomous legal order, and the same goes for the CJEU's exclusive jurisdiction regarding the validity of EU law. (One could also say that these are core elements of the constitutional identity of the EU itself.) The professional authority of the BVerfG is also of relevance here: already before, constitutional courts have taken note of and even referred to BVerfG jurisprudence on the relationship between EU law and national constitutions in the identity review context.[16] It is not hard to see why such judgments undermine the autonomy of the EU legal order. Secondly, in a practical and economic sense, the judgment could very well disrupt the PSSP programme – and what is more it comes at the time of a global Covid-19 pandemic to which the ECB has among other things responded with a rather similar initiative, the Pandemic Emergency Purchase Programme (PEPP).[17] Although her the BVerfG itself stated in its communiqué that the ruling did not pertain to the PEPP[18], it is difficult to imagine that the same challenge will not potentially be brought against that measure.[19]

There is nevertheless a possible escape route built into the bastion of constitutional identity in the BVerfG ruling: the German court has determined a provisional period of no more than three months, during which the European Central Bank could adopt 'a new decision that demonstrates in a comprehensible and substantiated manner that the monetary policy objectives pursued by the ECB are not disproportionate to the economic and fiscal policy effects resulting from the pro-

[10] Ibid. paras 153-163.
[11] *Nota bene*: the question of the compatibility of the measures with the prohibition of monetary financing as per Article 123 TFEU was also raised but the BVerfG found utlimately that „a manifest circumvention" of that provision could – „despite the concerns" – not be ascertained (para. 216).
[12] See e.g. T. Drinóczi, *Constitutional Identity in Europe: The Identity of the Constitution. A Regional Approach.* German Law Journal, Vol. 21, No 2, 2020, pp. 105-130.
[13] See Case 15/2014 DI, acting on behalf of Ajos A/S v Estate of A. Judgment of the Supreme Court, 6 December 2016 and Case C-441/14 Dansk Industri v Rasmussen [EU:C:2016:278]
[14] Case C-399/09 Landtová [EU:C:2011:415].
[15] As pointed out by D. Kyriazis, *The PSPP judgment of the German Constitutional Court: An Abrupt Pause to an Intricate Judicial Tango*, European Law Blog, 6 May 2020 (11 May 2020).
[16] As did for example the Hungarian Constitutional Court. For an analysis of the relevant judgment see Á. Mohay & N. Tóth, *Decision 22/2016. (XII. 5.) AB on the Interpretation of Article E)(2) of the Fundamental Law*, American Journal of International Law, Vol. 111, No. 2, 2017, pp. 468-475.
[17] Decision 2020/440/EU of the European Central Bank on a temporary pandemic emergency purchase programme (OJ 2020 L 91/1).
[18] https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2020/bvg20-032.html
[19] Kyriazis 2020.

gramme."[20] This is not uncontroversial either as thereby the BVerfG intends to lay down rules for a decidedly independent and decidedly EU-level institution, one which operates on the legal basis of EU law – which in turn can only be judicially reviewed by the CJEU. In this light, the suggestion that the German Government and the Bundestag are to influence the ECB (granted, only to conduct a thorough proportionality analysis) is also somewhat perplexing[21], even if the BVerfG reassures all that this does not conflict with said independence. [22]

Following the German decision, the CJEU issued a rather succinct press release recounting in no uncertain terms the binding nature of its preliminary rulings and the pivotal role that they play in the uniform interpretation and application of EU law, but – understandably – without any further comment or evaluation.[23]

It has been suggested that the constitutional identity clause in Art. 4(2) TEU may be utilized to re-conceptualise the relationship between EU law and domestic constitutional law, paving the way to a more nuanced interpretation of the relationship between EU law and national constitutional law, going beyond the absolute primacy doctrine applied by the CJEU.[24] Perhaps this BVerfG ruling – which will no doubt become one of the most analysed judgments in the field of European Union law – signals among other things a need for the CJEU to engage in a more elaborate interpretation of the identity clause and its effects and limits. Of course, that will only be of any use if the other actors in the judicial dialogue do not feel the need to necessarily take up a contrary position.

[Ágoston Mohay]

[20] 2 BvR 859/15, para. 235. The Bundesbank should further ensure that the bonds already purchased are sold in a method coordinated within the European System of Central Banks.
[21] Mayer 2020.
[22] 2 BvR 859/15, para. 232.
[23] https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200058en.pdf (10 May 2020)
[24] A. von Bogdandy & S. Schill, *Overcoming Absolute Primacy: Respect for National Identity under the Lisbon Treaty*, Common Market Law Review, Vol. 48, No. 5, 2011, pp. 1417-1454.

Attribution of Conduct in UN Peacekeeping Operations

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The paper explores the rules on attribution of conduct within United Nations (UN) peacekeeping operations. Although there is now a prevailing judicial practice of employing the effective control test, the content of this test is not sufficiently clear. A review of the so-far scarce judicial practice demonstrates that different courts interpret the test in different ways. This leads to uncertainty on how to apply the effective control test in future cases, the number of which will undoubtedly increase, as the number of peacekeeping operations in the world rises. In this paper, several judicial decisions dealing with the issue of attribution in the context of peacekeeping operations are analyzed and compared. The conclusion highlights some of the essential flaws of the current system, which should be dealt with in order to achieve a more unified approach to tackling the attribution issue.

Keywords: international responsibility, international peacekeeping, international organizations, United Nations.

1. Introduction

In parallel with the growth of the number of the UN peacekeeping operations in the world, there has been a growth of allegations of peacekeepers being involved in unlawful acts, primarily those of sexual exploitation and abuse. Although *The Code of Personal Conduct for Blue Helmets*[1] explicitly sets out the rules of behavior of the peacekeeping officers, one of them providing that peacekeepers should not "indulge in immoral acts of sexual, physical or psychological abuse or exploitation of the local population or United Nations staff, especially women and children," examples of disobedience of these rules are plenty. In the 1990s, sexual crimes by peacekeepers occurred in Bosnia, Mozambique, Cambodia, East Timor, and Liberia.[2] Some years later, the UNHCR and *Save the Children UK* reported on sexual violence in Guinea, Liberia, and Sierra Leone.[3] From 2014 to 2017, evidence on sexual abuse by French, Georgian, and Congolese soldiers stationed in the Central African Republic had emerged.[4] In 2018, shocking information on sexual exploitation came from Syria, where apparently women in refugee camps were forced to offer sexual favors for

[1] Ten Rules Code of Personal Conduct for Blue Helmets, https://conduct.unmissions.org/ten-rulescode-personal-conduct-blue-helmets (2 September 2019).

[2] R. Murphy, *An Assessment of UN Efforts to Address Sexual Misconduct By Peacekeeping Personnel*, International Peacekeeping, Vol. 13, No. 4, 2006, p. 531.

[3] Ibid.

[4] R. McCarrel, *The United Nations and Sexual Abuse, Why Peacekeeping Reform Has Failed*, Foreign Affairs, https://www.foreignaffairs.com/articles/2016-02-14/united-nations-and-sexual-abuse (02 September 2019); A. Essa, *UN Peacekeepers hit by new Allegations of Sex Abuse*, Al Jazeera News, 10 July 2017, https://www.aljazeera.com/news/2017/07/peacekeepers-hit-allegations-sex-abuse-170701133655238.html (2 September 2019); K. Sief, *Members of a UN peacekeeping force in the Central African Republic allegedly turned to sexual predation, betraying their duty to protect*, The Washington Post, 27 February 2016, http://www.washingtonpost.com/sf/world/2016/02/27/peacekeepers/?utm_term=.0f4b3f830e65 (2 September 2019).

aid from the United Nations in return.[5] Sexual abuses are among the most usual, but certainly not the only type of the UN peacekeeping officers' misconduct. Actions such as arbitrary arrest and detention have been reported many times as well.[6] In addition, instances of a failure of peacekeepers to provide a necessary protection, as it was the case with *Dutchbat* in Srebrenica, have raised much attention on the international scene.

Events in which peacekeepers were involved in some kind of unlawful behavior raise some important issues, ranging from those dealing with the prevention of abuses to those dealing with determining an internationally responsible subject and undertaking a remedial action.[7] In the present paper, we shall focus on the issue of international responsibility, more accurately on the issue of attribution of conduct of the members of peacekeeping missions. It will be analyzed under what circumstances are acts of peacekeepers attributed to international organizations under which they operate, and under what circumstances are they attributed to troop-contributing states.

The starting point of the analysis shall be the ILC Draft Articles on Responsibility of International Organizations of 2011 (DARIO).[8] Articles 6 to 9 deal with the issue of attribution of conduct. In the present paper, the specific focus will be laid on Article 7, which speaks of attribution of conduct of organs of a state placed at the disposal of an international organization and which, according to the DARIO Commentary, refers particularly to the peacekeepers.[9] Article 7 provides the application of the effective control test.[10]

The effective control test has been applied a number of times by national and international courts, although in certain judicial decisions, other standards of attribution have been employed as well. In spite of the fact that there is now a prevailing judicial practice supporting the application of the effective control test, there is still no unified reasoning on the issue of attribution among different judicial bodies.

In the present paper, different standards of attribution of conduct shall be elaborated and compared, with specific emphasis on the effective control test in the context of international organizations. The overview of the relevant judicial decisions shall be given with the aim of determining the logic of judicial reasoning in cases in which responsibility for certain conduct had to be allocated to either a state or an organization or to both of them jointly.

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[5] J. Ensor, *Women in Syria "forced to exchange sexual favors" for UN aid*, The Telegraph, 27 February 2018, https://www.telegraph.co.uk/news/2018/02/27/women-syria-forced-exchange-sexual-favours-un-aid/ (3 September 2019). See also: *Voices from Syria 2018*, United Nations Population Fund, December 2017, https://hno-syria.org/data/downloads/gbv.pdf (3 September 2019).

[6] See for instance, cases of *Al-Jedda* and *Mohammed*, *infra* 3.4.1., 3.4.4.

[7] See more on actions to address the peacekeepers' conduct at: https://peacekeeping.un.org/en/standards-of-conduct (5 September 2019).

[8] The legal significance of DARIO has been questioned by some scholars due to the fact that they, unlike the Draft Articles dealing with the responsibility of states (DARS), may not yet be reflecting customary international law. See: K. M. Larsen, *Attribution of Conduct in Peace Operations: the "Ultimate Authority and Control" Test*, European Journal of International Law, Vol. 19, 2008, p. 2018. Some critics maintain that the text of the Articles has no support in international practice. See: J. Alvarez, *Revisiting the ILC's Draft Rules on International Organization Responsibility*, ASIL Proceedings, Vol. 105, 2011, pp. 344-348.

[9] DARIO Commentary, Yearbook of the International Law Commission, Vol. II, Part II, 2011, p. 56.

[10] Draft Articles on the Responsibility of International Organizations, 2011, http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_11_2011.pdf (5 September 2019).

2. International Responsibility of International Organizations – an Issue of Attribution

Some authors rightly observe that the issue of the responsibility of international organizations has until a few decades ago been "a rather obscure area of law".[11] Recently, this issue has been addressed by the ILC DARIO. Two provisions are particularly relevant with regard to attribution.

First is Article 6, which states that "the conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization",[12] even if that organ or agent exceeds the authority or contravenes instructions,[13] or if the organization acknowledges and adopts as its own the conduct which would otherwise not be attributable to it.[14] DARIO define "organs" and "agents" of an international organization, providing that an organ is "any person or entity which has that status in accordance with the rules of the organization" while an agent is "an official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts".[15] As the ILC Special Rapporteur Giorgio Gaja observed, "what is decisive is not whether an entity is formally defined as an "organ" but rather whether an entity acts in that capacity.[16]

If the UN peacekeepers are considered to be organs of the UN, the above rule on attribution applies, while the apportioning of responsibility for the wrongful acts to the UN becomes automatic. According to the UN Legal Counsel, peacekeeping forces can indeed be considered as organs of the UN. In his opinion, "as a subsidiary organ of the UN, an act of a peacekeeping force is, in principle, imputable to the Organization, and if committed in violation of an international obligation entails the international responsibility of the Organization and its liability in compensation".[17] He further added that "the fact that any such act may have been performed by members of a national military contingent forming part of the peacekeeping operation does not affect the international responsibility of the United Nations *vis-à-vis* third States or individuals".[18] If, on the other hand, the UN Security Council has merely authorized the operation, which is then conducted under national or regional command, the responsibility lies exclusively with that state or a regional organization.[19] Legal position of peacekeepers as the subsidiary organs of the UN was also recognized in the Draft Model Status-of-Forces Agreement between the UN and the host countries.[20]

In cases in which a state organ is fully seconded to an international organization, that organ's

[11] P. Palchetti, *International Responsibility for Conduct of UN Peacekeeping Forces: the Question of Attribution*, Seqüência (Florianópolis), Vol. 70, No. 1, 2015, p. 20.
[12] Ibid.
[13] Art. 8 DARIO.
[14] Art. 9 DARIO.
[15] Art. 2 DARIO.
[16] G. Gaja, *Second Report on Responsibility of International Organizations*, Yearbook of the International Law Commission, Vol. II, Part I, 2004, p. 7.
[17] *Memorandum of the United Nations Legal Counsel, Mr. Hans Corell, of 3 February 2004 to the Director of the Codification Division, Mr. Václav Mikulka*, Yearbook of the International Law Commission, Vol. 2, Part I, 2004, p. 11.
[18] Ibid.
[19] Responsibility of International Organizations: Comments and Observations received from International Organizations, Document A/CN.4/637and Add. 1, http://legal.un.org/docs/?path=../ilc/documentation/english/a_cn4_637.pdf&lang=ESX (8 September 2019).
[20] Comprehensive Review of the Whole Question of Peacekeeping Operations in all Their Aspects, Model Status-of-forces Agreement for Peace-keeping Operations, Report of the Secretary-General, UN. Doc. A/45/594, 1990, para. 15.

conduct will be attributable to the organization, that is, Article 6 DARIO will apply.[21] However, in practice it is quite rare that national contingents are fully seconded to an organization, which then establishes full control over them.[22] In most cases, peacekeepers have a dual organ status, being at the same time an organ of a state and an organization. In a division of powers between these two subjects, normally defined in an agreement, an organization establishes operational control[23] over the troops seconded by member states, while the troop-contributing states retain disciplinary and criminal jurisdiction over them.[24] Such division of powers implies that either one of them, as well as both of them jointly, might bear the responsibility for the peacekeepers' misconduct.[25] A criterion

for apportioning responsibility in situations in which state organs are not fully seconded by member states is set in Article 7 DARIO.

Article 7 stipulates that "the conduct of an organ of a state or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct".[26] According to this provision, attribution will be judged in each case dependent on the established level of effective control. The rationale of Article 7 is clear: apportioning of responsibility in situations in which troops are not entirely seconded to an international organization cannot be automatic but rather depends on the actual control over them. Control means, *inter alia*, the possibility of preventing that misconduct.[27] Responsibility is thus apportioned to the subject that was in a position to prevent the occurrence of the misconduct and yet has failed to do so.

Some authors have criticized a sharp distinction between Articles 6 and 7 DARIO, that is, between fully and not fully seconded state organs.[28] They advocate the approach according to which the peacekeepers represent subsidiary organs of the UN and it is presumed that their conduct should be attributable to the Organization. This presumption rests on the fact that the contributing states transferred their authority to the UN, so that the national contingents could act exclusively on behalf of the UN.[29] The presumption may, however, be rebutted if national contingents "operate under the direct instructions of their contributing state" and "fall outside the reach of the UN's effective control".[30]

It is difficult to see how the application of Article 6 and the presumption of attribution to the UN could constitute a more convenient standard of attribution than the effective control standard pro-

[21] DARIO Commentary, p. 56.
[22] T. Dannenbaum, *Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be apportioned for Violations of Human Rights by Member State Troop Contingents Serving as UN Peacekeepers*, Harvard Law Journal, Vol. 51, 2010, p. 148.
[23] Operational control is considered to be the authority to "assign specific tasks or missions to subordinate commanders, to deploy units within the area of operations, to reassign forces, or to retain or delegate elements of operational or tactical level command or control." T. D. Gill, *Legal Aspects of the Transfer of Authority in UN Peace Operations*, Netherlands Yearbook of International Law, Vol. 42, 2011, p. 46.
[24] DARIO Commentary, p. 56; Comprehensive Review of the Whole Question of Peacekeeping Operations in all Their Aspects, Report of the Secretary-General, UN Doc. A/49/681, 21 November 1994, p. 3.
[25] Condorelli observes that peacekeepers represent elements of governmental authority of both the UN and their own state, which leads to the existence of dual attribution of their conduct. See: L. Condorelli, *Le statut des forces de l'ONU et le droit international humanitaire*, Rivista di diritto internazionale, Vol. 78, 1995, pp. 893-897.
[26] Art. 7 DARIO.
[27] Dannenbaum 2010, p. 114.
[28] A. Sari & R. A. Wessel, *International Responsibility for EU Military Operations: Finding the EU's Place in the Global Accountability Regime*, in B. Van Vooren & S. Blockmans & J. Wouters (Eds.), The EU's Role in Global Governance: The Legal Dimension, Oxford University Press, 2013, pp. 126-141.
[29] Ibid. p. 11.
[30] Ibid. p. 12.

vided by Article 7. If it is accepted that peacekeepers have dual institutional link with both the state and the organization, whereby states surely retain disciplinary and criminal jurisdiction but sometimes operational control as well,[31] it seems appropriate to apply the effective control test provided by Article 7.

In spite of the fact that the effective control test is "the most logical and reasonable standard for the purposes of attribution of conduct",[32] the question of determining a degree of that control, however, arises. Gaja noted in his Report that "what matters is not exclusiveness of control, but the extent of effective control",[33] which needs to be determined in each particular case.

3. Tests for Attribution of Conduct

3.1. Effective Control Test

The effective control test is not an invention of DARIO. The test is well-known in the context of state responsibility. Draft Articles on the Responsibility of States for Internationally Wrongful Acts (DARS) provide that "the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is, in fact, acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."[34] Not surprisingly, determining whether specific conduct is carried "under the direction or control of" a state may be

problematic. The Commentary to the DARS offers some guidelines in that respect. It provides that a "conduct will be attributable to the State only if the state had directed or controlled the specific operation and the conduct complained of was an integral part of that operation".[35] On the other hand, the conduct will not be attributable to the state if it was "only incidentally or peripherally associated with an operation and … escaped from the State's direction or control".[36] The same understanding of state control is present in the international jurisprudence. In the *Military and Paramilitary Activities in and against Nicaragua* the International Court of Justice was entrusted with the task of determining whether the acts of the Nicaraguan paramilitary group, the *contras*, were attributable to the United States. The Court concluded that the general support which was granted to the *contras* by the United States was not sufficient to treat the *contras* as acting on that state's behalf.[37] The Court further added that it would have to be proven that the United States had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.[38]

The ICJ again employed the effective control test in the *Genocide* case, in which the Court tried to establish whether the massacres at Srebrenica were committed by persons or entities ranking as organs of the Federal Republic of Yugoslavia. The Court then found that "it has not been estab-

[31] R. Murphy, *United Nations Military Operations and International Humanitarian Law: What Rules Apply to Peacekeepers?* Criminal Law Forum, Vol. 14, 2003, p. 174.
[32] Gill 2011, p. 53.
[33] Gaja 2004, p. 14.
[34] Art. 8, DARS with commentaries, 2001, http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (8 September 2019).
[35] Ibid.
[36] Ibid.
[37] *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Merits, Judgment, ICJ Reports 1986, pp. 62 and 64-65, paras. 109, 115.
[38] Ibid.

lished that those massacres were committed on the instructions or under the direction of organs of the respondent State, nor that the Respondent exercised effective control over the operations in the course of which those massacres … were perpetrated".[39]

The effective control test in the context of state responsibility, naturally, differs from the same test in the context of international organizations. This distinction derives from the different relations between the relevant subjects in each of these cases. In the case of state responsibility, actions of individuals or entities are either attributable to a state or not. In the context of the placing of an organ or agent at the disposal of an international organization, however, control does not concern the issue whether a certain conduct is attributable at all to a State or an international organization, but rather to which entity – the contributing State or organization or the receiving organization – conduct has to be attributed.[40] In making the assessment of who is the responsible party, it is not necessary to check the existence of the effective control on the part of both the state and the organization; it suffices to check whether an organization exercised such control. If it is established that an organization lacked such control, it automatically means that the act should be attributed to a state.[41] Also, the possibility of dual responsibility inevitably derives from the application of the effective control test, as it is possible that both the UN and the troop-contributing state had effective control over the particular conduct. Surprisingly, the UN Secretariat did not acknowledge this possibility. By differentiating between the UN peacekeeping operations, which are under the full command and control of the UN, and actions authorized by the Security Council, but undertaken under the control of states or regional organizations, it failed to recognize situations in which troops receive

orders from the UN but, in addition, receive orders from their respective governments.[42] For instance, the report of the Commission of Inquiry, established in order to investigate armed attacks on the UN personnel in Somalia (UNOSOM II) revealed that "the Force Commander of UNOSOM II was not in effective control of several national contingents which, in varying degrees, persisted in seeking orders from their home authorities before executing orders of the Forces Command".[43] Similarly, it was established that certain decisions by the commander of the Belgian contingent of the UN Assistance Mission for Rwanda (UNAMIR) were taken under the control of Belgium and not of UNAMIR.[44]

The only scenario in which the UN admitted not having control over the peacekeepers, and consequently not bearing responsibility, is when they are acting outside of their official capacity. Article 8 DARIO states that *ultra vires* acts shall be attributable to an organization "if the organ or agent acts in an official capacity and within the overall functions of that organization".[45] Commentary to DARS Article 7 offers some guidelines when it comes to delineating unauthorized but still official conduct and private conduct. The former refers to "actions and omissions of organs purportedly or apparently carrying out their official functions", as opposed to "private actions or omissions of individuals who happen to be organs or agents of the State".[46] This characterization, according to

[39] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, ICJ Reports 2007, p. 43, para. 413.
[40] DARIO Commentary, p. 57.
[41] P. D'Argent, *State organs placed at the disposal of the UN, effective control, wrongful abstention and dual attribution of conduct*, Questions of International Law, Vol 1, 2014, pp. 17-31. See also: A. Spagnolo, *The „reciprocal" approach in article 7 ARIO: a Reply to Pirre d'Argent*, Questions of International Law, Vol 1, 2014, pp. 33-41.
[42] C. Leck, *International Responsibility in United Nations Peacekeeping Operations: Command and Control Arrangements and the Attribution of Conduct*, Melbourne Journal of International Law, Vol. 16, 2009, p. 350.
[43] S/1994/653, paras. 243-244.
[44] *Mukeshimana-Ngulinzira and Others v. Belgium and Others*, RG Nos. 04/4807/A and 07/15547/A, Judgment of 8 December 2010, Court of First Instance of Brussels.
[45] Art. 8 DARIO.
[46] DARS Commentary, p. 46.

some authors, takes the acts of human rights violations outside the scope of "official capacity", that is, outside the scope of responsibility of the UN and triggers the responsibility of a troop-contributing state.[47] The fact is, however, that it is often quite difficult to differentiate between the acts committed in the official capacity from those committed "off-duty". There are no clear indications on how acting in the official capacity should be assessed. That is why factual circumstances of each particular case should be taken into consideration, including the opinion on the issue of the Force Commander or Chief of Staff.[48]

3.2. Overall Control Test

In *Prosecutor v. Tadic*, the International Tribunal for the former Yugoslavia (ICTY) introduced a new standard of attribution, the overall control test.[49] In the focus of the Tribunal was determining individual criminal responsibility, and not the state responsibility. However, the Tribunal found it necessary to determine whether the acts committed by Dusko Tadic could be attributed to the FR Yugoslavia. Such attribution would imply that the conflict in question was of an international character and thus Article 2 of the Fourth Geneva Convention of 1949 should be applied. The Appeals Chamber was of the opinion that effective control test was inappropriate given the specific circumstances of the case. It found that the effective control test may be employed in situations in which private individuals act on the state's behalf.[50] However, if those individuals make up "an organized and hierarchically structured group such as a military unit or, in case of war or civil strife, armed bands of irregulars or rebels", "for the attribution to a State of acts of these groups it is sufficient to require that the group as a whole … [was] under the overall control of the State".[51] Such control exists when a state has a role in "organizing, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group".[52] This means that, according to the overall control test, the responsibility of a state exists even if that state gave no specific instructions for the commission of any of the enumerated acts.[53] Clearly, this test is stricter for a state in comparison to that of effective control.

The ICJ reflected on the overall control test when deciding the *Bosnian Genocide* case. The Court observed that the ICTY was not called upon to rule on questions of state responsibility, as "its jurisdiction is criminal and extends over persons only".[54] The ICJ further found that the Tribunal dealt with "issues of general international law which do not lie within the specific purview of its jurisdiction and, moreover, the resolution of which is not always necessary for deciding the criminal cases before it".[55] Thus, the ICJ concluded that the application of the overall control test may have been appropriate for determining whether or not an armed conflict was international, but found that in the context of state responsibility it was "unpersuasive".[56]

[47] See Dannenbaum 2010, p. 158.
[48] DARIO Commentary, p. 61.
[49] *Prosecutor v. Tadic*, ICTY-94-1-A (1999), 38 ILM.
[50] Ibid. para. 129.
[51] Ibid. para. 120.
[52] Ibid. para. 137. See also S. Talmon, *The responsibility of outside powers for acts of secessionist entities*, International and Comparative Law Quarterly, Vol. 58, 2008, p. 506.
[53] Ibid.
[54] *Prosecutor v. Tadic*, para. 403.
[55] Ibid.
[56] Ibid. para. 404. For a scholarly critique of the overall control test see: G. Kajtár, *An Overall Critique of the Overall Control Test*, in Zs. Csapó (Ed.): Emlékkötet Herczegh Géza születésének 85. évfordulójára: A ius in bello fejlődése és mai problémái. *Pécs, 2013,* pp. 82-98. For a critical analysis of the standpoint of the ICJ see A. Cassese, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, European Journal of International Law, Vol. 18, No. 4, 2007, pp. 649-668.

3.3. Ultimate Authority and Control Test

The third test employed in international jurisprudence when determining the attribution of acts was the test of ultimate authority and control. In the *Behrami/Saramati* cases, the European Court of Human Rights (ECtHR) was asked to determine whether unlawful acts committed by the United Nations Mission in Kosovo (UNMIK) and the NATO military force in Kosovo (KFOR), both established by the UN Security Council Resolution 1244, constituted violations of the European Convention on Human Rights (ECHR) by the troop-contributing states. In the *Behrami* case, one boy was killed and another injured by undetonated cluster bombs that remained after the NATO bombing of Yugoslavia in 1999. It was submitted in the application to the Court that France violated Article 2 of the European Convention on Human Rights (ECHR) due to the fact that its KFOR troops failed to clear the unexploded bombs, although they knew of their existence.[57] France, on the other hand, claimed that it was UNMIK that was responsible for demining and, consequently, that the responsibility for what happened lies with the UN. In the *Saramati* case, a Kosovar was detained by the KFOR commander under suspicion of posing a security threat. The applicant claimed that his extra-judicial detention constituted a violation of Article 5 of the ECHR and brought a claim against Norway and France since the two KFOR commanders involved in his detention were of Norwegian and French nationality. The two states claimed that it was the UN that had authority over the commanders and is, therefore, the one the action should be brought against.

The ECtHR found in both cases that the acts in question should be attributed to the United Nations; however, it based its decisions on different arguments deriving from the different status of UNMIK and KFOR, respectively. While UNMIK was a subsidiary organ of the UN, and thus its actions were clearly attributable to the Organization, KFOR was not a subsidiary organ of the UN but instead a military force placed at the disposal of the Organization. It was, therefore, necessary to determine whether the UN exercised necessary control over KFOR and whether the UN could consequently be responsible for its actions.

In order to examine the Security Council control over KFOR, the ECtHR elaborated on the issue

of delegation of powers. The Court noted that the delegation of the Security Council powers is based on Chapter VII of the UN Charter and is established as the substitute for the Article 43 agreements, which were never concluded.[58] The Court found that the key question was "whether the UNSC retained ultimate authority and control so that operational command only was delegated".[59] The Court concluded that the UNSC did retain such ultimate authority and control, and it based its conclusion on four arguments. First, Chapter VII allowed the UNSC to delegate its powers to member states or regional organizations; second, the power to delegate is a delegable power; third, the delegation was explicit in the Resolution; fourth, the delegation was limited by the KFOR mandate, which was precisely defined in the Resolution; and fifth, the military presence was required by the Resolution to report to the UNSC in order to allow the SC to exercise overall authority and control.[60] The Court thus concluded that, although the UNSC delegated operational command to NATO, it retained ultimate authority and control over the security mission[61] and, for this reason, the impugned action is attributable to the UN.[62]

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[57] *Agim Behrami and Bekir Behrami v. France* (App. no. 71412/01) *Ruzhdi Saramati v. France, Germany and Norway* (App. no. 78166/01) ECtHR (2007) para. 61.
[58] *Behrami and Saramati*, para. 132-133.
[59] Ibid. para. 133.
[60] Ibid. para. 134.
[61] Ibid. para. 135.
[62] Ibid. para. 141.

The ultimate authority and control test introduced a rather innovative approach in determining the attribution of conduct. In opposition to the effective control test, which requires the subject in question to issue specific instructions, and the overall control test, which is less strict than the effective control test but nevertheless requires a certain degree of control over a conduct, the ultimate authority and control test does not require any actual control over the conduct but merely seeks to determine whether the delegation of power from one subject to another was validly performed. If so, acts or omissions by the subject, to which the power to act was delegated, are attributable to the one delegating the power.

The approach taken by the ECtHR in the *Behrami/Saramati* cases was not in accordance with the standard of attribution later adopted in DARIO. Although the said cases antedated DARIO, the effective control test was already then an established test of attribution in the context of state responsibility and was in that respect a part of customary international law.[63] Moreover, even prior to DARIO, the effective control test has been recognized in the context of responsibility of international organizations.[64] The ECtHR decision, which provided an attribution of conduct to the organization even though the troops were under factual control of a troop-contributing state, was widely criticized.[65] The criticism was reflected in the post-*Behrami* judicial practice, including the practice of the ECtHR itself, which departed from the ultimate authority and control test.

3.4. Relevant Cases in the National and European Jurisprudence

3.4.1. The Al-Jedda Case

Shortly after *Behrami*, the UK House of Lords decided the case of *Al-Jedda*. Al-Jedda, who held dual nationality of the UK and Iraq, was detained in Iraq by the UK forces for the alleged participation in terrorist activities. The UK forces operated under MNF-I, a multi-national force autho

rized by the Security Council.[66] Al-Jedda challenged the lawfulness of his detention before the UK courts, claiming that his right to liberty, guaranteed under the ECHR, was violated.[67] Both the Divisional Court in its judgment of 2005 and the Court of Appeal in its judgment of 2006 held that the Multinational force was authorized by the UN Security Council Resolution 1546 to take "all necessary measures" to contribute to the maintenance of peace and security in Iraq. Since the UN Member states are obliged to carry out Security Council decisions[68] and the obligations under the

[63] C. Ryngaert, *Apportioning Responsibility between the UN and Member States in UN Peace-Support Operations: An Inquiry into the Application of the "Effective Control" Standard after Behrami*, Israel Law Review, Vol. 45, No. 1, 2012, p. 158.
[64] Financing of the United Nations Protection Force, the United Nations Confidence Restoration Operation in Croatia, the United Nations Preventive Deployment Force and the United Nations Peace Forces headquarters, Report of the Secretary-General, United Nations General Assembly, 51st Session, A/51/389 (20 September 1996).
[65] See for instance: Larsen 2008, p. 520; A. Sari, *Jurisdiction and International Responsibility in Peace Support Operations: The Behrami and Saramati Cases*, Human Rights Law Review, Vol. 8, 2008, pp. 151-170; F. Messineo, *The House of Lords in Al-Jedda and Public International Law: Attribution of Conduct to UN-Authorized Forces and the Power of the Security Council to Displace Human Rights*, Netherlands International Law Review, Vol. LVI, 2009, pp. 35-62; K. E. Boon, *Are Control Tests fit for the Future? The Slippage Problem in Attribution Doctrines*, Melbourne Journal of International Law, Vol. 15, No. 2, 2014, p. 357.
[66] SC Res 1511 (2003); SC Res 1546 (2004).
[67] Art. 5(1) ECHR.
[68] Art. 25 UN Charter.

UN Charter prevail over all the other states' obligations,[69] the UK's obligation took precedence over its obligation under the Convention.[70] The applicant appealed to the House of Lords. Before this Court, the Secretary of State raised a new argument, claiming that detention was attributable to the United Nations and was, therefore, outside of the scope of the Convention. The House of Lords had to determine whether in this particular case, the UK or the UN bore responsibility for unlawful detention. The House of Lords emphasized different circumstances in the *Al-Jedda* case in comparison to those in *Behrami/Saramati*. According to Lord Bingham, "the international security and civil presence in Kosovo were established at the express behest of the UN and operated under its auspices, with UNMIK a subsidiary organ of the UN".[71] On the contrary, in Iraq, "the multinational force was not established at the behest of the UN, was not mandated to operate under UN auspices and was not a subsidiary organ of the UN".[72] Given the said differences between the two cases, the House of Lords found that the standard from *Behrami* was inapplicable in the present case and, consequently, the disputed acts should be attributed to the UK. By reasoning this way, the House of Lords actually embraced the effective control test.

The approach of the House of Lords was confirmed by the ECtHR. The Court, though, did refer to the ultimate control test, obviously to justify its application in the *Behrami* case. However, by distinguishing the factual situation in the two cases, the Court applied the effective control test in *Al-Jedda*.[73] It was actually an odd mixture of attribution tests in the Court's argumentation since the Court opined that "the United Nations Security Council had neither effective control nor ultimate authority and control over the acts and omissions of troops within the Multinational Force and that the applicant's detention was not, therefore, attributable to the United Nations".[74]

3.4.2. The Mukeshimana Case

Another instance of the application of the effective control test was the *Mukeshimana* case, heard before the Belgian first instance court. The case dealt with the 1994 Rwandan massacre and the

apportioning of responsibility between the UN and Belgium for not preventing the massacre. The UN mission, MINUAR, was, namely, composed of Belgian troops.

Some of the Rwandan refugees found shelter in a MINUAR encampment, the so-called ETO (*Ecole Technique Officielle*). However, the Belgian troops decided to withdraw the Blue Helmets from the MINUAR, leaving refugees unprotected. It was found that Belgian commanders could not have been ignorant of the war crimes committed on a large scale in Rwanda before the evacuation of the ETO, as well as that the mere presence of the Belgian troops would guarantee the Rwandan refugees safety.[75]

In deciding the case, the Belgian court found that peacekeepers' acts were attributable to Belgium

[69] Art. 103 UN Charter.
[70] *R. (on the application of Al-Jedda) v. Secretary of State for Defence* [2005] EWHC 1809 (Admin); [2006] EWCA Civ 327.
[71] *R. (on the Application of Al-Jedda) v. Secretary of State for Defence*, 2007, UKHL 58, para. 24.
[72] Ibid.
[73] An analysis of the Court's decision see in: M. Milanovic, *European Court decides Al-Skeini and Al-Jedda*, EJIL: Talk!, https://www.ejiltalk.org/european-court-decides-al-skeini-and-al-jedda/ (3 November 2019).
[74] *Al-Jedda v. the United Kingdom* (App. no. 27021/08) ECtHR (2011) para 84.
[75] *Mukeshimana-Nguilinzira and ors. v. Belgium and ors.*, Brussels Court of First Instance, ILDC 1604 (BE 2010), 8 December 2010, in C. Ryngaert & I. F. Dekker & R. A. Wessel & J. Wouters (Eds.): Judicial Decisions on the Law of International Organizations, Oxford University Press, 2016, p. 339.

and not to the UN, as peacekeepers were *de facto* under Belgian command and control.[76] Regardless of the fact that actions took place under the UN mission, the Court observed who exercised actual control over the troops. Thus, the Court employed the effective control test from Article 7 DARIO.

3.4.3. The Nuhanović Case

In the *Nuhanović* case, and the related *Mustafić* case heard before the Dutch courts, it was decided on the attribution of conduct of the so-called *Dutchbat* – the Dutch military contingent which formed part of UNPROFOR – the UN operation in Bosnia. The claim to the District Court of The Hague was brought by the former UN interpreter, Nuhanović, and the family of Rizo Mustafić. They claimed responsibility of the Netherlands for the failure of *Dutchbat* to provide shelter within its compound to Mustafić and Nuhanović's family, resulting in them being killed by the Bosnian Serb forces. The District Court dismissed their claim, stating that, although neither the UN nor the Netherlands exercised "effective overall control",[77] it was the UN that exercised operational command and control over the Dutch forces, which suffices for the attribution of acts to the UN.[78]

The Appeals Court reversed the first-instance decision. First, unlike the District Court, which excluded the possibility of dual attribution, it found that more than one party may exercise effective control in a particular case.[79] This was probably "the most important" and "potentially innovative" aspect of the judgment.[80] By applying Article 7 DARIO, the Court found that the Dutch forces exercised effective control and were thus in a position to prevent the occurrence of human rights violations but failed to do so.[81] The Supreme Court ruling upheld the Appeals Court decision, confirming that both the UN and the Dutch state were responsible for the acts of *Dutchbat*.[82]

In legal literature, there have been opposing standpoints with regard to the "power to prevent" standard, applied by the Appeals Court. The controversy of the said standard lies with the fact that its application broadens the application of the effective control test. The international law subject, be

it a state or an international organization, may be found responsible even if the conduct in question "occurred independent of any direct order, or even in contravention of orders from above".[83] This approach differentiates effective control in the context of international organizations from the same test in the context of state responsibility. Some authors, however, find the preventive interpretation of the test "a scholarly initiative", which, at the time of its introduction, "was neither based

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[76] Ibid.

[77] The "effective overall control" test, which nominally comprises both effective and overall control tests, yet in practice signifies the latter, was also employed by the ECtHR in determining whether Turkey exercised control over the policies and actions of the authorities of the Northern Cyprus. See *Loizidou v. Turkey* (App. No. 15318/89) ECtHR (1996).

[78] *Nuhanović v. State of the Netherlands (Ministry of Defence and Ministry of Foreign Affairs)*, First Instance Judgment, Decision No. LJN: BF0181, Case No. 265615, ILDC 1092 (NL 2008), 10 September 2008, Netherlands; The Hague; District Court, para. 4.12.3., 4.9.

[79] Ibid. para. 5.9.

[80] A. Nollkaemper, *Dual Attribution: Liability of the Netherlands for Conduct of Dutchbat in Srebrenica*, Amsterdam Law School Research Paper No. 2011-29, via SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1933719 (3 November 2019).

[81] *Hasan Nuhanović v. Netherlands*, Appeal judgment, LJN: BR5388, 5 July 2011, at 5.8. Similar approach has been advocated by Dannenbaum. See: Dannenbaum 2010, p. 158.

[82] *The State of Netherlands v. Hasan Nuhanovic*, 12/03324, Supreme Court, 06 September 2013.

[83] T. Dannenbaum, *Killing at Srebrenica, Effective Control and Power to Prevent Unlawful Conduct*, International and Comparative Law Quarterly, Vol. 61, No. 3, 2012, p. 722.

on UN practices nor on judicial precedents".[84] According to this line of reasoning, preventative interpretation of the effective control test was proposed in order to make available to the victims the necessary procedures to acquire adequate compensation, even though the availability of dispute settlement procedures and the issue of attribution are two different things.[85]

3.4.4. The Mothers of Srebrenica Case

The attribution of conduct for the acts of *Dutchbat* in Srebrenica was discussed in the *Mothers of Srebrenica* case as well. A Dutch foundation called Mothers of Srebrenica, representing surviving relatives of the victims of Bosnian Serbs in Srebrenica, instituted proceedings against both the UN and the state of Netherlands for the failure of *Dutchbat* to prevent events in the area which was supposed to be protected by the UN. As the Dutch Courts[86] and the ECtHR[87] confirmed that the UN enjoyed immunity and could not be prosecuted before the Dutch courts, the proceedings continued against the Netherlands.

The District Court decision in the present case came shortly after the Supreme Court decision in *Nuhanović*. The District Court applied Article 7 DARIO and adopted the effective control test.[88] The same test was later applied by the Appeals Court, which noted that in normal circumstances, such control is exercised by the UN, but in exceptional circumstances, a state may also have effective control over the troops placed at the disposal of the UN.[89] Both Courts discussed the issue of *ultra vires* acts of peacekeepers, and they had different views on the issue. While the first-instance Court accepted the applicant's assertion that *Dutchbat*'s acts should be attributed to the Netherlands on the grounds of the troops acting *ultra vires*,[90] the Appeals Court was of the opinion that, pursuant to Article 8 DARIO, all the acts performed "within the overall functions" of the UN should be attributed to the Organization, even if committed in contravention of instructions,[91] while only those acts which are completely outside of their capacity, meaning that they have nothing to do with the peacekeeping mission cannot be attributed to the UN.[92]

In spite of concluding that the acts cannot be attributed to the Netherlands on the basis of the *ultra vires* doctrine, the Court found that after the fall of Srebrenica, the UN and the Netherlands jointly decided to evacuate the population from the so-called "mini safe area", and, in that transitional period, the Dutch Government "participated in this decision-making process on the highest level" and had effective control over the peacekeepers' actions.[93]

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[84] Y. Okada, *Effective Control Test at the Interface between the Law of International Responsibility and the Law of International Organizations: Managing Concerns over the Attribution of UN Peacekeepers' Conduct to Troop-contributing Nations*, Leiden Journal of International Law, Vol. 32, 2019, p. 283.
[85] Ibid. p. 290.
[86] *Mothers of Srebrenica Association et al. v. The Netherlands and the United Nations*, the Hague District Court, 10 July 2008, ECLI:NL:RBSGR:2008:BD6795; The Hague Court of Appeal, 30 March 2010, ECLI:NL:GHSGR:2010:BL8979; Supreme Court of the Netherlands, 13 April 2012, ECLI:NL:HR:2012:BW1999.
[87] *Stichting Mothers of Srebrenica and Others v. the Netherlands* (App. no. 65542/12) ECtHR (2013)
[88] *Mothers of Srebrenica Association et al. v. The Netherlands*, The Hague District Court, 16 July 2014, ECLI:NL:RBDHA:2014:8748, paras. 4.32-4.34.
[89] *Mothers of Srebrenica*, Court of Appeal, para. 12.1.
[90] *Mothers of Srebrenica*, District Court, paras. 4.56-4.60.
[91] *Mothers of Srebrenica*, Court of Appeal, para. 15.2.
[92] C. Ryngaert & O. Spijkers, *The End of the Road: State Liability for Acts of UN Peacekeeping Contingents after the Dutch Supreme Court's Judgment in Mothers of Srebrenica*, Netherlands International Law Review, Vol. 66, 2019, p. 543.
[93] *Mothers of Srebrenica*, Court of Appeal, paras. 24.1-24.2.

The Court of Appeal held that the Netherlands acted wrongfully by facilitating the separation of the male refugees by the Bosnian Serbs and by not giving the male refugees, who were inside the compound, the choice of staying in the compound and thus denying them the 30% chance of not being exposed to the inhumane treatment and executions by the Bosnian Serbs. The 30% assessment is, of course, arbitrary, but the Court justifiably applied the 'loss of a chance' concept, according to which the outcome of the unfortunate events might have been different had *Dutchbat* acted differently.[94]

The Supreme Court reduced the responsibility of the Netherlands from 30% to 10%. The Court was of the opinion that "the chance that the male refugees, had they been offered the choice of remaining in the compound, could have escaped the Bosnian Serbs, was indeed small, but not negligible".[95] The Court, therefore, estimated that chance at 10%.

In determining the responsible party, the Supreme Court rejected the standard of the *Nuhanović* Court of Appeals case, according to which the responsibility lies with the one who was in a position to prevent the occurrence of acts in question and failed to do so. The Supreme Court referred to the peacekeepers as the organs of the UN[96] and based its discussion almost entirely on Article 8 DARIO, that is, on the *ultra vires* acts of *organs* of the organization. It is not clear why the Court relied on Article 8 DARIO, while in *Nuhanović,* it applied Article 7. The Court explained this difference in reasoning by stating that, in *Nuhanović,* it had to determine whether the acts of *Dutchbat* were attributable to the UN or the Netherlands, while in *Mothers of Srebrenica*, it was not an issue.[97] The argument of the Supreme Court seems odd, as in both the *Nuhanović* and the *Mothers of Srebrenica* case, the Netherlands was the respondent party, so the Court's reasoning on attribution should have logically been the same in both cases.[98] In any case, the Court applied the effective control test and determined that the Netherlands did not exercise effective control before the fall of Srebrenica, but it did so afterward, when it was decided to evacuate the Bosnian Muslims from the "mini safe area."[99]

In spite of the fact that the Supreme Court's decision was disappointing for the victims of the Srebrenica massacres, as it reduced the percentage of the state responsibility, calculating the degree of responsibility remains limited to the particular case and is not likely to set a standard for future similar cases.[100] What seems to be a more far-reaching implication of the *Srebrenica* cases is the fact that the Dutch courts paved the way for the responsibility of troop-contributing states in the UN peacekeeping missions. Some authors rightly observed that expanding the attribution to a state might have negative implications in sense that "there would be no incentive for the UN to introduce more comprehensive solutions such as, for instance, the establishment of a reparation fund or other mechanisms granting victims effective remedies", and, on the other hand, that "the states could be deterred from contributing troops to peacekeeping operations".[101]

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[94] G. Van Dijck, *When historic injustice meets Tort Law: the case of the Srebrenica genocide*, 2017, https://www.maastrichtuniversity.nl/blog/2017/07/when-historic-injustice-meets-tort-law-case-srebrenica-genocide (10 November 2019).

[95] *Mothers of Srebrenica*, Supreme Court, para. 4.7.9.

[96] *Mothers of Srebrenica*, Supreme Court, para. 3.3.3.

[97] Ibid. para. 3.3.5.

[98] Ryngaert & Spijkers 2019, p. 545.

[99] Ibid. para. 3.5., 5.1.

[100] T. Dannenbaum, A Disappointing End of the Road for the Mothers of Srebrenica Litigation in the Netherlands, https://www.ejiltalk.org/a-disappointing-end-of-the-road-for-the-mothers-of-srebrenica-litigation-in-the-netherlands/ (7 December 2019).

[101] P. Palchetti, *Attributing the Conduct of Dutchbat in Srebrenica: The 2014 Judgment of the District Court in the Mothers of Srebrenica Case*, Netherlands International Law Review, Vol. 62, 2015, p. 294. See also: Spijkers, O.: Emerging Voices: Responsibility of the Netherlands for the Genocide in Srebrenica – The *Nuhanović* and *Mothers*

Perhaps the latter fear influenced the Supreme Court to take a more cautious approach in attributing acts to states than the Appeals Court did.

It can be seen that in both cases concerning the Srebrenica genocide, the *Nuhanović* case, and the *Mothers of Srebrenica* case, all courts dealt with Articles 4 and 8 DARS and Articles 6 and 7 DARIO; however, they interpreted, applied and combined these articles in different ways.[102]

3.4.5. The Mohammed Case

The case of Serdar Mohammed concerned Mohammed's prolonged detention in Afghanistan by the UK forces, which were a part of the UN-authorized and NATO-led *International Security and Assistance Forces in Afghanistan* (ISAF).[103] The case was decided before the British High Court, appeals Court, and the Supreme Court.

Contrary to the ISAF standard procedure, which allows for detention up to 96 hours, after which a detained person must be either released or placed in the custody of the Afghan authorities, the UK applied its own policy, according to which the detention beyond 96 hours could be authorized in certain circumstances. This resulted in Mohammed's 110-days-long detention without charge.

Mohammed claimed violation of the right to liberty under Article 5 of ECHR. The UK government denied its responsibility, alleging that it formed part of the UN-authorized military force, and, therefore, the UN should be found responsible. The High Court discussed two issues: first, whether the actions of ISAF in Afghanistan are attributable to the UN and, second, whether the responsibility for Mohammed's detention lies with ISAF, the UK, or both.[104] Similar to its argumentation in *Al-Jedda*, the Court said that the Security Council had both effective control and ultimate authority and control over ISAF.[105] The conduct of ISAF should, therefore, according to the Court, be attributed to the UN.[106] However, since the UK justified the prolonged detention with the application of its own national policy, which was different from the one of ISAF, the Court ultimately attributed the conduct to the UK.[107] Although the decision resembled the one in *Al-Jedda* and the Court invoked the effective control, some authors interpreted it as "a revival of *Behrami*".[108] In spite of the fact that in *Behrami* the conduct was attributed to the UN, while in *Mohammed* it was attributed to the UK, the line of reasoning in both cases was similar and the only reason the conduct was attributed to the state in the latter case was the existence of extraordinary conditions which did not exist in the former.[109]

The Court of Appeal reached the same decision as the first-instance Court and attributed the con-

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of Srebrenica Cases Compared, http://opiniojuris.org/2014/07/23/emerging-voices-responsibility-netherlands-genocide-srebrenica-nuhanovic-mothers-srebrenica-cases-compared/ (9 December 2019); P. De Visscher, Les conditions d'application des lois de la guerre aux opérations militaires des Nations Unies, *Annuaire de l'Institut de Droit International*, Vol. 54, No. 1, 1971, p. 56.

[102] Ryngaert & Spijkers 2019, p. 539.

[103] The deployment of ISAF to Afghanistan was authorized by the UN Security Council Resolution 1386 (2001) and was done with the consent of the Afghan government. See also Security Council Resolutions 1510 (2003) and 1890 (2009), by which ISAF's mandate was extended.

[104] *Mohammed v. Secretary of State for Defence*, [2015] EWCA Civ 843, para. 170.

[105] Ibid. para. 177-178.

[106] Ibid. para. 178.

[107] Ibid. para. 187.

[108] T. Dannenbaum, *Dual Attribution in the Context of Military Operations*, International Organizations Law Review, Vol. 12, 2015, p. 422.

[109] Ibid.

duct to the UK, but it used a different methodology. As much as this different methodology did not influence the final outcome of the case and the High Court decision was confirmed, it "reflects a deep uncertainty in the law concerning the attribution of conduct in the context of UN-authorized operations".[110]

The case was ultimately decided before the UK Supreme Court. This Court disagreed with the Appeals Court with regard to the lawfulness of the detention that exceeded 96 hours, to the extent that Mohammed was being detained for imperative reasons of security.[111] However, the Court found that the arrangements for his detention were not compatible with the requirements set out in ECHR Article 5; therefore, the UK was consequently found responsible for the breach of the Convention.[112]

4. Concluding remarks

The analysis of the so-far scarce, but growing judicial practice demonstrates that the application of the effective control has become an accepted standard in determining the responsible subject(s) for the acts committed within the peacekeeping operations. After the *Behrami/Saramati* cases, all courts have applied the effective control test. Yet, practically each of these courts used a different argumentation while applying it. This diversity in legal arguments clearly shows that the effective control test in the context of international organizations still significantly lacks clarity.

What seems to be undisputed is the following: first, troop-contributing states bear the responsibility for the peacekeepers' unlawful acts which fall outside of their official capacity and, second, for acts which fall within the official functions of the peacekeepers, the effective control test will apply in each particular case, since the UN usually, but not exclusively, exercises operational control over the peacekeepers' acts.

Assessing attribution on a case-by-case basis seems logical; however, in the absence of clear guidelines on how to interpret and apply the effective control test, different courts will use different lines of reasoning, all claiming to apply the same test. This will inevitably result in a divergent judicial practice, which will further have a negative effect on determining the meaning and the scope of the effective control test.

In overcoming these controversies, it would be helpful if the theoretical background to the effective control test were more precise. For instance, the issue of whether to adopt the preventive approach or not is an important one, as it significantly broadens the spectrum of responsibility of a particular subject. Yet, no consensus on this issue exists either among legal scholars or in practice.

In addition, the issue of attribution should be separated from the issue of liability and the possibility of seeking redress. In other words, the responsibility of a troop-contributing state should not be observed as a way to overcome the problem of the jurisdictional immunity of the organization but rather as a consequence of the effective control that the state had over the peacekeepers. As to the impossibility to seek redress due to the immunity of international organizations, it is a separate question that has to be dealt with. The organization, primarily the UN, should develop procedures for compensating the victims of the peacekeepers' misconduct. This is the least it can do when those who were sent to protect do harm instead.

[110] J. W. Rylatt, *Attribution of Conduct in UN-authorized International Military Operations: Serdar Mohammed before the Courts of England and Wales*, Military Law and the Law of War Review, Vol. 55, 2016-2017, p. 106.
[111] *Serdar Mohammed v. Ministry of Defence*, Judgment, UKSC 2, 2017, para. 39, 111 (1)(3).
[112] Ibid. para. 111(4)(5)(6).

The Lanzarote Committee: protecting children from sexual violence in Europe and beyond

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The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, known as the Lanzarote Convention, is considered the most comprehensive international instrument dedicated to protect children from sexual violence in all spheres of life and settings. The purpose of the study is to present the functioning and practice of the Lanzarote Committee as an international human rights monitoring body along with the challenges it faces as well as to propose solutions how to handle them.

Keywords: Lanzarote Convention, Council of Europe, human rights monitoring, protection of children sexual violence, child participation

1. Introduction

The human rights monitoring mechanisms of the Council of Europe are a still somewhat under-researched topic, research much rather focuses on the jurisprudence and functioning of the European Court of Human Rights. The few critical evaluations available of European monitoring mechanisms[1] do not cover the Lanzarote Committee that has been overseeing the implementation of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention) since 2011. This Convention is a powerful instrument protecting children from sexual violence in an inter-connected world where the harmonization of legislation, transnational cooperation to end impunity and synchronized efforts of various stakeholders are more needed than ever. The purpose of this study is to dedicate well-deserved attention to the work of the Lanzarote Committee as an international human rights monitoring body.

The United Nations Convention on the Rights of the Child (CRC) was the first human rights treaty to explicitly recognize children as rights-holders.[2] As the most widely ratified human rights treaty, it prohibits all forms of violence against children including sexual violence and provides protection from all kinds of exploitation. The fundamental assumption that "no violence against children is justifiable, all violence against children is preventable"[3] is not challenged anymore but supported by a growing number of international instruments. The Lanzarote Convention is not the first Council of Europe treaty protecting the rights of the child, however, it is now considered as the most comprehensive international instrument dedicated to protecting children from sexual violence in all settings and spheres of life. It aims to prevent and combat sexual violence against children, to protect the rights of child victims and to promote international cooperation among states and national collaboration among the different stakeholders. As of March 2020, all 47 Council of Europe

[1] For example P. Lemmens & A. Alen & B. De Witte & A. Verstichel, *The Framework Convention for the Protection of National Minorities: a Useful Pan-European Instrument?*: Intersentia, Antwerpen, Oxford and Portland 2008, and G. de Beco, *Human Rights Monitoring Mechanisms of the Council of Europe*, Routledge, Abingdon 2012.

[2] J. E. Doek, *The human rights of children: An introduction*, in U. Kilkelly & T. Liefaard (Eds.), *International Human Rights of Children*, Springer, Singapore 2019, pp. 12.

[3] Report of the independent expert for the United Nations study on violence against children (A/61/299), para. 1.

member states signed and 45 states have ratified the Convention,[4] while Tunisia acceded as the first non-member state in 2019.

The first part of the study presents the framework of the Lanzarote Convention starting from its origins then explaining its personal scope and the mandate of the Lanzarote Committee. The second part deals with the composition of the Committee and its impact on effectiveness. The third part introduces the monitoring procedures, the fourth part summarizes the facilitation of exchange of information, experiences and good practices. Then, the cooperation between the Lanzarote Committee and other stakeholders is assessed, at the end, the role of children and their possible participation in the monitoring of the Convention is discussed. The conclusions drawn are intended to support the discussion around a possible revision of the working methods of the Lanzarote Committee.

2. Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse

2.1. Why a Council of Europe treaty to combat sexual violence against children?

According to the Explanatory Report of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, the idea of a European convention was triggered by the conclusions of the UN Committee on the Rights of the Child (CRC Committee). This monitoring body found that, despite having an Optional Protocol to the UN Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (hereinafter Optional Protocol on the Sale of Children), "children in Europe are not sufficiently protected against sexual exploitation and abuse".[5] The Group of Specialists on the Protection of Children against Sexual Exploitation, appointed by the Committee of Ministers of the Council of Europe in 2002, conducted a thorough analysis of the international instruments at place[6] and found that there was a need for a new binding instrument to protect children against sexual exploitation and sexual abuse.[7] This new instrument was vested with several ground-breaking features.

First, the Lanzarote Convention goes further than the Optional Protocol on the Sale of Children in terms of substantive criminal law. It also covers sexual abuse of children (Article 18), including sexual abuse in the context of the 'circle of trust', corruption of children (Article 22), when the

[4] The state of signatures and ratifications is available at the website of the Treaty Office of the Council of Europe: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/201/signatures?p_auth=BCk75HnV (30 March 2020).

[5] Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Explanatory Report, para. 7.

[6] These instruments are the following: The United Nations Convention on the Rights of the Child; The Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography; International Labour Organisation Convention 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour; The European Social Charter (Revised); The Convention on Cybercrime; The Council of Europe Convention on Action against Trafficking in Human Beings; The Council of the European Union Framework Decision on combating the sexual exploitation of children and child pornography; The Council of the European Union Framework Decision on the standing of victims in criminal procedures; The Stockholm Declaration and Agenda for Action; The Yokohama Global Commitment; The Budapest Commitment and Plan of Action; Recommendation (2001) 16 on the protection of children against sexual exploitation.

[7] Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Explanatory Report, para. 32.

child is made to witness sexual abuse or sexual activities even without taking part, and solicitation of children for sexual purposes (Article 23). The Lanzarote Convention is the first international instrument to criminalize the preparatory stage of sexual abuse and production of child pornography, known as 'online grooming'. This offence covers cases when an adult intentionally propose a meeting online to a child with the intention to commit such offences and takes steps to make the meeting happen, but no abuse takes place, therefore the offender could have not been held criminally liable for at least an attempt of an offence otherwise. In 2015, taking into account the rapid changes of information and communication technologies (ICTs), the Lanzarote Committee held that the solicitation of children via ICTs does not necessarily result in a meeting in person the offences committed during an online meeting nonetheless might cause serious harm to the child.[8] Recently, both the Lanzarote Committee and the CRC Committee made a standing to ensure the applicability of the instruments to sexual offences committed against children, irrespective whether they were facilitated by information and communication technologies or not.[9]

It is important to refer to the child-centred and child-friendly justice measures of the Convention that contributes to a better protection of children from sexual violence. The Lanzarote Convention emphasizes education of children on the risks of sexual exploitation and sexual abuse (Article 6) and the "participation of children in the development and implementation of state policies, programmes and other initiatives concerning the fight against sexual exploitation and sexual abuse of children" (Article 9) among the preventive measures. With regard to the protection and assistance provided to child victims, in line with the principle of the best interest of the child in investigations and criminal proceedings [Article 30 (1)], the Convention introduces a multidisciplinary response based on interagency and intersectoral cooperation. The most well-known model is the Icelandic Children's House or Barnahus, endorsed as a promising practice by the Lanzarote Committee.[10] Moreover, the provisions on interviewing child victims and their participation in the criminal court proceedings are also ground-breaking in terms of balancing the best interest of child victims, among others to avoid exacerbating their trauma, and the principles of fair trials guaranteed to every suspect or accused person.

2.2. The duty-bearers under the Convention: State Parties

The Lanzarote Convention was opened for signature on 25 October 2007 and entered into force on 1 July 2010 after its fifth ratification. As of March 2020, all Council of Europe member states signed the Convention with Armenia and Ireland yet to ratify. The treaty is open for signature by non-member states of the Council of Europe, however, those state that did not take part in its elaboration, shall be invited to accede by the Committee of Ministers of the Council of Europe upon unanimous consent of the members of the Lanzarote Committee (Article 46 (1)). Tunisia, as the first and so far only non-member state, acceded to the Convention on 15 October 2019 that entered into force on 1 February 2020 in respect of it. The Lanzarote Convention has a potential to grow beyond Europe much like the Budapest Convention on Cybercrime: out of 65 ratifications, 21 are non-member states including Australia, Canada, Japan and the United States of America.

[8] Opinion on Article 23 of the Lanzarote Convention - Solicitation of children for sexual purposes through information and communication technologies (Grooming), 17 June 2015.

[9] Interpretative Opinion on the applicability of the Lanzarote Convention to sexual offences against children facilitated through the use of information and communication technologies (ICTs), 12 May 2017, and Guidelines regarding the implementation of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, UN Committee on the Rights of the Child, 10 September 2019, CRC/C/156.

[10] Lanzarote Committee, Committee of the Parties to the Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse. 1st Implementation Report. Protection of children against sexual abuse in the circle of trust: The framework, 4 December 2015. pp. 25.

Under Article 47, the territorial application of the Convention can be specified at the time of signature or deposition of the instruments of ratification. Azerbaijan (in respect of the Nagorno-Karabakh region) and the Republic of Moldova (without specific reference in the declaration but with regard to Transnistria) declared that they cannot guarantee the application of the Convention in areas where they do not exercise effective control. Georgia did not make such declaration upon signature, but referred to the occupation of South Ossetia and Abkhazia in its reply to the General Overview Questionnaire.[11] Although the Convention does not allow the State Parties to narrow the territorial application after the signature, in 2015, Ukraine informed the Secretary General that the application of all Council of Europe treaties, including the Lanzarote Convention, is limited or not guaranteed in the Autonomous Republic of Crimea and the City of Sevastopol as well as in certain districts of the Donetsk and Luhansk oblasts.[12] Cyprus generally denotes that it cannot ensure the application of human rights conventions in the occupied area (Turkish Republic of Northern Cyprus) but has not made such remarks in relation to the application of the Lanzarote Convention.

The question of territorial application can be relevant also in case of state parties that have effective control over all their territories but have special arrangements with certain regions and departments. Denmark excluded the application of the Convention in case of the Faroe Islands and Greenland and the Netherlands with respect to its overseas territories, while France declared that the Convention shall apply to the whole territory of the Republic. Considering the transnational and global aspects of sexual abuse and exploitation of children, it would be desirable to extend to the application of the Convention to highest possible extent, as it happened in case of the CRC with regard to autonomous regions and overseas territories of the Council of Europe Member States. Nevertheless, the Convention provides for the extension of the territorial application even after ratification (Article 47 (2)).

Article 48 of the Convention provides for reservations only in respect of 7 provisions that are expressly established.[13] All the reservations admissible are to be found in the chapter on substantive criminal law. Out of the 46 ratifications, 17 state parties made a reservation, and none has been withdrawn so far:

- Germany, Hungary and the Russian Federation in respect of Article 20 (3) 1st indent, therefore they reserved the right not to apply the Convention for the production and possession of pornographic material "consisting exclusively of simulated representations or realistic images of a non-existent child".
- Denmark, Germany, Liechtenstein, the Russian Federation, Sweden, Switzerland in respect of Article 20 (3) 2nd indent, hence they exclude the criminal responsibility of children for the production and possession of material that involves only them, provided that they reached the age of sexual consent and the images are "produced and possessed by them with their consent and solely for their own private use". It is to be noted that the Convention did not expressly talk about the way children get to possess the material e.g. sharing of these images that is definitely much easier and common these days than at the time of the Convention's drafting.
- Bulgaria, Hungary, the Russian Federation in respect of Article 20 (4) not to criminalize

[11] See the reply of Georgia to the General Overview Questionnaire, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680470916 (29 March 2020).

[12] See the full text of the declaration at the website of the Council of Europe Treaty Office: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/201/declarations?p_auth=xslwGgMH&_coeconventions_WAR_coeconventionsportlet_enVigueur=false&_coeconventions_WAR_coeconventionsportlet_searchBy=state&_coeconventions_WAR_coeconventionsportlet_codePays=U&_coeconventions_WAR_coeconventionsportlet_codeNature=10 (29 March 2020).

[13] These articles are the following: Article 20(3) 1st and 2nd indent, 20 (4), 21(2), 24(3), 25(3), 25(5).

the "knowingly obtaining access, through information and communication technologies to child pornography".
- Bulgaria and the Russian Federation in respect of Article 21 (2), therefore to criminalize "knowingly attending pornographic performances involving the participation of children" only in cases where children have been recruited or coerced.
- Andorra, Belgium, Bulgaria, France, Germany, Luxembourg, Monaco, the Russian Federation, Slovenia, Sweden and Switzerland in respect of Article 24 (3) not to criminalize the intentional attempt to commit certain offences established by the Convention.
- Germany, Hungary, Latvia, Montenegro, Poland, the Russian Federation, Slovenia and Switzerland in respect of Article 25 (3), in order not to apply or apply only in specific cases and under specific conditions the obligation to establish jurisdiction for the offences committed by persons who has their habitual residence in the territory of the respective state.
- The Russian Federation in respect of Article 25 (5), hence they limited the application of extraterritorial jurisdiction without dual criminality with the regard to certain cases of sexual abuse of children (Article 18 (1b)) committed by its national who has their habitual residence in the territory.

2.3. The right-holders under the Convention: children

Aim of the Convention is to ensure children's right to protection from all forms of violence including sexual abuse and exploitation without any limitation on the personal scope of the application. The 'child' is defined by the Convention as any person under the age of 18 years,[14] irrespective of their sex, race, colour, language, religion, political or other opinion, national or social origin, association with national minority, property, birth, sexual orientation, state of health, disability or other status.[15] Accordingly, the same protection applies to every child including children who reached majority in terms of civil law obligations earlier than 18 years due to marriage as well as children who are on the move but, regularly or irregularly, reside within the territory of one of the signatories of the Convention. With regard to some of the offences, the age of legal consent is also relevant although its determination is left to discretion of the states (Article 18 (2)). In any case, the Convention does not intend to criminalize consensual sexual activities between minors,[16] as it was reiterated by the Lanzarote Committee in its Opinion on child sexually suggestive or explicit images and/or videos generated, shared and received by children.[17] In order to fight impunity for sexual exploitation of children in travel and tourism, the extraterritorial scope of the Convention ensures the prosecution of nationals of the state parties for certain offences committed abroad to the detriment of third country national children even if the act is not criminalized in the place where it was committed.[18]

Following the call of the Secretary General of the Council of Europe for a series of priority actions to protect children affected by the refugee crisis, the Lanzarote Committee dedicated special attention to asylum seeker and refugee children as well as children in irregular migration situation. In 2016, it decided to launch an urgent monitoring round in order to analyse how the risks of sexual

[14] Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Article 3.a.
[15] Ibid. Article 2.
[16] Ibid. Article 18(3).
[17] Lanzarote Committee, Committee of the Parties to the Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse, Opinion on child sexually suggestive or explicit images and/or videos generated, shared and received by children, Council of Europe, 6 June 2019.
[18] In accordance with Article 25 (4) of Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, these offences include Article 18, 19, 20, paragraph 1.a., and 21, paragraph 1.a and 1.b.

abuse and exploitation of children arise in the context of the refugee crises. In 2017, after several rounds of exchange of information, the Lanzarote Committee accepted the invitation of the Hungarian authorities for a country visit to the transit zones established on the Hungarian-Serbian border with the aim to monitor the situation of unaccompanied asylum-seeker children there.[19] On both occasions, the Committee recalled Article 11 (2) of the Lanzarote Convention and reiterated that in case of doubt about the age of the person when there are reasons to believe that the victim is a child, the same protection and assistance should be provided for them as for any other child while the age verification procedure is pending.[20] In June, 2018, the Committee issued a declaration "on protecting migrant and refugee children against sexual exploitation and sexual abuse" and requested the State Parties to "uphold the rights and best interests of the child at all times, regardless of their migration status" and "take measures to address the specific risk of exposure to sexual exploitation and sexual abuse of migrant and refugee children, taking into account the increased vulnerability caused by factors such as deprivation of liberty, family separation, inadequacy of reception and care and lack of effective guardianship systems".[21]

Children placed out of their home for care is another group particularly vulnerable to sexual violence. In order to ensure the protection of children out-of-home care, the Committee called upon the states to put in place measures necessary in this context including the screening of all persons taking care of the children, adequate mechanisms for supporting children to disclose any sexual violence as well as protocols for effective follow-up and evaluation.[22] The Lanzarote Committee pays special attention to the application of the non-discrimination principle and the protection of children who are the most vulnerable to sexual abuse and exploitation and it can be hoped that this approach will lead to specific measures with regard to other vulnerable groups in time.[23]

2.4. Mandate of the Lanzarote Committee

Being a treaty-based human rights monitoring mechanism, the two-fold role of the Lanzarote Committee is defined by the Lanzarote Convention: to monitor the implementation of the Convention as well as to "facilitate the collection, analysis and exchange of information, experience and good practice between the states to improve their capacity to prevent and combat sexual exploitation and sexual abuse of children".[24] Furthermore, whenever deemed appropriate, the Committee can facilitate the effective use and implementation of the Convention and express an opinion on any question concerning its application. The elaboration of the working methods is left to the discretion of the Committee as it adopts its own rules of procedures [Article 39 (3)]. The composition and functioning of the Committee will be discussed as follows.

[19] All the documents related to this urgent monitoring round is available on the website of the Lanzarote Committee: https://www.coe.int/en/web/children/urgent-monitoring2 (30 March 2020).

[20] Lanzarote Committee, Committee of the Parties to the Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse, Special report Protecting children affected by the refugee crisis from sexual exploitation and sexual abuse, Council of Europe, 3 March 2017, p. 9.

[21] Declaration of the Committee of the Parties to the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention) on protecting migrant and refugee children against sexual exploitation and sexual abuse, 28 June 2018.

[22] Lanzarote Committee, Declaration on protecting children in out-of-home care from sexual exploitation and sexual abuse, Council of Europe, 21 October 2019.

[23] Children particularly vulnerable to sexual abuse and exploitation are not a pre-defined group. As an example, the Lanzarote Committee Chair and Vice-Chairperson recently has issued a statement "on stepping up protection of children against sexual exploitation and abuse in times of the COVID-19 pandemic" after identifying children subject to confinement measures as a vulnerable group (3 April 2020).

[24] Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Article 41.

3. Composition of the Lanzarote Committee

3.1. Representatives of the State Parties

The implementation of the Lanzarote Convention is overseen by the Lanzarote Committee, which is composed of representatives of the state parties,[25] hence the number of its members always depends on the actual number of ratifications. According to its Rules of Procedure, the representatives should be "experts of the highest possible rank in the field of children's right, in particular in the protection of children against sexual exploitation and sexual abuse".[26] The state parties can nominate a substitute member as well, but only one representative can exercise the right to vote and reimbursement of travel and subsistence expenses. The decisions are taken by two-thirds majority of the votes cast, provided a quorum is present, while procedural matters can be settled by simple majority. No rules are in place on the conflict of interest, namely in cases when the Committee is to decide about a matter concerning one or more countries.

Accordingly, the Lanzarote Committee is not an independent expert body. The monitoring of the Convention can be considered a peer review with pros and cons. It is definitely an advantage that the Committee can serve as a forum to collect, analyse and exchange good practices as well as to discuss sensitive topics with direct involvement of state representatives. According to Gauthier de Beco, if an international monitoring body is not independent, states will not listen to them,[27] but we can argue the opposite as well: legitimacy of a Committee of Parties is less likely to be challenged since all decisions are made by the states themselves. It seems as a weakness that some discussions might get a political character and eventually influence the outcomes of the monitoring process. In addition to this, the fluctuation of the members appears to be quite high compared to independent bodies where the experts usually serve their terms.

The Committee meets three times per year for three days usually in Strasbourg, at the headquarter of the Council of Europe, but it already held meetings in Spain (Madrid), in France (Lyon), the Netherlands (the Hague) and Cyprus (Nicosia) upon the invitation of the respective government. Sessions held outside of Strasbourg are good occasion to combine the ordinary meeting with a capacity-building activity hosted by the local authorities and non-governmental organizations. The meetings are not public unless the Committee itself decides otherwise. The official languages are English and French, this applies to the meetings as well as to all documents prepared by the Committee.[28]

Chairperson and a vice-chairperson are elected from the members of the Committee for a one-year term with the possibility of renewal once. In addition, the Committee appoints a Bureau, consisting of the chairperson, the vice-chairperson and three members, to ensure continuity between the meetings, to supervise the preparations of the meetings and to execute other additional specific tasks delegated to them.[29] Working groups can be set up as well to deal with specific matters, like it happened in case of the preparations of the Thematic Questionnaire of the 2nd monitoring round, with the participation of external experts. Like other human rights monitoring bodies, the Committee is supported by a Secretariat in the execution of its mandate. It is notable that the Secretariat is still

[25] Ibid. Article 39.
[26] Lanzarote Committee, Committee of the Parties to the Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse, Rules of Procedure (revised as of 15-17 March 2016), Rule 2.1.
[27] de Beco 2012, p. 182.
[28] Lanzarote Committee, Rules of Procedure, Rule 6.
[29] Lanzarote Committee, Rules of Procedure, Rule 4.

composed of two permanent agents despite of the wide ratifications of the Convention that multiplied the workload in the last few years and already caused delays in the performance of its tasks.

3.2. Other representatives

The Lanzarote Committee has other representatives named 'participants' who are representatives of bodies of the Council of Europe and other international organizations[30] and 'observers' representing international non-governmental organizations and relevant private sector actors.[31] The other representatives can participate in the meetings and take part in the discussions without the right to vote and reimbursement of their travel and daily expenses.

Currently, the participants from Council of Europe bodies consist of representatives of the Parliamentary Assembly, the Congress of Local and Regional Authorities, the Commissioner for Human Rights, the Conference of International Non-governmental Organizations and several other steering committees and monitoring bodies. Beyond the Council of Europe, member states and states with observer status that are not Parties to the Convention yet, European Union and its agencies, the United Nations and its specialized agencies, Europol, Interpol, the World Health Organization, the International Organization of La Francophonie, the Council of the Baltic Sea States, the European Network of Ombudsperson for Children, the European Network of National Human Rights Institutions appoints a participant.

The procedure of admitting civil society organizations as observers is set out by the resolution of Committee of Ministers on intergovernmental committees and subordinate bodies, their terms of reference and working methods.[32] Accordingly, the Lanzarote Committee considers the expression of interest of non-governmental organizations working at international or European level and may decide by unanimous vote to accept it. The most significant international non-governmental organizations in the field of protection of children from sexual violence, such as ECPAT International, the European NGO Alliance for Child Safety Online, INHOPE Foundation and Missing Children Europe, have already been admitted as observers to the Lanzarote Committee.[33] The cooperation with civil society organizations is discussed later in this study.

4. The monitoring procedure

4.1. General Overview Questionnaire

Within six months from its ratification, states shall submit their reply to the General Overview Questionnaire aimed at "providing a general overview of the legislation, institutional framework and policies for the implementation of the Convention at the national, regional and local level". It contains 23 questions under four headings: (1) General framework, (2) Prevention, (3) Protection

[30] Ibid. Rule 2.2.
[31] Ibid. Rule 2.3.
[32] Committee of Ministers, Resolution CM/Res(2011)24 on intergovernmental committees and subordinate bodies, their terms of reference and working methods, 2011.
[33] Cf. the website of the Lanzarote Committee: https://www.coe.int/en/web/children/civil-society#{%2229153566%22:[2]} (30 March 2020).

and promotion of child victims and (4) Prosecution of perpetrators.[34] Thereafter, the states shall regularly update their reply in case of substantial changes that probably occurs eventually. The state reply to the General Overview Questionnaire is similar to an initial state report at the UN human rights system, however, it is not assessed by the Lanzarote Committee separately but used as a reference in the thematic monitoring procedures.[35] One can argue that this is a missed opportunity: persistent issues of non-compliance with the Convention either will never be revealed by the Committee or with long delay and by coincidence during a thematic monitoring round.

4.2. Thematic monitoring

The monitoring of the Lanzarote Convention is divided by rounds, similarly to other Council of Europe monitoring mechanisms, and each monitoring round has a thematic focus based on a questionnaire developed by the Lanzarote Committee. The replies constitute the state report. However, there is no country-by-country assessment as a matter of course, whether the implementation report shall by Party or cover all Parties has to be decided at the early stage of monitoring.[36] This approach was decided by the Lanzarote Committee at its 2nd meeting in March, 2012.[37] As of March 2020, the Lanzarote Committee concluded one thematic monitoring round on sexual abuse of children in the circle of trust. The 2nd thematic round on the protection of children against sexual exploitation and sexual abuse facilitated by information and communication technologies is currently ongoing. In both cases, the implementation report covers all Parties instead of individual assessment.

The length of the monitoring round seems to be determined by several factors. The states respond to the Thematic Questionnaire within a timeframe given by the Committee but the lack of response, even partial, certainly causes a delay. Then, the Committee seeks information from other stakeholders: civil society organizations and national human rights institutions can submit replies to the monitoring questionnaire or comments on the states' replies within 2 months from its publication on the website of the Committee.[38] As an example, the table compiling the various deadlines by countries for other stakeholders to submit information in the 2nd monitoring round shows the struggle of the states to respect the deadlines.[39]

Once the Committee received all the replies, it starts the discussion question by question in plenary. Any member of the Lanzarote Committee can volunteer to be rapporteur for the replies given to the different questions. Most of the cases, the observations have two readings as the rapporteur points out difficulties in the analysis and request further information. The 1st monitoring round, counting from the decision about the topic in March 2012 till the adoption of the 2nd implementation report in March 2017, lasted five years. As it was mentioned above, the 2nd thematic round is still pending, the decision about the topic was made in June 2016, the thematic questionnaire was adopted in June 2017 with deadline for replies in October 2017. Nevertheless, it is important to recall that the Committee had been and is working on the discussion of the replies in parallel with follow-up

[34] General Overview Questionnaire on the implementation of the Lanzarote Convention As adopted by the Lanzarote Committee on 16 May 2013, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804703b3 (29 March 2020).
[35] State Party replies to the General Overview Questionnaire are available on the website of the Lanzarote Committee, under the heading of the 1st thematic monitoring round: https://www.coe.int/en/web/children/state-replies (29 March 2020).
[36] Lanzarote Committee, Rules of Procedure, Rule 27.3.
[37] Lanzarote Committee, Report of the 2nd meeting, Strasbourg, 29-30 March 2012.
[38] Lanzarote Committee, Rules of Procedure, Rule 22.
[39] State of play of replies to the 2nd monitoring round questionnaire, https://rm.coe.int/state-of-play-of-replies-to-the-2nd-monitoring-round-questionnaire/168079324f (29 March 2020).

on the implementation reports of the previous rounds as well as drafting declarations and opinions. Furthermore, it belongs to the full picture that there has been always an overlap between the different monitoring rounds, the Committee started to discuss the topic of the next monitoring round and to draft the questionnaire while it was finalizing the implementation report of the previous round.[40]

The state replies, the contributions of non-governmental organizations, national human rights institution and children constitute an equal and legitimate source of information for monitoring purposes. Unlike other Council of Europe monitoring bodies, the Lanzarote Committee does not undertake on-the-spot visits during the thematic monitoring. There are no separate meetings or dialogues with the states under review, the members occasionally engage with the Committee if they want to challenge the assessment of the situation in their countries or if the Chairperson or other members of the Committee address them. In practice, the Committee is always open to receive clarifications or updates, written or during the meetings, until the last moment before the adoption of the report.

The implementation report consists of the analysis of the situation, the conclusions derived, compilation of good practices, and general or country-specific recommendations. The Lanzarote Committee rarely singles out states for 'naming and shaming': out of the 96 recommendations formulated in the implementation reports of the 1st monitoring round 22 recommendations were addressed to specific states, sometimes to more than one. The Committee established a practice of classifying recommendations by their levels of urgency with the purpose to determine priorities for implementation, nevertheless, some argues that this can be also counter-productive as states might consider the remaining ones unimportant.[41] The Lanzarote Committee urges State Parties in case of lack of compliance with the Convention or when the implementation of a key obligation is lacking; it considers that steps should be taken if further improvement are necessary to fully comply with the Convention; it invites the State Parties to take measures if it believes that they are on the right track but it wishes to point out at one or several promising practices to reinforce the protection of children.[42] The Lanzarote Committee adopts the final report that has not to be endorsed by the Committee of Ministers therefore made public immediately.

4.3. Urgent monitoring

The Rules of Procedures provides that "if the Lanzarote Committee receives reliable information indicating a situation where problems require immediate attention to prevent or limit the scale or number of serious violations of the Convention, it may request the urgent submission of a special report concerning measures taken to prevent possible serious or persistent cases of sexual exploitation and sexual abuse against children in any Party or Parties to the Convention".[43] Accordingly, the urgent monitoring round might cover all state parties or focus on the situation in one particular country. The special reports, including the findings and the recommendations, are published on the day of their adoption by the Lanzarote Committee along with the comments from the parties concerned.

The first urgent monitoring round covering all signatories to the Convention was triggered by the 2015 refugee crisis in Europe. The Lanzarote Committee, as a response to the call of the Secretary General for priority actions, decided to launch a monitoring on the protection of children affected

[40] See the meeting reports of the Lanzarote Committee.
[41] de Beco 2012, p. 175.
[42] Lanzarote Committee, Committee of the Parties to the Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse. 1st Implementation Report. Protection of children against sexual abuse in the circle of trust: The framework, 4 December 2015. pp. 7.
[43] Lanzarote Committee, Rules of Procedure, Rule 28.1.

by the refugee crisis from sexual exploitation and sexual abuse in June 2016. The deadline to submit replies to the Focused Questionnaire was set by September 2016. Despite of the fact that the Committee was still finalizing the implementation report of the 1st thematic monitoring round, they managed to examine the replies and information from other stakeholders and publish the special report in March 2017. They formulated 36 recommendations for all state parties while only one was addressed to one particular country that shows the Committee decided to deal with the issue of the refugee crisis as a European challenge.

Eventually, the Lanzarote Committee decided to focus on the situation of children affected by the refugee crisis in one state party, Hungary. Following an exchange of information and an invitation for a country visit from the state authorities, in June 2017, a delegation of the Committee visited the transit zones at the Serbian/Hungarian border to monitor the protection of asylum-seeking children from sexual exploitation residing there. Breaking the practice of the previous special report, the Committee decided to take note of the "Special report further to a visit undertaken by a delegation of the Lanzarote Committee to the transit zones at the Serbian/Hungarian border prepared by the members of the delegation with the support of the Secretariat"[44] and endorse the recommendations contained therein. Therefore, the report was published as the report of a country visit taken by a delegation while it included the Committee's exchange with the state authorities before and after the visit. Hungary was given the opportunity to address the Committee and engage in dialogue during the discussion of the delegation report as well as at the subsequent meetings when the implementation of the 24 recommendations was assessed. In June 2019, the Committee decided to merge the follow-up of the recommendations of the delegation report with the procedure assessing the implementation of the recommendations of the special report "Protecting children affected by the refugee crisis from sexual exploitation and sexual abuse".[45]

The possibility to examine urgent situations in one or several state parties to the Convention is crucial in case of specific children's rights issues, as we have seen that the CRC Committee also decided recently to undertake field visits. Notwithstanding, country monitoring and especially country visits require elaborated rules, among others on the conflict of interest in case of the country rapporteurs or delegation members, and clarifications on the procedure of adoption of the special report without forgetting about the necessary human and financial resources.

4.4. Follow-up to the implementation reports

The process of the follow-up on the implementation of the recommendations of the monitoring reports is currently under development as the Rules of Procedure only foresee that the Committee "may on a regular basis ask Parties to inform it of the steps taken to implement its recommendations".[46] The Committee has not set yet deadlines for reporting about the implementation of the recommendations in its monitoring reports but has requested the states to send such information afterwards. As of March 2020, follow-up on the recommendations of the 1st monitoring round has not started yet due to heavy workload of the Committee. Taking the urgent monitoring round with 41 states under review as an example, the assessment of the implementation of the 36 general and 1 country-specific recommendation means the in-depth evaluation of 1476 different items. In relation to the urgent monitoring round, the Committee developed the approach to prioritize the 'urge' recommendations, but it is still an overwhelming task to deal with.

[44] The special report, https://rm.coe.int/special-report-further-to-a-visit-undertaken-by-a-delegation-of-the-la/1680784275 (29 March 2020).
[45] List of decisions 24th meeting Strasbourg, 4-6 June 2019, T-ES(2019)16_en, 25 June 2019.
[46] Lanzarote Committee, Rules of Procedure, Rule 27.6.

Currently the Lanzarote Committee is facing several challenges in relation to the assessment of the implementation of its recommendations. Since it runs thematic monitoring rounds, the Committee is not going back to check the situation in the respective countries in the next round as a matter of course, it needs a separate procedure for that. Furthermore, the monitoring is mostly not country-specific - as it was mentioned before, the only urgent monitoring focusing on one country was already merged with the follow-up of the general urgent monitoring round -, while recommendations addressed to all State Parties do not necessarily relevant for all of them. This was partially resolved in the 2nd implementation report of the 1st thematic monitoring round where the 'urge' recommendations were addressed to particular states. Nevertheless, even in case of recommendations appropriate for all or several countries, the progress of implementation is probably different hence the follow-up procedure will end up fragmented.

A possible revision of the monitoring mechanism and the working methods of the Committee would definitely have an impact on the follow-up. Nevertheless, it would be crucial to ease the workload of the Committee, feed the follow-up into the monitoring as an integral part of it and strengthen cooperation with civil society organizations with regard to the implementation and follow-up of recommendations.

5. Exchange of information, experiences and good practices

The other function of the Lanzarote Committee is to provide platform for states, participants and observers to exchange information, experiences and good practices. The determination of promising practices is also part of the monitoring: in the 1st implementation report 66 projects were identified as such. Beyond the monitoring rounds, members of the Committee or external experts can share and exchange information concerning the protection of children sexual abuse and exploitation at the meetings or in writing.

With a view to support the state parties in the implementation of the Convention, the Lanzarote Committee can issue opinions and already did so on some occasions.[47] These are soft-law documents, non-binding in legal terms, but they can be incorporated within the framework of the monitoring as it happened in case of the "Interpretative Opinion on the applicability of the Lanzarote Convention to sexual offences against children facilitated through the use of information and communication technologies (ICTs)". The states were requested, at the introduction of the 2nd thematic questionnaire, to bear in mind the Interpretative Opinion while replying to the questions.[48] The opinions are aimed at interpreting the implementation of the Lanzarote Convention, with particular focus on emerging issues such as online grooming or self-generated sexual images of children, while declarations address recent events or practical matters. The themes covered by the standard-setting of the Committee will probably vary as the monitoring activities evolve and more practical experience will be in place to identify what issues entails further clarification.

[47] The adopted documents of the Lanzarote Committee, https://www.coe.int/en/web/children/lanzarote-committee#{%2212441908%22:[2]} (30 March 2020).

[48] Lanzarote Committee, Committee of the Parties to the Council of Europe Convention on the protection of children against sexual exploitation and sexual abuse, Thematic Questionnaire for the 2nd monitoring round on The protection of children against sexual exploitation and sexual abuse facilitated by information and communication technologies (ICTs), https://rm.coe.int/thematic-questionnaire-for-the-2nd-monitoring-round-on-the-protection-/168075f307 (30 March 2020).

6. Cooperation with other stakeholders

6.1. Role of civil society organizations

The Council of Europe carried out an evaluation of the contribution of international non-governmental organizations to standard setting and monitoring, among others, of the Lanzarote Committee.[49] It concluded that the expertise provided by non-governmental organizations manifest an added-value and contribute to the validity, the legitimacy and impact of the organization, although, the Council of Europe "needs to create incentives and facilitate NGOs' contribution" as they have limited human resources especially to familiarize themselves with the standards, structure and working methods of the organization.[50]

The Lanzarote Convention explicitly recognizes the role of civil society actors in respect of:

- Participation in the elaboration and implementation of policies [Art. 9 (2),(4)],
- Multi-agency and multi-stakeholder cooperation on national level [Art. 10 (2b), (3)],
- Victim assistance and support [Art. 14 (2), Art. 31 (5)],
- Engagement with the Lanzarote Committee including the assessment of compliance with the Convention [Art. 40 (3)].

With regard to the promotion and implementation of the Convention, state is the addressee of the obligations, nevertheless, also obliged to encourage, facilitate and support the activities of civil society to this end. Non-governmental organizations can provide valuable expertise in law and policy making procedures and contribute to implementation at national and local level. They are key local partners in raising awareness on the phenomenon of sexual abuse and sexual exploitation of children, educating children and young people and providing training for professionals, and by all these means, enhancing visibility of the Lanzarote Convention for the public at large. In addition, civil society plays a pivotal role in the provision of victim assistance and services, in many cases, by taking over tasks from the state even without the allocation of the necessary resources. Nevertheless, the multi-stakeholder approach promoted by the Convention includes civil society and other private actors as well. The Lanzarote Committee has a role to play here: it can call upon state parties to strengthen cooperation with non-governmental organizations, especially in case of the provision of services for child victims that has to be in accordance with law and in collaboration with state authorities. Furthermore, it can endorse NGO projects as a promising practice and encourage the states to provide funding for other stakeholders contributing to the implementation of the Convention.

Concerning the monitoring of the Convention, civil society actors can engage with the Lanzarote Committee directly and vice versa. Human rights monitoring bodies cannot rely solely on the information provided by the states otherwise it is not assessment but mere description of state measures. We have to assume that no situation is perfect, some data is always hidden by the state due to fear of criticism or other political reasons. On the other, non-governmental organizations can take advantage of international monitoring and synchronize it with their advocacy efforts: they can refer to the standards of the Convention, soft-law instruments of the Committee as well as findings and recommendations of the monitoring procedures.

[49] Co-operation of (I)NGOs with the Council of Europe in standard setting and monitoring, Evaluation Report, Directorate of Internal Oversight, Evaluation Division, [22] April 2016.
[50] Ibid. p. 35.

As explained above, non-governmental organizations, separately or in coalition, may submit replies to the same monitoring questionnaires addressed to the states or comment on the state's replies. According to the Rules of Procedure, the secretariat transmits the civil society comments to the Parties concerned and makes them public,[51] but in practice, the Committee has allowed civil society organizations to opt for confidential reporting.[52] Otherwise, the Lanzarote Committee is transparent with its monitoring, all contributions submitted by state and non-state actors are published on its website with the exception of civil society reports requested to be kept confidential.

To the General Overview Questionnaire 7 replies, to the 1st Thematic Questionnaire 4 replies, to the Special Questionnaire of the urgent monitoring round 3 replies, to the 2nd Thematic Questionnaire 14 replies arrived from non-governmental organizations. It has to be considered that the number of ratifications were rapidly growing since the 1st thematic monitoring round, therefore non-governmental organizations from more and more countries were given the opportunity to submit information on compliance with the Convention. Moreover, this data does not take into account the number of confidential submissions. Although the Rules of Procedure would allow the Committee to organize hearings with external experts,[53] it met with national non-governmental organizations only during its country visit to Hungary when no additional resources were needed.[54]

The observer status of international non-governmental organizations has a considerable but unlocked potential. As discussed above, observers can contribute to the preparation of reports, opinions, declarations and take part in any of the discussions of the Lanzarote Committee that means access to the working documents and meetings, too. This option is not available for national or subnational NGOs but their expertise could be still channelized through the observers that are usually international networks or umbrella organizations. Another issue to be raised here is that significant number of national non-governmental organizations would still miss a direct link to the Committee because they do not have membership or cooperation with any of the observer INGOs. It seems to be the best solution to set up an NGO Group for the Lanzarote Convention coordinated by an INGO but open for any national non-governmental organization that is working on the implementation and monitoring of the Convention as it happened in case of the CRC. Nowadays, the successor of the NGO Group for the UN Convention on the Rights of the Child is an independent international non-governmental organization, namely the Child Rights Connect, that play a central role in key children's rights developments at international level.[55]

States would also benefit from enhanced and structured civil society engagement, as it would ensure a transparent, effective and reliable monitoring procedure. In order to further strengthen the cooperation between the Lanzarote Committee and civil society actors, both parties need to take steps. The evaluation study referred above found that the NGOs are motivated to make investment to engage with the Council of Europe if they expect tangible impact of their contribution.[56] Therefore, the Committee should keep cooperation as a priority and maintain the mutually beneficial relationship. Civil society organizations also need to take initiative and organize themselves in order

[51] Lanzarote Committee, Rules of Procedure, Rule 26.4.

[52] See the *Practical information to guide civil society in commenting/replying* in the 2nd monitoring round of the Lanzarote Committee on the protection of children against sexual exploitation and sexual abuse facilitated by information and communication technologies available at the website of the Lanzarote Committee, https://rm.coe.int/information-note-for-civil-society/1680796253 (30 March 2020).

[53] Lanzarote Committee, Rules of Procedure, Rule 20.

[54] Appendix 3, Situation of children in the transit zone in Hungary. Visit by a delegation of members of the Lanzarote Committee (5-7 July 2017). Programme of the visit.

[55] I. Paolazzi, *The NGO Group for the Convention on the Rights of the Child*. in J. Zermatten, & J. D. Philip (Eds.), 30 ans de droits de l'enfant: un nouvel élan pour l'humanité! Université de Genéve, Geneva 2019, p. 109.

[56] Co-operation of (I)NGOs with the Council of Europe in standard setting and monitoring, Evaluation Report, Directorate of Internal Oversight, Evaluation Division, 22 April 2016, p. 36.

to optimize this relationship and maximize the use of their space of manoeuvre.

6.2. Role of national human rights institutions

National human rights institutions (NHRI), in terms of the Paris Principles adopted by the United Nations General Assembly,[57] have a different role to play than civil society due to their mandate and powers. These institutions are established by the Constitution or legislation to promote and protect human rights with resources from the state budget and independence from all branches of the state. Within their competence, they encourage ratification of international human rights instruments, promote and ensure the harmonization of national legislation, regulations and practices with these instruments and their effective implementation. This applies to the Lanzarote Convention mutatis mutandis, while the Convention also requires states to set up or designate independent national or local institutions for the promotion and protection of the rights of the child provided with specific resources and responsibilities (Article 10 (2a)). Thanks to their wide competences including "the hearing any person and obtain any information and any documents necessary for assessing situation falling",[58] they are in a good position to assess compliance with the Convention and its implementation as well as to advise the government, the Parliament or any other competent body.

The European Network of Ombudsperson for Children, the European Network of National Human Rights institutions are participants of the Lanzarote Committee, therefore they can take part in the discussions without the right to vote. Their representatives being present at the meetings are usually one of its members, for example Children's Ombudsman from a member state, who can provide valuable contribution based on field experience. With regard to the monitoring of the Convention, national human rights institutions can submit reports according to the same rules as civil society, however, only one submission arrived to the Special Questionnaire of the urgent monitoring round and four to the 2nd Thematic Questionnaire.

It would be pivotal to strengthen cooperation between the Lanzarote Committee and NHRIs because it would definitely pay off in long run. The dynamics of this relationship is similar to the one with civil society actors: national human rights institutions will actively engage with the Lanzarote Committee if they see that their contribution has an impact on the monitoring of the Convention and on their advocacy activities. Notwithstanding, these institutions also need to set as a priority of their strategy to monitoring and support the implementation of the Lanzarote Convention, like in case of the CRC.

7. Child participation

The CRC declares that every child who is capable of forming his or her own views has the right to express those views freely in all matters affecting them, whereas the views of the child being given due weight in accordance with the age and maturity of the child.[59] Matters covered by the Lanzarote Convention are definitely affecting children, let alone that they are the right-holders under the Convention as discussed earlier. Children can be involved in the promotion and implementation of human rights conventions at national, regional or local level as well as in its monitoring including

[57] Principles relating to the Status of National Institutions (The Paris Principles), adopted by General Assembly resolution 48/134 of 20 December 1993.
[58] Ibid.
[59] Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Article 12.

engagement with the international monitoring body.

The Lanzarote Convention mentions explicitly the involvement of children in the Chapter on preventive measures and request states to „encourage the participation of children, according to their evolving capacity, in the development and the implementation of state policies, programmes or others initiatives concerning the fight against sexual exploitation and sexual abuse of children."[60] The Explanatory report points out that "the development of policies and measures, including action plans, to combat the sexual exploitation and abuse of children must of necessity be informed by children's own views and experiences in accordance with their evolving capacity".[61] Accordingly, child participation in the promotion and implementation of the Convention belongs to the scope of the monitoring exercised by the Lanzarote Committee, however, only the 1st thematic questionnaire addressed child participation so far.

The modalities of child participation in the monitoring of the Lanzarote Convention and opportunities for engagement with its monitoring body had been on the agenda of the Lanzarote Committee for a while. In 2017, launching of the 2nd thematic monitoring round proved to be a good occasion to pilot child participation particularly because the topic of sexual abuse and exploitation facilitated by ICTs is relevant for all children these days. With the aim to provide support, the Lanzarote Committee prepared the 'Guidelines for Implementation of Child Participation in the 2nd thematic monitoring round of the Lanzarote Convention'.[62] These Guidelines, a compilation of practical information and model workshops with non-formal educational means, are addressed to the organizers and facilitators of the child consultations.

Due to the peculiarities of the monitoring of the Lanzarote Convention, participation of children is different compared to the monitoring of the CRC for example. The scope of child participation is more narrow but at the same time more focused because it is based a thematic questionnaire. In the 2nd thematic monitoring round, 16 questions were addressed to the State Parties to assess whether they protect children against sexual exploitation and sexual abuse facilitated by information and communication technologies (ICTs), particularly ICT facilitated sexual coercion and/or extortion using self-generated sexual images of children. In order to ensure that the participation of children is effective and meaningful, out of the 16 questions 3 were considered relevant for the children's life and proposed for the consultation with the children:

> (1) whether the national curriculum include awareness-raising about the risks of self-generated sexual images,
>
> (2) whether is it in place any awareness-raising activity addressed to children about the risks of self-generated sexual images,
>
> (3) what kind of reporting procedures or helplines are in place to provide children with the necessary support, assistance and psychological help in case they fall victim of sexual coercion or extortion.[63]

[60] Ibid. Article 9 (1).

[61] Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Explanatory Report, para. 67.

[62] The Guidelines are available on the website of the Committee, https://rm.coe.int/guidelines-for-implementation-of-child-participation-in-the-2nd-monito/16808a3956 (30 March 2020).

[63] See Guidelines for Implementation of Child Participation in the 2nd thematic monitoring round of the Lanzarote Convention on "The protection of children against sexual exploitation and sexual abuse facilitated by information and communication technologies (ICTs)" https://rm.coe.int/guidelines-for-implementation-of-child-participation-in-the-2nd-monito/16808a3956 (30 March 2020).

With the regard to the next thematic monitoring rounds of the Lanzarote Convention, the Lanzarote Committee probably has to consider each time the most relevant and important questions that would constitute the basis of consultations with children. Nevertheless, children's participation in the reporting process could have bigger impact if children are already involved in the preparatory phase when the Lanzarote Committee choses the topic of the next monitoring round and drafts the questionnaire. On one hand, they could influence the decision related to the topic and framework of the upcoming monitoring round, on the other hand, the children themselves could define the extent and form of their participation in the process. The Committee furthermore should consider separate or private meetings with children, like the CRC Committee, in order to be able to get clarifications and raise further questions to the children. This would require child-friendly environment and preparation of the members of the Committee who are engaging with the children.

Even though the monitoring of the Lanzarote Convention is thematic, and the Lanzarote Committee mostly issues general recommendations addressed to all state parties with the exception of cases of serious lack of compliance with the Convention, children express their views on the implementation of the Convention in their respective countries. In the 2nd thematic monitoring round, children submitted contribution to the Lanzarote Committee from ten state parties that is a high number considering that this was the first occasion to involve children in the monitoring. At this stage, while discussing the state replies to the questionnaire and information gained from other sources of information, the Lanzarote Committee faces the challenge how to take into account the children's contributions reflecting the situation in one country. Most probably, the solution will be in line with the practice of the monitoring body, similar issues raised by children from several countries will be addressed by general recommendations while the ones related to the implementation of the Convention in a particular country will entail a country-specific recommendation.

One of the most challenging issue faced by the Lanzarote Committee was to reach out partners who could involve children in the monitoring based on the Guidelines provided. The CRC has the highest number of ratifications and reporting states as well as the highest level of civil society participation in the UN treaty body system. Without any doubt, this is thanks to the unique role and position of the Child Rights Connect that has been the strategic partner of the CRC Committee and the Office of the High Commissioner for Human Rights for the engagement of civil society in the reporting cycle.[64] The Child Rights Connect provides a valuable support for non-governmental and children's organizations concerning the preparation of children's reports or involvement of children in the drafting of civil society reports, furthermore, participation of children in the pre-sessional working groups of the CRC or in private meetings. Within the period between 2009 and 2018, 55 children's reports were submitted to the CRC and 80 other reports included children's perspective.[65]

The Lanzarote Committee has no such strategic civil society partner yet, however, international non-governmental organizations holding observer status with the Committee widely disseminated the Guidelines within their network. As discussed above, there would be a potential in setting up strategic partnership with observer INGOs or create an NGO Group for the Lanzarote Convention also to support wider participation of children. Nevertheless, it should be pointed out that the Lanzarote Committee has been encouraging state authorities also to involve children in the monitoring: during the 2nd thematic round, out of the 10 children's contributions 2 of them were actually supported by state authorities. This important move has to be further endorsed in order to strengthen the responsibility of states to involve children in the monitoring of human rights conventions instead of expecting non-governmental organizations to do so.

[64] Child Rights Connect, *Study on the global status of engagement in CRC reporting*, 2019, p. 9.
[65] Ibid. p. 36.

The Lanzarote Committee has put into practice the provisions of the Convention on child participation and has shown good example to the state parties. Beyond the child participation in the monitoring, in 2019, the focus of the European Day on the Protection of Children against Sexual Exploitation and Sexual Abuse was to empower children to stop sexual violence and support awareness-raising projects designed and implemented by children themselves.[66] Hopefully, this approach will apply to all the upcoming European Days irrespective of the theme in focus.

Nevertheless, the Lanzarote Committee needs a carefully thought-out strategy for child participation in the monitoring of the Convention, preferably in the form of working methods. This can serve as a good practice for other Council of Europe monitoring bodies and contribute to mainstreaming child participation throughout the organization. The CRC Committee already adopted such a document with the aim to define, facilitate and promote the meaningful participation of children in the reporting process.[67] Working methods of the Lanzarote Committee would ensure that children are involved in a meaningful way in all stages of the monitoring including the preliminary stage when it decides about the theme and at the follow-up phase when the recommendations are implemented and monitored. In any case, the Lanzarote Committee should follow-up with the children who sent contribution to them regarding the outcomes of the monitoring, the impact of their engagement and how their views were taken into account. This can happen along with the preparation of the child-friendly version of monitoring reports that can be widely disseminated among children.

8. Conclusions

The Lanzarote Committee is arguably a significant international monitoring body due to its important and unique mandate to protect children from sexual violence in Europe and beyond. The study presented the functioning and practice of the Lanzarote Committee along with the challenges it faces such as delayed discussion of the state replies and prolonged monitoring rounds, limited participation of non-governmental organizations and lack of sufficient follow-up to the recommendations. Therefore, it is probably fair to say that the Committee has arrived to the moment to assess its own work and performance and introduce adjustments, even major ones.

First and foremost, the Committee should examine the effectiveness of the thematic monitoring covering all state parties and consider country monitoring via thematic questionnaires. Country monitoring fosters a permanent dialogue with the states, examines and focuses on individual performance – there is no place to hide. The monitoring fatigue, experienced by states both at the Council of Europe and the United Nations human rights system, is another factor to consider: the reporting and in general the contributions expected from the state parties should be manageable which is not the case if the Committee is working on several documents at the same time.

Second, as it has been argued, peer review of the respect of human rights standards conducted by Committee of Parties to the Convention has benefits and burdens. In the Council of Europe system there are conventions, such as the Convention on Action against Trafficking in Human Beings and the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, of which monitoring is shared: the Committee of Parties adopts and addresses recommendations to the states based on the report and conclusions of an independent expert body. If the Lanzarote Committee opts for this solution, the role of the two bodies has to be explicitly defined in order to ensure smooth collaboration.

[66] The 2019 Edition of the European Day, https://www.coe.int/en/web/children/2019-edition (30 March 2020).
[67] Committee on the Rights of the Child Working methods for the participation of children in the reporting process of the Committee on the Rights of the Child, 16 October 2014, CRC/C/66/2.

Third, the Lanzarote Committee has difficulty in coping with the current workload that is not proportional to the available human and financial resources. Nevertheless, the Committee also should set its own priorities not to fragment the already scarce resources: working on more than one monitoring round in parallel with the follow-up of the implementation of recommendations of the previous rounds as well as drafting opinions and declarations are time-consuming not to mention the administrative issues to deal with. The prolonged monitoring rounds and the lack of follow-up on its recommendations significantly weakens the monitoring system and the position of the Committee, too.

Fourth, the Committee should acknowledge the potential in cooperation with other stakeholders and develop broad alliance with non-governmental organizations and national human rights institutions. At the same time, non-governmental organizations, with the lead of the international NGOs with observer status, should organize themselves and create the environment that optimize their active engagement with the Committee. As it was suggested, an NGO Group for the Lanzarote Convention can be set up also to serve as a forum to share information about the work of the Committee and to facilitate the contribution of civil society actors.

Lastly, it should be concluded that the Lanzarote Committee is in the position to interpret its mandate flexibly. The provisions of the Lanzarote Conventions provide for general framework except that it assigns the monitoring to the competence of the Committee of the Parties. Consequently, the Committee can adapt its working methods according to the circumstances by modifying its Rules of Procedures, an Optional Protocol would be necessary only in case of a decision to set up an independent expert body to monitor the Convention without regard to the preservation of the Committee of Parties.

A new theoretical framework of the law of intergovernmental organizations and its applicability to the European Union

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In some cases, the existing theories about the European Union do not explain coherently some phenomena related to European integration, such as the expansion of powers. That issue is so specific that a complex approach is needed. The aim of this study is to show an appropriate theoretical approach which consists of two elements. The first is an element of international political theory, namely the English School, while the second is an element of international jurisprudence, Guy Fiti Sinclair's approach. Recent literature specifically focused on the special relationship between the foundations of international society and intergovernmental organizations. In my opinion, such an approach would fit to Sinclair's theory who examined the expansion of powers of intergovernmental organization.

Keywords: international political theory, English School, Guy Fiti Sinclair, expansion of powers of international organizations, European Union law

1. Introduction

Jurisprudence and the study of international relations are not compatible at first glance. They have different theoretical backgrounds and use fundamentally different methodologies. Both examine international law, and sometimes, even the law of the European Union (EU) from different viewpoints, and could infer different results. Unfortunately, both fields usually refuse to accept that these results could be combined effectively.[1] For the study of international relations, law has secondary importance as the dominant realism has neglected its importance for a long time. For the study of law, the branch of international relations was considered to be too young and unimportant. There were approaches which tried to develop cooperation between the two fields but these did not yet gain wide acceptance.[2] I think there are matters where the cooperation of jurisprudence and international relations (IR) analysis is not only recommended, but rather necessary, as in the case of the law of intergovernmental organizations.

This cooperation is even more problematic when the subject is not a "simple" international organization. There are ongoing academic debates related to the exact nature, identity and characteristics of the European Union. In addition, there are competing theories which try to explain the behavior of the European Union and its member states, e.g. neo-functionalism, intergovernmentalism, and multilevel governance. However, these models are imperfect as they either consider the EU to be just a simple forum for pursuing state interests or they neglect the fact the member states have their own goals and will in the global international community and the European Union as well.[3]

[1] C. J. Christopher, *International Law is, as International Theory Does?* American Journal of International Law, Vol. 100, No. 1, January 2006, p. 248.
[2] A. Irish & C. Ku, & P. F. Diehl, *Bridging the International Law-International Relations Divide: Taking Stock of Progress*. Georgia Journal of International and Comparative law, Vol. 41, No. 2, 2013, pp. 357-388.
[3] A. Kaczorowska-Ireland, *European Union Law*, 4th edn., Taylor-Francis Ltd, New York, 2016. pp. 33-36.

The purpose of this study is to present a theoretical framework which could combine jurisprudence and international relations in one concept. The theory consists of two components. I use the English School from the field of international political theory. It does not only accept the importance of the realities of power in the international arena but also considers intergovernmental organizations and law as important factors for the international community. From the field of law, I will rely on Guy Fiti Sinclair's approach because he specifically examined the expansion of power of intergovernmental organizations. In his research, he took into consideration the legal-sociological process within intergovernmental organizations. Sinclair accepts both the importance of power in the development of those organizations and the ideas and the law as relevant factors. In the current academic literature, his research is unique.

As I present a theoretical framework in this study, I must examine scientific results related to the English School. I concentrate on the "founding fathers" of the school but I also pay attention to the recent trends within the theoretical approach (Section 2). In Section 3, I focus on Guy Fiti's Sinclair's theory and analyze whether such an approach is compatible with the English School. I rely on Sinclair's 'To Reform the World – International Organizations and the Making of Modern States'[4] in that section. In Section 4, I specifically examine the applicability of this theoretical framework to the European Union. I rely on sources related to the "nature" of the EU and the law of the European Union as well. For this, I examine the most relevant thinkers and EU law sources.

2. English School as a "base theory"

The school of realism acquired a dominant position in the study of international relations (IR) at the beginning of the Cold War. The reason for this is that the events of the Second World War did not attest the liberal theoretical ideas and their core, the concept of cooperation. However, the Cold War generated controversial tendencies in the international arena. On the one hand, nuclear proliferation, the bipolar world, or the international crises that occurred during the time of the Cold War could fit easily into realist or neorealist theories. On the other hand, realists could not give convincing explanations to the phenomenon of economic interdependencies, such as the GATT, IMF or even European integration. Neoliberalism did provide an explanation for these interdependencies, but it was still unable to interpret power relations convincingly and comprehensively.[5] Consequently, new theoretical approaches appeared in IR, which criticized the two competing theories.

One of them was the English School, which followed an idiosyncratic approach. According to Romsics, liberal and realist theories reflected on the political theoretical traditions in the USA.[6] Instead, the English School tried to synthesize the two dominant schools of IR with a new set of expressions.[7] As a result, the English School recognizes the importance of power, state interest, and material capabilities but emphasizes that alliances, rights, norms, the principle of reciprocity and debates also influence international relations. The reason is that all of these are connected to human

[4] G. F. Sinclair, *To Reform the World – International Organizations and the Making of Modern States*, OUP, Oxford, 2017.

[5] J. Sterling-Folker, *Neoliberalism*, In T. Dunne, M. Kurki & S. Smith (Eds.), International Relations Theories – Discipline and Diversity (3rd ed.). OUP, Oxford, 2013, pp. 114-118.; A. Whyte, *Neorealism and neoliberal institutionalism: born of the same approach*. https://www.e-ir.info/2012/06/11/neorealism-and-neoliberal-institutionalism-born-of-the-same-approach/ (21 March 2020).

[6] Romsics G., *A hallgatástól a kritikáig – A nemzetközi kapcsolatok elmélete és az emberi jogok*. Fundamentum, Vol. 13. No. 3, 2009, p. 33.

[7] R. Scheele, *Is the English School Just Another Paradigm in IR?*, 2013, https://www.e-ir.info/2013/10/24/is-the-english-school-just-another-paradigm-in-ir/ (21 March 2020), para. 5.

nature.[8] The concept of the English School comes from Hedley Bull and Martin Wight.

2.1. The traditions of English School

These two prominent thinkers distinguished three 'traditions' in international politics: the realist (Hobbesian), the rational (Grotian) and the universalist / revolutionist (Kantian) traditions.[9] The traditions represent a certain aspect of international relations, which could be coupled with three additional concepts: realism with the international system, rationalism with the international society, and universalism with the world society. These three traditions have different ontological, and epistemological backgrounds and they use distinct methodologies within IR.[10] These patterns embody different aspects of the nature of international politics,[11] therefore considering all of them helps to understand international politics in its entirety.

According to the first concept, realism, the core of the international system stems from the power relations between states because they are still the most important actors in international relations.[12] The international system is, therefore, ruled by anarchy, because states, unlike individuals, are not subject to a common government. In that regard, the most important aim of the state is survival. However, this does not exclude the possibility that a state might set out other goals as well.[13] A pessimistic, or even "tragic" view of human nature may also be considered a realistic approach.[14] Based on the concept of realism, Bull defines the international system as a system in which "two or more states have sufficient contact between them, and have sufficient impact on one another's decisions, to cause them to behave – at least in some measure – as part of a whole".[15]

Regarding the second (rational) concept, Bull stresses that international society "exists when a group of states, conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions". An international society, therefore, focuses on the institutionalization of common interests of states, the norms, the rules, and the institutions.[16] One of the reasons for the existence of such an international society is the presence of trade and other economic relations between states. The sovereignty of states has significant importance in the maintenance of this society but some of the rules necessarily restrict it.[17] A further characteristic of the international society is its anarchical nature. There is no common government or other effective power structure which could enforce the law or secure cooperation. Regardless, states are conscious of the common rules and values of their community.[18] Writers of the English School categorized international societies in history. Bull made two separate groups: a pluralist

[8] H. Bull, & A. Watson, *Conclusion*, In H. Bull & A. Watson (Eds.), The Expansion of International Society, OUP, Oxford, 1984, p. 452.
[9] Scheele 2013, para 5.
[10] F. C. Buranelli, *Global International Society, Regional International Societies and Regional Organizations: A Dataset of Primary Institutions*, in T. B. Knudsen & C. Navari (Eds.), International Organization in the Anarchical Society, Palgrave Macmillan, New York, pp. 233-263.
[11] H. Bull, *The Anarchical Society: A Study of Order in World Politics* (4th edn.), Palgrave Macmillan, New York, 2012, p. 9.
[12] B. Buzan, *From International World Society? - English School Theory and the Social Structure of Globalisation*, Cambridge UP, Cambridge, 2004, p. 7.
[13] S. J. Barkin, *Realist Constructivism*, International Studies Review, Vol. 5, No. 2, 2003, p. 328.
[14] R. N. Lebow, *The tragic vision of politics – Ethics, interests and orders*, Cambride UP, Cambridge, 2003.
[15] Bull 2012, p. 9.
[16] Ibid. 13.
[17] Scheele 2013, para 5.
[18] Bull 2012, pp. 44-49.

international society builds on a thin and weak basis of shared norms and values; in contrast, a solidarist international society has a thicker basis of these norms.[19] Buzan applied a more detailed differentiation, displaying pluralist and solidarist societies as two opposing ends of a scale.[20]

It is important to separate the rationalist tradition from the universalist / revolutionist tradition, which is connected to the concept of world society. Bull states that IR cannot be considered only as interstate relations.[21] The universalist / revolutionist tradition focuses on the individuals, and other non-state actors, and even the world population as a whole in some cases. The English School uses this concept to examine the transnational element in IR.[22] This approach is not unprecedented, as history provides several examples of the importance of the transnational element. For instance, the Catholic Church played a significant role in the different periods of history and the international community of Europe.[23] It is important to highlight that the concept of world society has a unique connection with the concept of international society. Buzan emphasizes that international society provides the political framework which is essential for world society to face all the dangers of anarchy. In return, world society provides the 'community foundation' which is crucial to give rise to an international society from a fairly basic level.[24]

2.2. The institutions of international society

Institutions are considered by the English School to be the pillars of the international society.[25] According to Bull, institutions are the customs and regularities of the international society which constitute a framework to reach common goals and create common practices. The English School refers to institutions as symbols of the international society. They prove that such a society is not just a group of states but also a community which makes conscious efforts to fill itself with substantial content. Institutions are the conditions for the maintenance of international society.[26] Bull distinguished five institutions ('constitutional normative principles'): diplomacy, international law (IL), balance of power, great power management, and war.[27] He also emphasized that they originate from a ground norm, which is the principle of sovereignty.[28] Other authors considered other institutions as well, or they categorized them in a different way.[29] It is important to highlight though that institutions existed far before the Westphalian state system.[30] Certain aspects of IL and diplomacy existed in the Middle Ages, while the balance of power, great power management and war were

[19] B. Ahrens, *The European Union Between Solidarist Change and Pluralist Re-Enactment*, in T. B. Knudsen & C. Navari (Eds.), International Organization in the Anarchical Society, New York: Palgrave Macmillan, 2019, p. 266.
[20] P. Marton, *Barry Buzan és az Angol Iskola*, http://www.grotius.hu/publ/displ.asp?id=PKHCDP (21 March 2020).
[21] Bull 2012, p. 35.
[22] Buzan 2004, p. 7-8.
[23] T. Dunne, *The English School*, in T. Dunne, M. Kurki & S. Smith (Eds.), International Relations Theories – Discipline and Diversity, 3rd edn, OUP, Oxford, 2013, p. 140.
[24] B. Buzan B*, From International Society to International System: Structural Realism and Regime Theory Meet the English School,* International Organization, Vol. 47, No. 3, 1993, p. 351.
[25] A. Wendt & R. Duvall, *Institutions and International Order*, in E-O. Czempiel (Ed.), Global Changes and Theoretical Challenges: Approaches to World Politics for the 1990s, Lexington Books, Lexington, 1989, pp. 52-53.
[26] T. B. Knudsen, *Fundamental Institutions and International Organizations: Theorizing Continuity and Change,* in T. B. Knudsen & C. Navari (Eds.), International Organization in the Anarchical Society, Palgrave Macmillan, New York, 2019, p. 28.
[27] Bull 2012, pp. 68-71.
[28] C. Navari, *Modelling the Relations of Fundamental Institutions and International Organizations*, in T. B. Knudsen & C. Navari (Eds.), International Organization in the Anarchical Society, Palgrave Macmillan, New York, 2019, p. 53.
[29] Knudsen 2019, pp. 30-33.
[30] M. Wight, *Systems of States*, Leicester UP, Leicester, pp. 110-152.

settled practices in the Medieval international society.[31] However, the ground norm of sovereignty gave these practices concrete forms.

Institutions possess unique characteristics, which must be detailed to understand their complex nature. As Jackson states, they are intersubjectively real. They are real in the sense of shared understandings which come from (limited) human rationality and the interactions between people. They are formed in the society, and in the international community at the end.[32] Bull and Knudsen mention balance of power as an example. This institution comes from human nature and appears as a cause for the existence of alliances and also the cause of proliferation.[33]

Furthermore, there is an improved interaction between states and institutions. States, as members of the international society, establish and maintain relations with other actors based on the rules provided by the institutions. A good example of this are diplomatic traditions which exist between states, and – obviously – war. In addition, the actions of states generate and reproduce institutions. Consequently, there is a mutually reinforcing relationship between institutions and states. Meanwhile institutions provide the existence of interstate relations, the ongoing activities of states legitimize them within this institutional frame.[34] Unfortunately, this description does not touch upon the role of other actors in the international community, such as intergovernmental organizations (IGOs).

2.3. The connection between primary and secondary institutions

The constructivist turn in IR had an effect on the English School as well, leading to the rebirth of the school. One of their pioneer thinkers, Barry Buzan relied on the works of Alexander Wendt and other constructivist authors and turned his attention to the tradition of world society. His approach can be considered as international sociology, which focuses on the role of non-state actors in the English School.[35] Furthermore, Buzan's 'From International to World Society?' also took into consideration that authors from the English School neglected the importance of sub-global events in the world and the role of regional IGOs.[36]

Buzan identified primary and secondary institutions.[37] According to his approach, primary institutions are the institutions which were described in section 2.2. On the other hand, the author categorized IGOs as secondary institutions.[38] The usage of similar terminology is not a coincidence. In section 2.2., it was stated that there is a mutually reinforcing relationship between states and (primary) institutions. According to Buzan, there is also a strong connection between primary and secondary institutions.[39] As Knudsen states, the primary group is essential for the existence of IGOs. Moreover, primary institutions do not only create, but also formalize secondary institutions because they embody, specify and reproduce the basic principles and practices of secondary institutions. For instance, the membership of the United Nations Security Council (UNSC) represents the institution of great power management (a primary institution) through the fact that UNSC com-

[31] Knudsen 2019, p. 39.
[32] P. T. Jackson, *The Conduct of Inquiry in International Relations: Philosophy of Science and Its Implications for the Study of World Politics*, Routledge, New York, pp. 126-137.
[33] Knudsen 2019, p. 28.
[34] Wendt & Duvall 1989, pp. 53, 58-63.
[35] Marton.
[36] Buzan 2004, pp. 205-227.
[37] Ibid pp. 163-167.
[38] Navari 2019, pp. 8-9.
[39] Ibid.

prises five permanent members which have certain voting privileges.[40]

On the other hand, secondary institutions / IGOs have further significant roles in this matter. They do not simply verify the existence of primary institutions but also have an effect on them. The reason for this is that IGOs "socialize" states in international relations. They lay down the rules, procedures and practices and the frame in which states could pursue their interests.[41] As these rules originate from primary institutions, secondary institutions have a considerable effect on the former. During this process, IGOs cannot change primary institutions at their core. However, secondary institutions affect the whole concept of international society, and therefore, world order.[42] It must also be emphasized that not only universal IGOs are capable of provoking such changes. Regional organizations could affect their own regional international societies, or even the universal international society.[43]

2.4. The English School and international law

Bull states that IL is one of the (primary) institutions for international society.[44] He emphasizes though that IL is not the base of international order because international order derives from the interactions of more (primary) institutions.[45] Therefore, the English School recognizes the fact that law is sometimes subjugated to power.[46] Bull emphasizes though that this is not an unhealthy relationship, proved by the connection between the balance of power and IL. International law establishes trust between states through the creation of a framework for diplomacy and interstate alliances. Therefore, IL has an important role regarding the institution of the balance of power. On the other hand, the consequences of the balance of power sometimes contradict the rules of IL to keep the order in international relations.[47] It can be said though that IL is considered to be a normative frame for the international society.[48]

The English School admits that the most important difference between IL and domestic law is the lack of an authority in IL, which would enforce the rules for states.[49] Considering this, the school establishes some assumptions. First, self-help gets a greater role in the international community. As there is no central authority which could keep the order, a state must help itself, or rely on its allies. A suitable example is Article 51 of the UN Charter about self-defense, or Articles 39-42 on collective security.[50] Second, IL is not a tool for social control and can be considered only restrictively as a possible way for reforms. The reason for this is that a reform through IL can only be successful if great powers agree with the process.[51] On the other hand, law can introduce certain changes. If an accepted rule of IR has a blurred meaning, the members of the international community consider

[40] Knudsen 2019, p. 41.
[41] Ibid pp. 41-42.
[42] C. Navari & T. B. Knudsen. *Introduction: A New Approach to International Organization,* in T. B. Knudsen & C. Navari (Eds.), International Organization in the Anarchical Society, Palgrave Macmillan, New York, 2019, p. 8.
[43] Knudsen 2019, pp. 42-43; B. Buzan & A. Gonzales-Pelaez, *International Society and the Middle East – English School Theory at the Regional Level*, Palgrave Macmillan, New York, 2009.
[44] Bull 2012, pp. 122-155.
[45] P. Wilson, *The English School's approach to international law*, in C. Navari (Ed.), Theorising International Society: English School Methods, Palgrave Macmillan: New York, 2009, p. 177.
[46] Ibid p. 206.
[47] Bull 2012, p. 138.
[48] Wilson 2009, p. 177.
[49] A. James, *Law and Order in International Society*, in A. James (Ed.), The Bases of International Order: Essays in the Honour of C. A.W. Manning, OUP, Oxford, 1973, p. 65.
[50] Knudsen 2019, p. 35.
[51] Wilson 2009, pp. 178-180.

that carefully. Consequently, IL has an effect on the conduct of actors in IR.[52]

Third, IL is a normative framework for the international community. It creates the rules for concluding, suspending or terminating an international agreement. There are also rules which establish the legal background for diplomatic and consular relations. These rules do not nullify the cruel nature of the international arena, but they make it more predictable.[53] It is not that obvious though, why states obey these rules. It can be a matter of custom, the fear from the threat or use of force, or simply state interests.[54] Even the fear from the image of a rule-breaker can be a motivational force.[55] Fourth, the existence of IL proves that there is little solidarity in international society essentially. States do not trust others to make obligatory rules for them. It also means that IL is very difficult to change.[56]

As we can see, the English School examined the concept of IL but it did not try to focus on specific issues related to the concept of law. In my opinion, the authors from the English School neglected to answer certain questions related to IL though. Regarding the first, the school does not focus on the issue, what role IL has for secondary institutions / IGOs. Regarding the second, there is no research which would focus on the relationship between law and the expansion of powers of IGOs (Knudsen, 2019: 35).[57] My position is that international jurisprudence could fill this space and give satisfactory answers to these questions.

3. English School meets jurisprudence – Guy Fiti Sinclair's approach

3.1. The expansion of the powers of IGOs

International legal scholarship examines the legal questions relating to IGOs, including their (legal) status, structure, functions and powers. The problem is that the field has paid little attention to the expansion of IGOs' powers and the effects of the expansion in its entirety. The majority of the authors focused only on certain tendencies and tools such as implied powers or ultra vires acts.[58] In contrast, Guy Fiti Sinclair's 'To Reform the World – International Organizations and the Making of Modern States' focuses on the composite nature of law regarding this phenomenon. Although he is an international lawyer and does not take into consideration the tendencies of international political theory, his work can be coupled with the approach of the English school.

According to Sinclair, IGOs are created with their founding treaties which define their objects and purposes, enumerate their powers, list their organs and declare their procedural rules. However, he emphasizes the volatile nature of these rules because IGOs tend to set new goals and acquire adequate powers to achieve those goals. These objectives appear through the new ideas appearing

[52] James 1973, p. 80.
[53] Wilson 2009, p. 184.
[54] C. A. W. Manning, *The Legal Framework in a World of Change*, in B. Porter (Ed.): The Aberystwyth Papers: International Politics, 1919-1969, OUP, Oxford, 1972, pp. 322-323.; Bull 2012, p. 139-140.
[55] Wilson 2009, p. 185.
[56] Ibid p. 187.
[57] Knudsen 2019, p. 35.
[58] C. F. Amerasinghe, *Principles of the institutional law of international organizations*, Cambridge UP, Cambridge, 2005.; N. Blokker, *Constituent instruments*, in J. K. Gogan, I. Hurd & I. Johnstone (Eds.), The Oxford Handbook of International Organizations, OUP, Oxford, 2016, pp. 943-961.; J. Klabbers, *An Introduction to International Institutional Law*, Cambridge UP, Cambridge, 2002; H. G. Schermers & N. M. Blokker*, International Institutional Law 6th Revised edn*., Martinus Nijhoff, Leiden, 2018.

in the international community. IGOs have the tendency to embrace these new ideas and create powers for themselves related to those ideas. Sinclair gives three case studies for this peculiar phenomenon: the International Labour Organization (ILO), the UNSC, and the World Bank. In his work, he examines what kind of challenges the IGOs faced during their expansions, which ideas and goals they picked, how this affected their member states, and what role the law of the specific IGOs had during that process.[59]

This phenomenon has a political theoretical and legal perspective as well. From the viewpoint of political theory, we can observe the phenomenon of power aggregation. As Schabert states, an organization can hold power only if there is an ongoing aggregation of power, which power is continuously reproduced.[60] The public administration, which spends human and material resources and time producing policy papers, constantly aggregates power. In the case of IGOs, the same perception appears. The growing number of UN organs and their work, which creates an ongoing symbolical legitimization for the international community, is a good example for such an aggregation.[61]

Concerning the legal perspective, Sinclair relies on the concept of "constitutional growth".[62] The intention of IGOs to expand their powers does not appear at the time of their creation, hence there are no provisions for such expansion in the text of the founding treaties at all. Regardless, the IGOs demand new powers using their established practices and through the reinterpretation of existing rules. During this process, there are no textual changes in the founding treaty.[63] Georg Jellinek named this concept "constitutional transformation." He pointed out that the constitution of a state can change even if the written text remains intact.[64] This comes from the so-called "normative force of the factual". According to Jellinek, human nature tends to reproduce the usual and frequently repeated beliefs and convictions. He states that "the belief grows that the frequently repeated command in itself and isolation from its source constitutes […] a norm to be fulfilled per se."[65] The text of the written constitution implies these beliefs which can be considered as norms but their interpretations could change from time to time.[66] In the case of IGOs, the same phenomenon could occur. IGOs would like to expand their own powers but do not want to alter the texts of their founding treaties. These informal expansions of powers are often presented as reforms.[67]

3.2. The creation of modern states

Sinclair contradicts those approaches which consider IGOs as simple forums in which sovereign states try to acquire as many benefits as they can and give away as few powers as they must.[68] In his view, IGOs have a molding or forming effect on their member states; the expansion of powers results in a process that creates the so called concept of "modern state" based on a broadly Western model. This logic also determines that the expansion of IGOs does not only occur at the expense

[59] Sinclair 2017, p. 9.
[60] T. Schabert, *A politika méltóságáról és jelentőségéről*, Századvég, Budapest, 2013, p. 34.
[61] T. M. Franck, *The Power of Legitimacy among Nations*, OUP, Oxford, 1990, p. 100.
[62] Sinclair 2017, p. 18.
[63] Ibid p. 3.
[64] G. Jellinek, *Verfassungsänderung und Verfassungswandlung: Eine staatsrechtlich-politische Abhandlung*. Häring, Berlin, 1906, p. 8.
[65] P. Sólyom, *Az állam általános elmélete és a jog viszonylagos ereje – Észrevételek Georg Jellinek államelméletéhez*, Pro Futuro, Vol. 2, No. 2, 2012, p. 62.
[66] P. Takács, Államelmélet a XIX-XX. században – Georg *Jellinek elmélete*, Állam- és Közigazgatástudományi Szemle, Vol. 1, No. 2, December 2011, p. 6.; J. Arato, *Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations*. Yale Journal of International Law, Vol. 38, No. 2, p. 305.
[67] Sinclair 2017, p. 5.
[68] Ibid. p. 284.

of the member states. He defines states as superstructures which have been and are still formed through different practices during a cultural process. These states acquired new abilities and new powers as a part of this process. This process is not linear, it includes contradictory and complementary reform proposals and counter-proposals as well.[69] Consequently, the Western model of states comes from a unique series of reforms. In this development, not only states, IGOs and their organs but also non-state actors play an important role.[70]

3.3. Sinclair's concept of law

To achieve a comprehensive analysis, Sinclair does not examine law from the inside. He investigates the chosen IGOs from a sociological-legal viewpoint, considering the historical context (Donaldson, 2019).[71] As the process mentioned above is not coherent and contains contradictory elements, Sinclair does not see law as a uniform construction but as a content which is constantly formed through sociological interactions. Hence, law has a multi-faceted and contradictory nature, which could generate more and more identities and meanings. This approach facilitates the interpretation of the expansion of IGOs.[72] In addition, the author refers to the multifunctionality of law. On one hand, he recognizes law as a tool for political pressure.[73] On the other hand, he emphasizes the role of law in expertise and moral questions and their connections with each other. In his view, law in expertise is legitimized by that fact that IGOs embraces certain moral principles and goals like human dignity, equality, peace or justice. The concept of law does not only appear in both levels but also creates connections between the two. According to Sinclair, this issue is strengthened by judicial opinions and academic research as well.[74]

3.4. The compatibility of Sinclair's approach and the English School

At first glance, the combination of the two theoretical approaches holds a great challenge. However, the concept of the English School and Sinclair's socio-legal approach have significant similarities which makes them compatible with each other.

First, both of them considers IL and IGOs as important factors in IR. Additionally, they recognize the importance of (state) power in international relations as well. The English School lists IL among the primary institutions and takes into account the importance of the correlation between primary institutions and secondary institutions / IGOs. Furthermore, the school does not neglect the importance of power and the interests of states. Sinclair's approach also pays attention to IL and IGOs, and power relations as well. He is aware that the will of great powers and the acceptance of small states are needed for the reforms of IGOs.[75] He also recognizes that IGOs and their laws are quasi arenas for state interests. However, Sinclair goes beyond these when he examines the complex nature of these organizations and their laws.

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[69] Ibid pp. 2, 14-15, 30.
[70] G. F. Sinclair, *State Formation, Liberal Reform, and the Growth of International Organizations, European Journal of International Law*, Vol. 26, No. 2, September 2015, pp. 448-449.
[71] M. Donaldson, *International Organizations and the Making of Modern Legal Histories*, https://www.ejiltalk.org/international-organizations-and-the-making-of-modern-legal-histories/ (21 March 2020).
[72] Sinclair 2015, p. 503.
[73] Sinclair 2017, pp. 276-287.
[74] Ibid pp. 291-292.
[75] Ibid p. 284.

Second, both concepts accept the fact that secondary institutions influence primary institutions. According to the English School, they cannot alter them to their core, but they still have an impact on them. Consequently, secondary institutions have an effect on the whole international society as well. As a comparison, Sinclair states that IGOs acquire powers embracing the emerging ideologies and using them as a base of their own reforms. During their expansion, they acquire more and more powers but they also create new powers for their member states. Such a phenomenon changes the concept of sovereignty as it receives additional meanings. As sovereignty is the first among the primary institutions, it is safe to say that Sinclair describes the same correlation between primary and secondary institutions as the English School.

Third, Sinclair's statements about the concept of law can be combined with the ideas of the English School. He states that the law can be a tool to achieve power. At the same time, he also emphasizes though that IGOs embrace the emerging ideas and create new principles for themselves. These ideas often come from non-state actors which reminds us of world society and the Kantian tradition. IGOs use these ideas and principles to create detailed regulations around these issues, which is a quasi-epitome of the Grotian tradition of the English School. Furthermore, Sinclair points out that law appears in the "worlds" of international relations and indicates the complex nature of law.

These similarities show that IGOs and their laws can be examined with a combined theoretical framework using elements of the English School from IR and Guy Fiti Sinclair's approach from the field of IL. But the question arises whether such a theoretical approach can be applied in the case of a sui generis entity, namely in the case of the European Union.

4. The theoretical framework and the European Union

The theoretical framework detailed above can be applied to all IGOs which have the tendency to expand their own powers.[76] The question occurs whether certain IGOs can be examined in this case. Sinclair picked the ILO, the UNSC and the World Bank as they had such an expansive tendency and they supported the creation of modern states. It is clear that these organizations are universal IGOs, but I think that certain regional entities have the will and the capabilities worth examining from this theoretical perspective. The EU has a unique status though, which must be taken into account.

4.1. The status of the European Union

As Isiksel states the dilemma about the exact character of the EU "is as old as European integration itself."[77] A safer approach stresses the sui generis nature of the entity, which is a mere tautology. This perspective only circumvents to answer the question.[78] Some radical approaches consider European integration as a special federal entity.[79] Odermatt in this case separates four models for the EU: 1. the concept of a 'new legal order', 2. a 'self-contained regime' in IL, 3. a 'regional economic integration organization' and 4. a 'classic intergovernmental organization'.[80] The first and second

[76] Ibid p. 3.

[77] T. Isiksel, *European Exceptionalism and the EU's Accession to the ECHR*, European Journal of International Law, Vol. 27, No. 3, October 2016, pp. 565, 571.

[78] R. Schütze, *From Dual to Cooperative Federalism – The Changing Structure of European Law*, OUP, Oxford, 2009, p. 59; K. Ziegler, *International Law and EU Law: Between Asymmetric Constitutionalism and Fragmentation*, in A. Orakhelashvili (Ed.), Research Handbook on the Theory and History of International Law, Edward Elgar, 2011, pp. 268, 270.

[79] R. Schütze, *European Constitutional Law*, Cambridge UP, Cambridge, 2012, pp. 77-79.

[80] J. Odermatt, *Unidentified Legal Object: Conceptualising the European Union in International Law*, Connecticut

alternatives interpret the EU only as a legal order. However, it is clear that European integration means more than just a regime of IL or a 'simple' legal order. Concerning the scenarios related to IGOs, the third and the fourth models could give us more promising explanations. After all, the European Community was conceived as an IGO,[81] and even the member states generally treat it "as a kind of [IGO]".[82]

From the point of IL, it is safe to say that the EU is a bit more than just an IGO. The International Law Commission (ILC) Study on the Fragmentation of International Law states that "the European Community […] is a subject of [IL] and for practical purposes may be treated towards the outside world as an intergovernmental organization, with whatever modification its specific nature brings to that characterization".[83] At the same time, European integration has a unique legal order. The EU established a common market and specific legal relations between its members, their enterprises and individuals.[84] It means that the EU went beyond the normal parameters of a classical IO,[85] therefore the fourth scenario does not apply. The problem with the approach of the ILC is that it keeps the EU - even if it has unique characteristics compared to other IGOs - at the same level as other IGOs.[86] It is important to note that the imperfect nature of IL must be recognized in this matter. The concept of law aims to categorize and conserve contemporary matters to manage certain situations. Hence, the categorizations of IL are imperfect as well. It is also problematic that IL does not have consensual definition for IGOs. Despite the fact that it is hard to identify the EU's exact nature, it can be stated that it has similarities with other IGOs, such as the existence of a founding treaty and a separate legal regime. It is worth noting in this case that the EU has 'a unique legal order' which incorporates more characteristics than a legal regime (see section 4.2.). [87] Furthermore, there are a wide variety of organs under its aegis, just like in the case of other IGOs.

The same identification problem occurs in IR as well because English School writers cannot provide a clear and coherent answer to this question. Bull considered the EU as a super-state, "which is simply a nation-state writ large, but at a process in an intermediate stage".[88] For Bull, what matters is not the idea of this super-state. He doubts that such an entity will ever come into existence, rather the societal structure that this idea created.[89] On the other hand, Ahrens and Buranelli stress the EU's potential as an IO, which challenged the modern political order of the nation-state.[90] The recent approaches from this branch of IR agree on one issue though: the EU presents itself as an international society that was formed within a particular regional context with a growing membership.[91] This international society has unique attributes.

Journal of International Law, Vol. 33, No. 2, May 2018, p. 216.

[81] Schütze 2012, p. 48.

[82] J. Crawford & M. Koskennemi, *Introduction*, in J. Crawford & M. Koskenniemi (Eds.), The Cambridge Companion to International Law, Cambridge UP, Cambridge, 2012, p. 12.

[83] M. Koskenniemi, *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law*, International Law Commission, A/CN.4/L.682, 2006, supra note 2, p. para. 219. [*Fragmentation of International Law*].

[84] Odermatt 2018, p. 239.

[85] G. Nesi, *EU Presidency Statement – Report of the International Law Commission*, United Nations, 2003 https://www.un.org/press/en/2003/gal3238.doc.htm (21 March 2020).

[86] Odermatt 2018, p. 239.

[87] Schermers & Blokker 2018, §22/B; I. F. Dekker & R. A. Wessel, *Governance by International Organizations: Rethinking the Normative Force of International Decisions,* in F. Dekker, W. G. Werner (Eds.), Governance and International Legal Theory, Springer, Dordrecht, 2004, pp. 219, 231.

[88] Bull 2012, p. 56.

[89] Ahrens 2019, pp. 265-266.

[90] Ibid p. 266; Buranelli 2019, pp. 241-243.

[91] T. Djez, & R. Whitman, *Analysing European Integration. Reflecting on the English School – Scenarios for an Encounter*, Journal of Common Market Studies, Vol. [40], No. 1, 2002, p. 45; Ahrens 2019, p. 266; T. Diez, I. Manners & R. G. Whitman, *The Changing Nature of International Institutions in Europe: The Challenge of the European Union*,

First, the EU generated the phenomenon of the solidarization of international society. Article 2 of the Treaty on the European Union (TEU) gives adequate proof for such a phenomenon. The article clearly states that "[t]he Union is founded on the values of respect for human dignity, freedom, equality, the rules of law and respect for human rights (…)".[92] From early on, the goal of European integration was the transformation of the state-centric regional order. There are certain proofs for this process, such as the existence of EU citizenship.[93] As Ahrens states, the EU used pluralist structures and impulses (for instance the European Coal and Steel Community, or certain groups and governments during the negotiations of the specific treaties) to constitute a more solidarized international society.[94] It is also worth pointing out that the EU aims to solidarize not only the regional but also the global international society as well.[95] As Article 3(5) TEU states regarding the wider world, the Union "shall contribute to peace, security, the sustainable development of the Earth, solidarity […] as well as to the strict observance and the development of international law."[96]

Second, the EU has an effect on the primary institutions as well.[97] As I pointed out in section 2.3., IGOs affect the primary institutions of international society. Regarding this matter, the EU supports almost all primary institutions of contemporary international society. As a part of its effect, it also reinterprets the concept of sovereignty with additional unique features, such as the pooling of sovereignty or supranationalism.[98] Diez, Manners and Whitman even speak about the transformation of Bull's primary institutions, such as the alteration of the balance of power into the pooling of sovereignty, war into pacific democracy, or great power management into member state coalitions.[99] Third, the 'European world society' provides a strong basis for the shared values of the international society, which shows that there is a stronger relationship between international and world society in the EU.[100]

It follows from the above that the status of the EU is far from obvious. It can be said though that both IL and the concept of the English School considers EU as an IGO 'with extras'. Even if it is that unique, it created a regional international society, which affects the primary institutions as well.

4.2. The status of the law of the European Union

Just as the EU is considered unique, EU law has similarly peculiar characteristics. As the Court of Justice of the European Union (CJEU) stated, "the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals".[101] The CJEU also stated in Opinion 2/13, this new legal order possesses "its own institutions, for the benefit of which the Member States thereof have limited their sovereign rights, in ever wider fields". It has "its own constitutional framework and founding principles, a particularly sophisticat-

Journal of European Integration, Vol. 33, No. 2, February, 2011, pp. 117-138.

[92] Treaty on the European Union, OJ C 326, 26.10.2012, p. 13–390 (GA), Art. 2.

[93] Diez & Whitman 2002, p. 51.

[94] Ahrens 2019, pp. 266-276.

[95] B. Ahrens, & T. Diez, *Solidatisation and Its Limits: The EU and the Transformation of International Society*. Global Discourse, Vol. 5, No. 3, July 2015, pp. 341-355.

[96] TEU Art. 3(5).

[97] Diez & Manners & Whitman 2011, p. 123.

[98] Buranelli 2019, pp. 242-243.

[99] Diez, Manners & Whitman 2011, pp. 123-134.

[100] R. Morgan, *A European "Society of States" – But Only States of Mind?* International Affairs, Vol. 76, No. 3, July 2000, p. 563; Diez & Whitman 2002, pp. 53-55.

[101] C-26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* (Van Gend en Loos), [ECLI:EU:C:1963:1].

ed institutional structure".[102] On that basis, it may be considered that the founding treaties of the EU are not just simply international agreements, but they have some sort of constitutional nature as well.[103] According to the CJEU, "[t]he E[U] Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter" "based on a rule of law".[104] From the point of view of international jurisprudence, it must be emphasized though that EU law is not strongly separated from IL yet.[105] The ILC and many authors still state EU law as a candidate for a self-contained regime.[106] Considering the attributes of EU law, nevertheless even the ILC recognizes this constitutional character.[107] To emphasize and preserve this separate nature of EU law, the CJEU emphasized its autonomy. The Court of Justice of the European Union focused on the internal nature of the autonomy of EU law at first, between the Community and its Member States.[108] Later, the earlier case law was referred by the ECJ which helped to establish the external aspect of the autonomy of EU law.[109] According to van Rossem, this external autonomy requires two conditions, namely that "the essential character of the powers of the EU and its institutions remains unaltered by an international agreement" and the procedures that ensure the uniform interpretation of certain treaties (specifically ones utilizing an external judicial body) do not have the effect of binding the EU to a particular interpretation of the rules of EU law.[110] This was reaffirmed in the recent case law of CJEU, namely in Opinion 2/13 regarding the accession to the European Convention on the Protection of Human Rights and Fundamental Freedoms, and in the Achmea case.[111]

The authors of the English School did not focus on the status of EU law specifically as their relevant articles mostly concentrated on the nature of European integration. It can be said though that EU law can be connected to the solidarization of the EU. As Schütze stated, IL is changing from a law of coexistence to a law of cooperation. The emerging rules of IL focus on the positive rules of cooperation, and not the negative code of rules of abstention. The EU embraces this cooperative spirit on a regional scale, and EU law is a means for such a process.[112] Regarding the question of institutions, Diez, Manners and Whitman listed EU law as a primary institution, which took the place of IL within the European international society.[113] In my opinion, EU member states remained autonomous and important actors in the global international society. Therefore, the statement that EU law simply succeeded IL in the European international society can be considered as an exaggerated observation. It is safe to say however, that EU law can be considered as one of the primary institutions for the European regional international society.

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[102] Opinion 2/13, [ECLI:EU:C:2014:2454], paras 157-158.
[103] Schütze 2012, p. 4.
[104] Opinion 1/91, [ECLI:EU:C:1991:490], para. 21; C-294/83, *Parti écologiste "Les Verts" v European Parliament*, [ECLI:EU:C:1986:166], para. 23.
[105] E. Klein, *Self-Contained Regime*, Max Planck Encyclopedia of Public International Law, 2018, opil.outlaw.com/home/EPIL (21 March 2020).
[106] Odermatt 2018, pp. 231, 239.
[107] *Fragmentation of International Law* 2006, para. 218; Odermatt 2018, pp. 231, 239; J. W. van Rossem, *Interaction between EU law and international law in the light of Intertanko and Kadi: the dilemma of norms binding the Members States but not the* Community, Cleer Working Papers, No. 4. , 2009, https://www.asser.nl/upload/documents/11172009_42019clee09-4comb.pdf, p. 41. (11 April 2020).
[108] C-6/64, Costa v. ENEL [ECLI:EU:C:1964:66]; J. W. van Rossem, *The Autonomy of EU Law: More is Less?*, in R. A. Wessel & S. Blockmans (Eds.), Between Autonomy and Dependence – The EU Legal Order Under the Influence of International Organisations, Springer Verlag, Berlin Heidelberg, 2013, p. 16.
[109] T. Molnár, *Revisiting the External Dimension of the Autonomy of EU law: Is There Anything New Under the Sun?*, Hungarian Journal of Legal Studies, Vol. 57, No. 2, 2016, p. 182, Opinion 1/91, para. 35.
[110] Van Rossem 2013, p. 8; Molnár, p. 183.
[111] Opinion 2/13, [ECLI:EU:C:2014:2454], paras. 174-177; C-2814/16, Slowakische Republik v. Achmea BV [ECLI:EU:C:2018:158], paras 32-33, 35-37.
[112] Schütze 2009, p. 59.
[113] Diez & Manners & Whitman 2012, pp. 127-128.

4.3. English School and Sinclair's theory for the EU?

The question arises whether the theoretical framework described above is applicable in the case of the EU. After all, both the study of law and IR emphasizes the similarity between the EU and other IGOs.

First, the EU does not have a fundamental difference from other IGOs as regards the expansion of powers. Sinclair separated two elements for his examination. In the first place, he relied on Jellinek's metaphor about the "constitutional transformation" and called the similar phenomenon as "constitutional growth" in the case of IGOs. Furthermore, he emphasized the importance of the administrative way of thinking in the cases of IGOs. Both approaches come from constitutional law analogies. Moreover, he examined IGOs from quasi domestic socio-legal perspectives. It should be noted here that there is a widespread agreement on the fact that the law of the EU has a constitutional character. Therefore, the use of constitutional law analogies in the case of the EU is not that odd.

Second, Sinclair stated that his theoretical approach cannot be applied to all IGOs because they "have not always and everywhere expanded their powers, nor has every attempt of an IGO expansion has been successful."[114] In the case of the EU, there is a constant will to build a new political and social order in Europe. Regarding the development of integration, the change and the expansion has been part of the EU since its establishment. As it was stated in section 4.1., the EU used the existing pluralist structures to promote constitutive change towards more solidarist structures. Even the establishment of the European Coal and Steel Community could not have happened without the pursuit of national interests and concerns of state sovereignty. Ahrens illustrated this process with the fact that the changing founding treaties transferred more and more powers to the organizations of European integration.[115] This, however, is not a linear progression, rather an ongoing and disorderly process of struggle.[116]

Third, the EU has extremely strong and effective tools for such an expansion. The Treaty on the Functioning of the European Union (TFEU) lists the exclusive competences of the Union, the shared competences with the member states, and the supplementary competences as well.[117] At the same time, these provisions are not comprehensive as EU law provides ample opportunities for a "constitutional change" in this matter. According to Schütze, three crucial legal developments emerged in EU law. First, the rise of the teleological interpretation, which enabled to Union's competences to 'spillover' into other policy areas. Second, the rise of the Union's general competences, which enables the Union to horizontally cut across the various policy areas listed in the Treaties. TFEU prescribes the Union's harmonization competence, which has a clear cut effect for all the policy areas within the EU (TFEU, Article 114). Another example is Article 352 TFEU, which provides the opportunity for the EU to create competences itself if it is considered necessary. Third, the doctrine of implied powers, which focuses on the Union's external powers. The doctrine enables the exclusive competence of the EU in case of a conclusion of an international agreement when its conclusion is necessary to the Union to exercise its internal competence, or may affect common rules or alter their scope (TFEU, Article 3(2)).[118] In this process, the CJEU plays a significant role because the Court of Justice has the interpretative monopoly of EU law.[119] Furthermore, it should be noted that Sinclair used a broader term of 'law' in his examination, which assumes other, less

[114] Sinclair 2017, p. 3., note 6.
[115] Ahrens 2019, pp. 269-276.
[116] Sinclair 2015, p. 30.
[117] Treaty on the Functioning on the European Union, OJ C 326, 26.10.2012, p. 13–390 (GA) Art. 3-4, 6.
[118] Schütze 2012, p. 153.
[119] T. Moorhead, *The Legal Order of the European Union: The Institutional Role of the Court of Justice*, Taylor & Francis Ltd, New York, 2016.

formal methods for the expansion of powers.

Fourth, the combined approach of the English School and Sinclair's ideas could also point out the complex role of EU law. As it was shown in section 3.2., law can be considered 1. as a tool for power, 2. the detailed regulations and procedural rules for an IO, or 3. even the ideas which come from the non-state actors of world society. In the context of the EU, this complex nature of law is worth examining as well. Regarding the first aspect, it is not great powers but rather member state coalitions which have a great effect on the law of the EU.[120] Regarding the second aspect, EU institutions have a wide variety of regulatory powers which are used not only to create obligations for states but also to make obligatory rules for their citizens. Considering the third aspect, the EU has a very developed world society, which influences the work of the EU through civil organizations and other ways. A good example for this is the citizens' initiative, which enables European citizens to call on the Commission to make a legislative proposal. Once an initiative gathers a million signatures, the Commission decides on what follow-up action to take.[121]

5. Conclusion

The purpose of this study was to create a theoretical framework for the law of IGOs and to apply that framework effectively. During this analysis, I used sources from IR, especially those related to the English School. As a second component, I relied on Sinclair's IL research to fill the holes in the approach of the English School. Although these concepts have different theoretical backgrounds, there are a lot of similarities. The combination of these approaches creates a theoretical synthesis which helps to examine the law of IGOs in its complexity. Furthermore, this approach is not only applicable in the cases of universal IGOs but also for regional IGOs. Even though the European Union is not a simple intergovernmental organization, its similarity to other IGOs makes the applicability of this theoretical framework possible. This is in my view especially true for the expansion of powers and 'competence creep' in the EU. As I see, these questions have significant importance in understanding the European Union, its law and their roles. The combination of the fields of IR and law could make it happen.

[120] Diez & Manners & Whitman 2011, pp. 123-134.
[121] Art. 24 TFEU

Online Dispute Resolution Scheme for E-Commerce: The ASEAN Perspectives

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In the age of information and communication technology, the Internet has become a new channel for meeting and social interaction of people all around the world, and e-commerce transactions are increasing radically worldwide. At the same time, disputes arising from such transactions are also increasing and these disputes are often difficult to deal with. Hence, policymakers and regulators, both at regional and international levels, are working to provide an appropriate redress scheme for disputes arising from e-commerce transactions, particularly those related to consumer rights and consumer protection. This paper is an investigation rather than an analytical study: it aims to examine the e-commerce-related online consumer protection in the Association of Southeast Asian Nations (hereinafter: ASEAN) and introduce the online dispute resolution mechanism of ASEAN for facilitating the development of e-commerce. The paper also reviews the rules of the UNCITRAL and of the EU regarding online dispute resolution for online consumer protection to help understand international perspectives.

Keywords: Online dispute resolution, consumer protection, ASEAN ODR, EU ODR, UNCITRAL

1. Introduction

E-commerce is a radically new pattern of conducting commercial activities, and it is potentially a significant force to increase economic growth and strengthen development around the world. It has established international trade through the sale of related goods and services and brought traders and consumers from around the world together in a virtual marketplace. The global e-commerce is projected to grow at a rate of twelve percent annually from 2015 and expected to maintain until 2020. By contrast, bricks-and-mortar-based retailing will only grow at the rate of two percent over the same period.[1]

In the age of digitalization in the 21st century, electronic commerce is an essential engine for global economic growth. It helps increase productivity across sectors of economies, further promote both trade in goods and services and investment, and creates new jobs, new sectors of activities, new forms of marketing and selling as well as new revenue streams.[2] However, with the growth of e-commerce and the increasing use of e-commerce worldwide, there seems to be an increase in electronic transaction disputes too, especially disputes arising from cross-border e-commerce which concern the protection of consumers and their rights.[3]

[1] A. Bourlier & G. Gomez, *Strategies for Expanding into Emerging Markets with E-Commerce*, Euromonitor International, 2016, p. 1. https://unctad.org/meetings/en/Contribution/dtl-eWeek2017c08-euromonitor_en.pdf (18 November 2019).
[2] European Union - United States: Joint Statement on Electronic Commerce, *International Legal Materials*, Vol. 37, No. 3, May 1998, pp. 667-668.
[3] SEC (2011) 1408 final, p. 20.

An example of this concern is apparent in the European Union, revealed by the Digital Single Market consumer survey (DSM survey): most problems with purchases online were not remedied, and even where the problems were addressed it was likely that they would not result in a satisfactory solution for the consumer.[4] Indeed, when disputes arise from electronic transactions, cross-border proceedings can turn out disproportionately costly and lengthy, and even where a judgment was obtained in the consumer's favor, costs and effort are required to enforce it against the trader. Furthermore, the litigation possibility in foreign courts and differences in the laws applicable to the contract also make businesses abstain from engaging in cross-border electronic transactions.[5] These issues could become a barrier to e-commerce development. Hence, it is necessary for policy-maker and businesses to provide an appropriate redress mechanism for dealing with disputes arising from e-commerce transactions. At the moment, online dispute resolution (ODR) seems to be one of the most appropriate mechanisms for dealing with disputes arising from such e-commerce transactions. It can help parties resolve disputes in a simple, fast, flexible, and low-cost method without requiring a presence at a meeting or hearing.[6]

ASEAN, like other regions, is embracing opportunities from the growth of innovation and technology. It has recognized the information and communication technology as a significant driving force for its regional integration and economic growth.[7] In the last decade, ASEAN has brought prosperity and wealth to the region through innovation and technology.[8] Despite this, ASEAN would not be able to achieve a dynamic economy development and a people-oriented, people-centered ASEAN without strengthening the framework of the consumer protection which is also strategy set by the ASEAN Economic Community (hereinafter: AEC) for 2025. Therefore, the protection of consumers as an essential part of the AEC 2025 strategy has a significant role in enhancing an effective, efficient, modern, and fair marketplace in the AEC.[9]

Recognising this, ASEAN developed its dispute resolution mechanism to build ASEAN citizens' confidence in domestic and cross-border transactions in order to promote e-commerce development and ensure the protection of consumers within the region. At this sectoral level, the strategic measures were further refined into specific initiatives and activities by the ASEAN Strategic Action Plan for Consumer Protection 2025 (hereinafter: ASAPCP 2025). Strategic Goal 3 of ASAPCP 2025 foresees among others the setting up of the ASEAN Regional Online Dispute Resolution (ODR) mechanism, including national ODR systems; an ASEAN ODR network; and an ASEAN mechanism for cross-border complaints and investigations.[10]

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[4] For information about the survey, see https://ec.europa.eu/info/files/obstacles-digital-single-market-final-report_en (5 April 2020).

[5] COM (2015) 192 final, pp. 16-17.

[6] U. Jeretina, *Consumer Online Dispute Resolution (ODR) – As a key cultural change – Mechanism For Innovative Public Administration in EU*, Central European Public Administration Review (CEPAR), 2018, p. 6; *See* UNCITRAL Technical Notes on Online Dispute Resolution, United Nations, 2017, para 2. See also P. Sengpunya, *Regional Online Dispute Resolution Mechanism: the EU Perspective*, Arsboni, 29 November 2019. https://arsboni.hu/regional-online-dispute-resolution-mechanism-the-eu-perspective/ (24 December 2019);

[7] See Review of E-commerce Legislation Harmonization in the Association of Southeast Asian Nations, UNCTAD, 2013, p. iii.

[8] See ASEAN ICT Master Plan 2015, p. 6.

[9] ASEAN Secretariat, *Handbook on ASEAN Consumer Protection Laws and Regulations*, June 2018, p. vii.

[10] See the ASEAN Strategic Action Plan for Consumer Protection (ASAPCP) 2016-2025: *Meeting the Challenges of a People-Centered ASEAN Beyond 2015 – Appendix - Summary of the Strategic Goals and Initiatives/Targets,* 2016.

1. Online Dispute Resolution for E-Commerce at International Level

In this digital age, the Internet has become a new channel for meeting and social interaction of people all around the world[11], and it has also become an important platform for commercial activities that introduce e-commerce in both business-to-business (B2B) and business-to-consumer (B2C). E-commerce has become a significant driving force for cross border trade in all regions around the world since it removes geographical barriers to international trade and opens up new marketplaces.[12]

With the increasing electronic activities and interaction online, the number of disputes between people is rising at the same time both domestically and across borders. These disputes arising from the online sphere are usually a concern of the use of e-commerce, the business-to-consumer (B2C) in particular.[13] And the disputes arising from e-commerce can be difficult for courts to deal with because of several reasons such as questions as to the applicable law; the high volume of claims; differences between the litigation for high cost transactions and he claims for low value transaction; and the difficulty of enforcing foreign judgments.[14] For this reason, the demand for ADR is increasing exponentially around the world, especially ODR, which is a fast, efficient, flexible, and inexpensive mechanism for handling e-commerce, both the domestic level and cross borders.

1.1. United Nations

By recognizing the increase of cross-border e-commerce worldwide and noting the need for appropriate mechanisms for dealing with disputes arising from e-commerce transactions, the United Nations Commission on International Trade Law (UNCITRAL) decided to undertake work on Online Dispute Resolution (ODR) at its forty-third session held on 21 June-9 July 2010 in New York. It established a Working Group III to embark on developing online dispute resolution mechanisms relating to cross border e-commerce transactions, including B2B and B2C.[15]

1.1.1. UNCITRAL Technical Notes on Online Dispute Resolution

In 2016, the UNCITRAL adopted a non-binding document at its forty-ninth session namely the UNCITRAL Technical Notes on Online Dispute Resolution (hereinafter: Technical Notes)[16] aiming to enhance ODR development; and to support ODR platforms, ODR administrators, neutrals, and the parties of the relevant ODR proceedings.[17] The Technical Notes embodies and ODR processes model, in which it encourages the ODR system to represent the following principles:

a) Impartiality;

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[11] S. E. Mustafa & A. Hamzah, *Online Social Networking: A New Form of Social Interaction*, International Journal of Social Science and Humanity, Vol. 1, No. 2, July 2011, p. 67.
[12] L. Chen & F. Kimura (Eds.), *Regional Online Dispute Resolution System ASEAN*, Routledge, New York, 2019, p. 4.
[13] R. V. Cupido, *The Growth of E-Commerce and Online Dispute Resolution in Developing Nations: An Analysis*, IJEME, Vol. 10, No. 10, 2016, pp. 3371-3374.
[14] L. D. Duca & C. Rule, & Z. Loebl, *Facilitating Expansion of Cross-Border E-Commerce - Developing a Global Online Dispute Resolution System (Lessons Derived from Existing ODR Systems – Work of the United Nations Commission on International Trade Law)*, Penn State Journal of Law and International Affairs, Vol. 1, No. 1, 2012, p. 62-63.
[15] Official records of the General Assembly, Sixty-fifth Session, Supplement No. 17 (A/65/17), para. 257.
[16] UNCITRAL Technical Notes on Online Dispute Resolution, United Nations, 2017, pp. iii – vii.
[17] Technical Notes, para. 3.

b) Independence;

c) Efficiency;

d) Effectiveness;

e) Due process;

f) Fairness; and

g) Accountability and transparency.[18]

The Technical Notes intend to assist the structure and framework of an ODR system for resolving disputes arising from online cross-border purchase of low-value products, and they do not intend to promote any ODR practice as the best practice.[19] The Technical Notes consist of 12 sections and 53 articles, and their characteristic features[20] can be clarified as followings:

a) They reflect approaches to ODR systems that embody fundamental principles for ODR;

b) They are designed for use in disputes arising from cross-border, low-value electronic transactions concerning B2B or B2C;

c) They are a non-binding instrument; they are a descriptive document. They do not intend to be exclusive or exhaustive, nor to be used as rules for any ODR proceeding;

1.1.2. UNCITRAL ODR Package Model

The package model for ODR considered by the UNCITRAL consists of three stages: negotiation, facilitated settlement, and arbitration.[21] According to the package model under the Technical Notes, the ODR process takes part when an unhappy party submits a claim through the ODR platform to the ODR administrator, and the ODR administrator notifies the respondent of the existence of the claim and the claimant of the response.

Under the UNCITRAL ODR system, in the negotiation stage, the disputed parties directly negotiate with each other through the platform operated by the ODR provider using electronic communication without any intervention of a third party as a neutral person.[22]

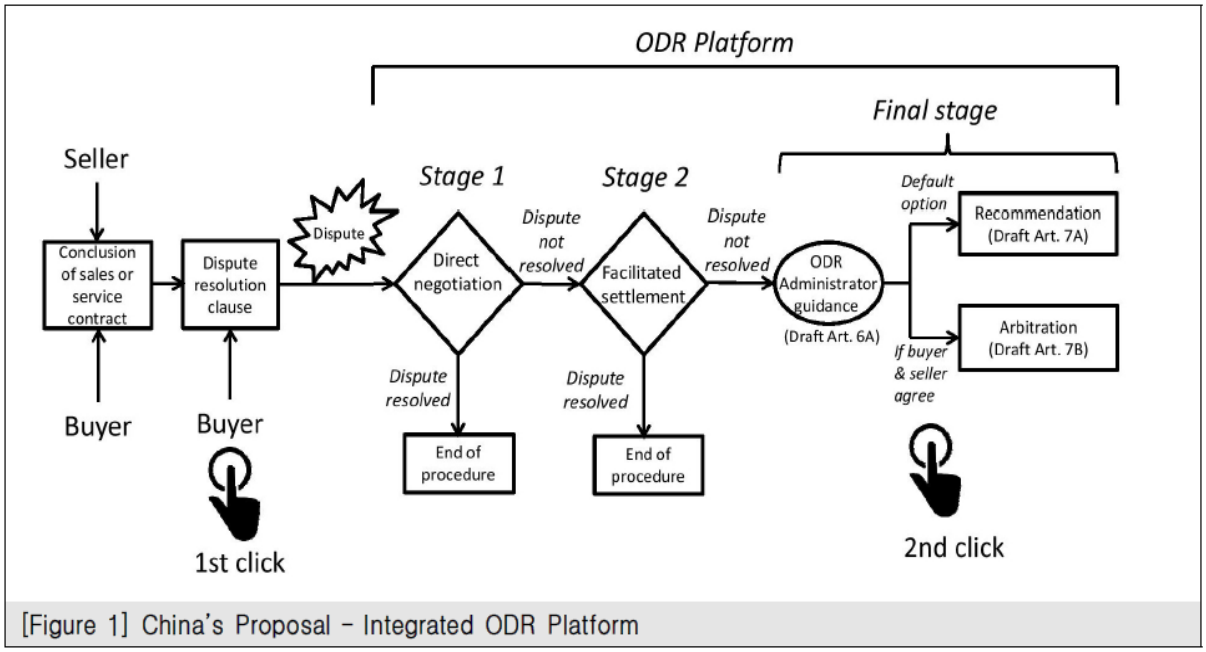
If that negotiation process fails, the parties may move to a second stage – a facilitated settlement. In the facilitated settlement stage, an intervention of a neutral third party takes place as the ODR administrator appoints a neutral adjudicator for communicating with the parties and attempt to support the parties to reach a mutually acceptable settlement.[23]

If the dispute remains unresolved, the process may move to the third and final stage – arbitration. In this final stage, the case is decided by an impartial neutral person, and the decision of this award

[18] Technical Notes, para. 4.
[19] Technical Notes, para. 5.
[20] Technical Notes, para. 4-6.
[21] Technical Notes, para. 18.
[22] Technical Notes, para. 19.
[23] Technical Notes, para. 20.

is enforceable.[24]

The following figure shows the three stages of the ODR process proposed by China and promoted by UNCITRAL:



[Figure 1] China's Proposal - Integrated ODR Platform

(Source: A/CN.9/827, p. 14)

The UNCITRAL ODR package is expected to be a significant model which can assist national legislators to adopt their ODR platform. It is deemed to significantly contribute to the ODR systems development to enable online settlement for disputes arising from cross-border low-value electronic transactions, which will significantly help all countries, especially developing countries and countries in transition of economies, to ODR proceedings in developing and using ODR systems[25]

1.2. European Union

To facilitate cross-border e-commerce and to strengthen consumers' trust when shopping online is one of the political priorities of the European Commission in the framework of the EU internal market.[26] The EU considers cross-border e-commerce and consumers' trust in online transactions a vital part of the Commission's Digital Single Market strategy. Hence, the EU considers promoting access to efficient and effective redress mechanisms through ADR/ODR procedures as one of the key segments to achieve the Digital Single Market strategy.

1.2.1. Policy Background and Legal Framework

At first, the EU consumer ADR policy was addressed through non-binding standards and sec-

[24] S. Bae, *A Study on ODR Enforcement for Disputes Arising from Cross-border E-Commerce: Focusing on the UNCITRAL and EU*, the e-Business Studies, Vol. 17, No. 5, 30 October 2016, p. 173; and see also Technical Notes, para. 21.
[25] Resolution adopted by the General Assembly on 13 December 2016 (A/RES/71/138), paras. 7-8.
[26] COM (2017) 744 Final, Brussels, 13.12.2017, p. 1.

tor-specific legislation, where the Member States were required to encourage or ensure access to out-of-court redress.[27] In May 2010, the EU announced a strategy to improve the ADR system, including ODR, in its flagship initiative "Digital Agenda for Europe." It intended to launch an EU-wide strategy to strengthen ADR/ODR systems and propose an EU-wide online redress tool for e-commerce and improve access to justice online.[28]

In April 2011, the Commission adopted the communication "Single Market Act on Twelve Levers to Boost Growth and Strengthen Confidence", The purpose of the initiative was to establish affordable out-of-court settlement procedures that were simple, flexible, and fast for consumers and protect relations between businesses and their customers including an e-commerce dimension.[29]

In 2013, the EU adopted Regulation (EU) No 524/2013 (ODR Regulation)[30] and Directive 2013/11/EU (ADR Directive)[31], aiming to strengthen the ADR/ODR system and to enable accessible and efficient out-of-court redress mechanisms for consumer disputes in the EU, including in disputes arising from cross-border e-commerce. The ADR Directive and the ODR Regulation together provide a legal framework to ensure that consumers have access to high-quality ADR mechanisms for resolving their disputes with traders, including through an ODR platform.[32]

The ODR Regulation and the ADR Directive are both interlinked and complementary.[33] The ADR Directive builds trust in EU consumers regards certified ADR bodies for resolving any disputes arising from both domestically and cross-border shopping made online or offline[34], and the ODR Regulation ensures ODR contact points to be designated by Member States to provide users of the ODR platform one-to-one support.[35]

The ODR Regulation and ADR Directive applies disputes arising from the purchase of goods or services made online or offline in both domestic and across borders in the EU and EEA countries.[36] However, they do not address disputes arising from any consumer-to-consumer (C2C) or business-to-business (B2B)[37] relations; they only address disputes stemming from the purchase of goods and services in business-to-consumer (B2C) context.[38] Furthermore, the ODR Regulation and the ADR Directive do not apply to disputes concerning public providers of higher education or health care services, nor do they lay down a framework for direct negotiation made by the parties, or settlement attempts made by a judge in the course of judicial proceedings.[39]

1.2.2. EU ODR Scheme

To facilitate cross-border e-commerce and build trust for consumers online within the EU, the EU launched the ODR platform in January 2016, and the platform was officially opened to the public

[27] COM (2019) 425 final, Brussels, 25.9.2019, p. 1.
[28] COM (2010) 245 Final, Brussels, 19.5.2010, p. 13.
[29] COM (2011) 206, Brussels, 13.4.2011, p. 9.
[30] OJ L 165, 18.6.2013, p. 1-12.
[31] OJ L 165, 18.6.2013, p. 63-79.
[32] COM (2019) 425 final, Brussels, 25.9.2019, pp. 2-3.
[33] Sengpunya 2019.
[34] ADR Directive, Recital 4.
[35] ODR Regulation, Recital 25.
[36] ADR Directive, Recital 16.
[37] COM (2017) 744 final, p. 3.
[38] ODR Regulation, Art. 2; and *See also* ADR Directive, Art. 2.
[39] ADR Directive, Art. 2 para. 2; and *See also* ADR Directive, Recital 14 and Recital 23.

on 15 February 2016.[40] The launch of the ODR platform aims to facilitate the online resolution of disputes arising from the purchase of goods or services between consumers and traders that made online or offline domestically and across borders.

The EU ODR platform offers a single point of entry to consumers and traders seeking a dispute resolution mechanism to resolve disputes arising from both domestic and cross-border e-commerce transactions[41] through an interactive web-interface without being together at a meeting room or going to court. The EU ODR platform was established with functions based on paragraph 4 of Article 5 of the ODR Regulation,[42] in which the parties can conduct the dispute resolution procedure online through electronic case management. Consumers may initiate a procedure by submitting a complaint electronically to a trader, and the trader can identify the competent ADR entity. When the ADR body is mutually chosen, the parties transmit the complaint to that body. The platform also provides free translation of information necessary to all relevant actors for the dispute resolution.[43]

According to the ODR Regulation and ADR Directive, the ODR process takes part when the consumer complainant submits a fully completed complaint to the ODR platform, and the trader responds and agrees to go to the ODR process for resolving the dispute under mutually agreed dispute resolution body.[44] Each dispute resolution body under the ODR Regulation and the ADR Directive has its own rules and procedures. The Directive establishes a minimum harmonization approach. It does not prescribe a specific model nor a specific type of ADR procedure.

In general, the ODR process under the EU ODR platform consists of four steps:[45]

a) Consumer complainant submits a complaint to the ODR platform, and ODR platform notifies the trader;

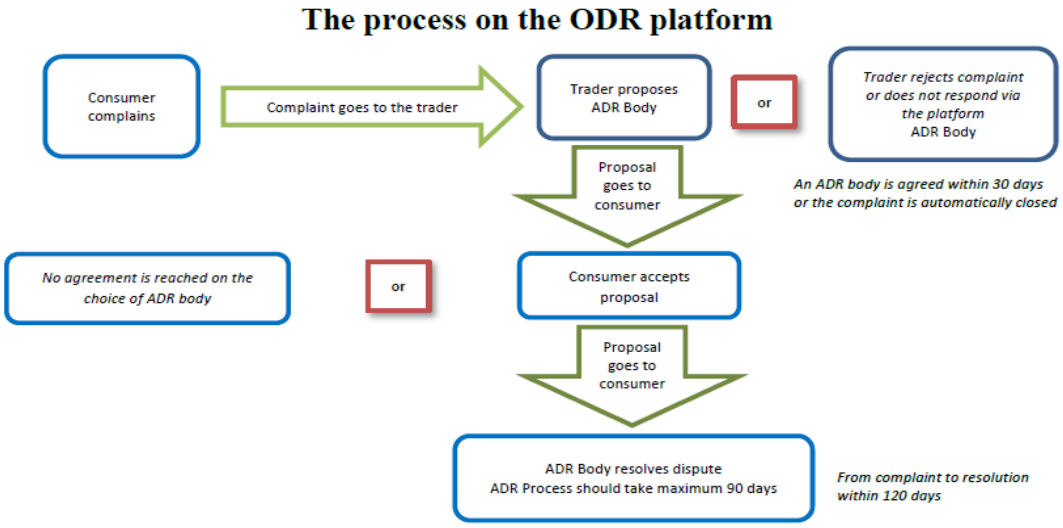
b) The parties agree on a dispute resolution body;

c) The dispute resolution body handles the complaint; and

d) The dispute resolution body announces the outcome and closes the complaint.

[40] COM (2019) 425 final, p. 13.
[41] European Commission - Press release, "*Solving disputes online: New platform for consumers and traders*", Brussels, 15 February 2016.
[42] COM (2017) 744 final, p. 2.
[43] ODR Regulation, Art. 5 para. 4.
[44] ODR Regulation, Art. 9.
[45] https://ec.europa.eu/consumers/odr/main/?event=main.home.howitworks (3 December 2019).

The following flow chart shows the ODR process under the EU ODR platform:



(Source: European Commission, 2017)

ODR platform of the EU provides consumers a user-friendly flatform to file complaints online, consists of a multilingual register of ADR entities, and provides information on consumer redress. The ODR platform of the EU has the following key characteristics:

"a) Consumers and traders can choose any of the EU official languages for their interaction with the platform (e.g. submitting their complaints, receiving notifications). An automatic translation tool is available for free text communication; b) The platform identities which notified ADR bodies are competent to handle the case and refers the dispute the ADR body on which the parties agree; c) ADR bodies can use the platform's case management system to conduct the ADR procedure entirely online; d) The parties can request that the outcome of the ADR procedure is translated by a professional translator; e) Clear deadlines are built into the platform to ensure a fast process."[46]

The EU ODR platform has functioned properly and has overall impressed consumers in the EU. The response of a survey conducted in 2017 indicated that 71% of the ODR platform visitors were satisfied and found it useful.[47] The ODR platform contributes to increasing consumers' and traders' confidence in online transactions both in domestic and cross-border, in which consumer disputes arising from online transactions can be settled in a simple, fast, and inexpensive way.[48] However, in the EU ODR platform the question remains whether participation in the procedure is voluntary or mandatory or whether the procedure's outcome is binding or not.[49] Furthermore, not all ADR bodies from all Member States are connected to the existing ODR platform, and participation of traders in the platform still remains low, which only 2% of disputes submitted to the platform could be transmitted the dispute to an ADR entity and about 80% of disputes was closed automatically after 30 days because traders had not responded the platform to the notification of the dispute.[50] To conclude, these are still key challenges for EU ODR system.

[46] COM (2017) 744 final, p. 2.
[47] Ibid. pp. 7-8.
[48] Jeretina 2017.
[49] COM (2019) 425 final, Brussels, 25.9.2019, p. 3.
[50] European Commission - Press release 2016, p. 14.

2. E-Commerce and Consumer Protection Laws in ASEAN

2.1. The ASEAN E-commerce Legal Framework

ASEAN has been working on developing the ICT landscape and its legal framework for years. The cooperation of ASEAN on ICT initiated before 2000, and it started becoming more concrete since year 2000 when an e-ASEAN Framework Agreement was adopted. This Framework Agreement intends to enhance the information infrastructure of ASEAN, facilitate e-commerce growth, and foster investments in the digital market. Along with the Framework Agreement, successive five-year ICT master plans were also adopted, the first in 2010, aiming at the development of infrastructure and the digital divide bridging.[51] The Master Plan placed an action to foster the preparation of domestic legislation on e-commerce, and to harmonise the legal infrastructure for electronic contracting and dispute resolution in order to deepen the regional policy and regulatory framework.[52] Moreover, the ASEAN ICT Masterplan (or AIM) 2020 was adopted in 2016, focusing on developing an integrated digital economy more broadly. It aims to drive ASEAN towards a secured, enabled, and transformative digital economy; and to enable an integrated, inclusive, and innovative ASEAN Community.[53]

In November 2017, ASEAN adopted the Work Programme on Electronic Commerce 2017–2025 in order to strengthen the e-commerce development within the ASEAN single market.[54] The work programme aims to develop and implement guidelines, coordination mechanisms, and specific initiatives related to infrastructure of broadband, the -commerce legal frameworks modernization, consumer protection, trade facilitation, payment systems, the security of electronic transactions, competition, and improved logistics.[55]

However, currently, ASEAN does not have any legal superstructure to establish a unified regime that could support regional e-commerce, unlike the European Union that has a supranational legal order. ASEAN has developed an e-commerce legal framework by harmonizing the Member States' national laws into a regional legal system while respecting cultural sensitivities and national sovereignty.[56] Consequently, the e-commerce legal support of ASEAN depends upon the adoption of a common reference framework that serves as legal templates providing a guide for helping ASEAN Member States (AMS) enacting their domestic laws and regulations on e-commerce in the respective ASEAN jurisdictions.[57]

By legal harmonization, ASEAN has made remarkable progress in the development of the e-commerce legal framework within its member states in order to strengthen e-commerce in the region and to achieve, as part of the e-ASEAN Framework Agreement, its Roadmap for Integration of the e-Commerce Sector. The e-commerce legal harmonization of ASEAN focused more on electronic

[51] ASEAN Secretariat, ASEAN Investment Report 2018 – *Foreign Direct Investment and the Digital Economy in ASEAN*, (November 2018), p. 238; See also ASEAN ICT Masterplan 2015 Completion Report, ASEAN (2015), pp. 8-11; and ASEAN ICT Masterplan 2015, pp. 9-10.
[52] ASEAN ICT Masterplan 2015 Completion Report, ASEAN (2015), pp. 30-32
[53] See generally ASEAN ICT Master Plan 2020.
[54] See the Preamble of the ASEAN Agreement on Electronic Commerce (2018); and also https://asean.org/asean-economic-community/sectoral-bodies-under-the-purview-of-aem/e-Commerce/ (08 December 2019).
[55] ASEAN Secretariat 2018, p. 239.
[56] J. Wong, *On Legal Harmonization Within ASEAN*, Singapore Law Review, Vol. 5, 2013, pp. 1-2.
[57] E. Mik, *Legal and Regulatory Challenges to Facilitating e-Commerce in ASEAN*, in P. Hsieh & B. Mercurio (Eds.), ASEAN Law in the New Regional Economic Order: Global Trends and Shifting Paradigms, Cambridge University Press, 2019, p. 344.

transactions laws and less on other cyber laws.[58] ASEAN hopes that e-commerce legal harmonization will drive development and further the ASEAN regional integration in the ICT age and establish a legal environment that will foster its e-commerce development.[59]

Furthermore, ASEAN launched the ASEAN Work Programme on E-commerce in November 2017, which called on ASEAN to strengthen coordination and cooperation on e-commerce. The work programme resulted in an ASEAN Agreement on e-Commerce, aiming to facilitate trans-border e-commerce transactions and connectivity of digital in ASEAN by laying down trade rules on e-commerce.[60] The ASEAN Economic Ministers endorsed the ASEAN Agreement on e-Commerce at the 50th ASEAN Economic Ministers Meeting on 29 August 2018, and later then the Agreement was officially signed by the ASEAN Economic Ministers on 12 November 2018, on the side-lines of the 33rd ASEAN Summit and Related Meetings.[61] However, the entry into force and eventual enforcement of the agreement will depend upon the deposit of ratification instruments of the Member States.[62] And as of April 2020, only five out of ten member states (Singapore, Thailand, Vietnam, Cambodia, and Myanmar) have deposited the ratification instrument.[63]

2.2. ASEAN Regional Framework on Consumer Protection

ASEAN has included consumer protection in a central place in its regional agenda on policymaking and it considers consumer protection as one of the most significant segments of the ASEAN economic and social integration process. It is essential in enhancing economic growth and promoting a competitive market and the appropriate consumer protection can increase consumer demand and confidence so that it will bring possible implications to the business cycle.[64]

Nevertheless, the complex regulatory and institutional regimes of ASEAN, as it follows an informal legalism with no legal superstructures, can disrupt the consumer protection laws' effectiveness, and it can be very challenging for consumer protection in ASEAN. Hence, relying on the regional commitment of the ASEAN Community, ASEAN has strategically positioned the protection of the consumer in the AEC Blueprint and affirmed it during the 39th Meeting of ASEAN Economic Ministers in 2007, stating *inter alia* that:

"Given the significant progress achieved in the integration of ASEAN toward a "people-centered" community, the Ministers agreed that it is time to promote regional cooperation initiatives that would provide ASEAN consumers with a high level of protection. As such, the Ministers endorsed the establishment of the ASEAN Coordinating Committee on Consumer Protection."[65]

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[58] See Review of E-commerce Legislation Harmonization in the Association of Southeast Asian Nations – *Executive Summary, and Introduction*, UNCTAD, 2013, p. ix.

[59] Ibid. pp. iv and 1.

[60] Preamble, ASEAN Agreement on Electronic Commerce (2018); and *See also* Towards an ASEAN Agreement on Electronic Commerce, UNCTAD, Geneva, Switzerland, (2018). https://unctad.org/en/pages/MeetingDetails.aspx?meetingid=1730 (10 December 2019).

[61] See generally: Press-release: *Factsheet on ASEAN Agreement on Electronic Commerce*, MTI Singapore, 12 November 2018.

[62] For more information about the ASEAN Agreement on e-Commerce, see http://agreement.asean.org/search.html?q=electronic+commerce (02 April 2020).

[63] http://agreement.asean.org/agreement/detail/368.html (02 April 2020).

[64] ASEAN Secretariat 2018, p. 12-13.

[65] The Thirty-Ninth ASEAN Economic Ministers' (AEM) Meeting, Makati City, Philippines, 24 August 2007. Online https://asean.org/?static_post=the-thirty-ninth-asean-economic-ministers-aem-meeting-makati-city-philippines-24-august-2007 (12 December 2019); *See also* Brief Policy "ASEAN Consumer Protection: Essential actions towards a single market", ACCP, 15 June 2011, p. 2.

By the above affirmation, the ASEAN Committee on Consumer Protection (ACCP) was established. The ACCP has a role to ensure all AMS adopt their consumer protection measures, policies, laws, and regulations; and to ensure the enhancement of formation access by consumers, mechanisms establishment for consumer dispute resolution and product recalls, and the strengthening of institutional capacity.[66] Up to date, nine out of ten AMS have laws consumer protection[67], while Cambodia is working on drafting consumer protection law and it is expected to be passed by the end of 2019.[68] The ACCP consists of consumer protection agencies representatives of all AMS.[69] It serves as the central point of ASEAN for implementing and monitoring regional mechanisms and arrangements to enhance consumer protection in the region.

And by recognizing the importance of consumer protection for supporting an efficient, effective, modern, and fair marketplace, ASEAN continues to frame effective protection of the consumer in its ASEAN Economic Community Blueprint 2025 (the AEC Blueprint 2025). The AEC Blueprint 2025 lays down Strategic measures including:

"a) Establish a common ASEAN consumer protection framework through higher levels of consumer protection legislation, improve enforcement and monitoring of consumer protection legislation, and make available redress mechanisms, including alternative dispute resolution mechanisms; b) Promote a higher level of consumer empowerment and knowledge by addressing consumer concerns as well as enhancing consumer knowledge and advocacy; c) Build higher consumer confidence and cross-border commercial transactions by strengthening product safety enforcement, stronger participation of consumer representatives, and promotion of sustainable consumption; d) Encourage consumer-related matters in ASEAN policies through impact assessment of consumer protection policies and development of knowledge-based policies; and e) Promote consumer protection measures in products and services sectors such as finance, e-Commerce, air transport, energy, and telecommunications."[70]

To achieve the strategic measures under the AEC Blueprint 2025, the ASEAN Strategic Action Plan on Consumer Protection 2025 (ASAPCP) was adopted on 14 October 2016.[71] The purposes of the ASAPCP are to develop a common framework of consumer protection in ASEAN through modernized legislation, promoting higher levels of consumer confidence and consumer empowerment, and taking into account e-commerce trends.[72] The ASAPCP sets out a consumer policy strategy for ASEAN for the years 2016-2025, its implementation is overseen by the ACCP in collaboration with other sectoral bodies of ASEAN and relevant stakeholders.[73] This initiative intends to provide protection and fair treatment to ASEAN consumers, lower gaps in the consumer protection implementation within ASEAN, strengthen the technical capacities of ASEAN officials, and enable ASEAN to integrate concerns of consumers into all other policies of ASEAN and at the same time

[66] https://www.aseanconsumer.org/cterms-regional-cooperation-in-asean/asean-committee-on-consumer-protection-accp (10 December 2019); and See also the ASEAN Secretariat, *Handbook on ASEAN Consumer Protection Laws and Regulations*, June 2018, p. 13.
[67] ASEAN Secretariat 2018, pp. 19-55.
[68] C. Vannak, *Consumer Protection Law to pass this year*, Khmer Times, May 3, 2019. https://www.khmertimeskh.com/50600269/consumer-protection-law-to-pass-this-year/ (11 December 2019).
[69] https://www.aseanconsumer.org/file/pdf_file/List%20of%20ACCP%20Leads%20(ACCP%20Website)%20-%204May18.pdf (12 December 2019)
[70] ASEAN Economic Community Blueprint 2025, Jakarta: ASEAN Secretariat, November 2015, Section B.2, pp. 13-14.
[71] https://aseanconsumer.org/read-publication-asean-strategic-action-plan-for-consumer-protection-asapcp-2025 (18 December 2019).
[72] ASEAN Secretariat 2018, Foreword, p. v.
[73] See generally the ASEAN Strategic Action Plan for Consumer Protection (ASAPCP) 2016- 2025: Meeting the Challenges of a People-Centered ASEAN Beyond 2015.

achieving the highest benefits for consumers and business in the AEC.

2. The Online Dispute Resolution System of ASEAN

ASEAN considers consumer protection as an important driving force for the smooth functioning of an integrated market. With the growth of e-commerce, there are likely increasing online consumer transactions in ASEAN, especially cross-border transactions. Consumers and sellers would be able to enjoy substantial benefit if cross-border transactions within the ASEAN were facilitated by harmonized laws and regulations, and where online disputes can be settled by simple, fast, and low-cost methods.[74] Based on this recognition, ASEAN established a working group for ensuring that legislation on consumer protection of AMS is in place. It further developed a dispute resolution mechanism, particularly an online dispute resolution system, in order to increase online consumer confidence and facilitate e-commerce growth in the region.

2.2. ASEAN Online Dispute Resolution Framework

Similar to the start of the EU consumer ADR policy, the ASEAN policymakers and regulators currently address consumer dispute resolution through non-binding standards requiring AMS to encourage or ensure access to out-of-court redress mechanisms.

In 2015, ASEAN launched the ASEAN Economic Community (AEC), which become a major milestone in regional economic integration. The AEC has been guided by the AEC Blueprint 2025 adopted by ASEAN Leaders on 22 November 2015 at their 27th ASEAN Summit.[75] The AEC Blueprint 2025 recognizes e-commerce growth as a significant segment in supporting regional economic integration. It highlights the development of a regional legal framework for online dispute resolution (ODR) for facilitating e-commerce transactions in ASEAN.[76] The AEC Blueprint 2025 thus calls for action to adopt an agreement on e-commerce, including strategic measures as follows:

" a) Harmonised consumer rights and protection laws; b) Harmonised legal framework for online dispute resolution, taking into account available international standards; c) Inter-operable, mutually recognised, secure, reliable and user-friendly e-identification and authorisation (electronic signature) schemes; and d) Coherent and comprehensive framework for personal data protection."[77]

To implement the strategies related to online dispute resolution under the AEC Blueprint 2025, the ASEAN Strategic Action Plan for Consumer Protection (ASAPCP) 2025 was adopted upon work on consumer protection of the ASEAN Committee on Consumer Protection (ACCP).[78] The ASAPCP has set the Online Dispute Resolution mechanism of ASEAN in its Strategic Goal 3, where the high consumer confidence and cross-border commercial transactions shall be instituted, and an ap-

[74] The ASEAN Secretariat, *Consumer Protection Digests and Case Studies: A Policy Guide* (Volume 1), November 2014, p. 140.
[75] https://asean.org/asean-economic-community/ (3 January 2020).
[76] V. Chen & A. Godwin, & I. Ramsay, *ASEAN Framework for Cross-Border Cooperation in Financial Consumer Dispute Resolution*, Asian Journal of Comparative Law, Vol. 12, No. 1, July 2017, pp. 167-196 and pp. 22-23; see further ASEAN Economic Community Blueprint 2025, paras. 52-53.
[77] ASEAN Economic Community Blueprint 2025, para. 53.
[78] https://aseanconsumer.org/read-publication-asean-strategic-action-plan-for-consumer-protection-asapcp-2025 (3 January 2020).

propriate regulatory framework and enforcement measures shall be ensured. The goal provides that an ASEAN Regional Online Dispute Resolution (ODR) Network shall be established, including:

a) National ODR systems;

b) ASEAN ODR network; and

c) ASEAN mechanism for cross-border complaints and investigations.[79]

This initiative is an important performance of ASEAN for identifying regulatory gaps for the responsive and effective framework of consumer protection in the region and enhance consumer confidence and trust within the ASEAN markets. It would help ASEAN to have appropriate and effective dispute resolution mechanisms in place taking into account technology developments and in accordance with international norms and standards for facilitating e-commerce and protecting online consumers in the region.

2.3. ASEAN Online Dispute Resolution System and Way Forward

ASEAN aims to become a people-oriented and people-centred community and to develop a dynamic economy. As such, it recognizes the importance of consumer protection for increasing confidence for consumers in order to support the development of its single market. Hence, ASEAN included ADR and ODR mechanism as one of the important elements of the ASEAN Work Programme on e-Commerce 2017-2025,[80] which was further supported by the ASAPCP into specific initiatives and activities in consistence with the AEC Blueprint 2025.

Based on goal 3 of the ASAPCP, the ASEAN Online Dispute Resolution scheme would have a structure consisting of three elements: National ODR systems, ASEAN ODR network, and ASEAN mechanism for cross-border complaints and investigations.[81]

2.3.1. National ODR Systems

According to the ASAPCP, by the year 2020, each ASEAN Member State shall create its national Online Dispute Resolution System in order to serve as the platform providing mediation service for e-commerce transactions. The objectives of the national ODR system are to strengthen accessibility to consumer redress; provide a low cost, simple, and fast method for dispute resolution; and increase trust and confidence for consumer in e-commerce transactions.[82] The national ODR system should at least comprise the following elements for an effective consumer redress:

"a) It must be applicable for all types of transactions, be it done online or offline. An OADR system may be web-based but it should not discriminate on B2C transactions with a brick and mortar business, or online business; b) It should enable a three-way communication between the consumer complainant, business establishment, and mediator since OADR involves the conduct

[79] Ibid.
[80] See https://asean.org/asean-economic-community/sectoral-bodies-under-the-purview-of-aem/e-commerce/ (5 January 2020).
[81] Ibid.
[82] IGE Consumer, Establishment of the National Online Alternative Dispute Resolution System in the Philippines – 2017-2020 Work Plan, 3rd SESSION, 9-10 July 2018, Room XVII, Palais des Nations, Geneva, 10 July 2018, p. 3.

of mediation conferences via online; c) It must be user-friendly. Common understanding of its use, purpose, processes, and terminologies must be ensured among the consumers, businesses, and government; and d) It must be accessible, fair, independent, transparent, effective, and timely in facilitating redress for consume." [83]

The ASAPCP lays down reference material for AMS to develop their own action plan and establish an online dispute resolution system in line with ASAPCP recommendations.[84] Similar to the EU ODR system, the ODR body of each AMS may have its own rules and procedures. However, from an existing ODR system of Thailand,[85] it is possible to envisage that the national ODR system of ASEAN could consist of fundamental procedures as followings:

a) Consumer files complaints and the proposed solution to ODR body;

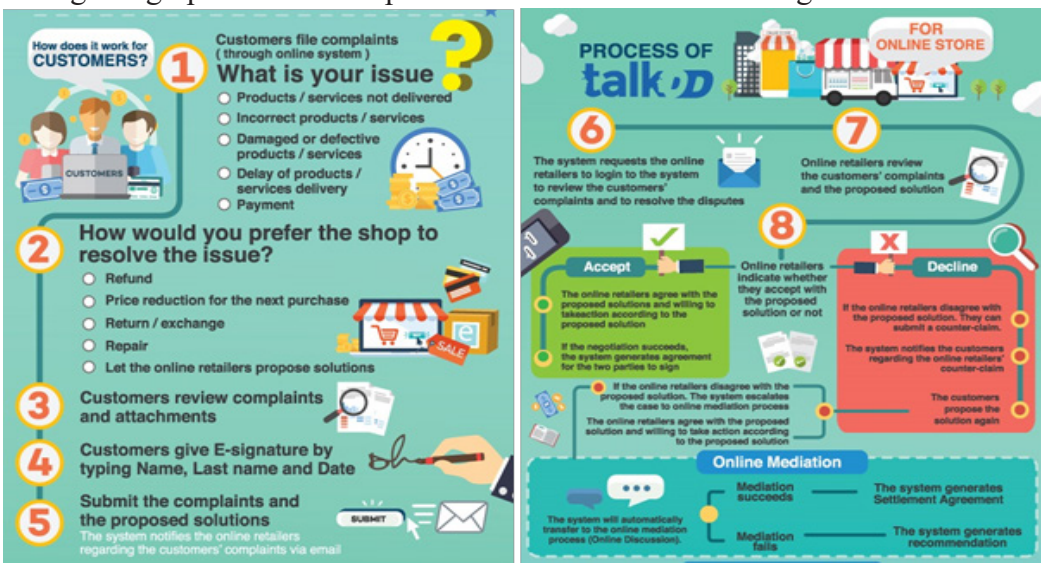
b) The ODR body contacts the trader to review the complaint and proposed resolution;

c) The trader reviews the complaint and indicates whether or not accept the proposed solution;

d) If the trader accepts the proposed solution, the ODR body produces an agreement for the parties to sign. If the trader declines the proposed solution, the ODR system will automatically transfer to the online mediation process; and

e) If the mediation succeeds, the ODR body generates the settlement agreement. If the mediation fails, the ODR body generates a recommendation for the parties.

The following infographic shows the procedures of Thailand's existing ODR:



(Source: TalkDD, 2019)

[83] Intergovernmental Group of Experts on Consumer Law and Policy, Establishment of the National Online Alternative Dispute Resolution System in the Philippines – 2017-2020 Work Plan, 3rd SESSION, 9-10 July 2018, Room XVII, Palais des Nations, Geneva, 10 July 2018, pp. 6-7. https://unctad.org/meetings/en/Contribution/cicplp3rd_c_dti_drr_en.pdf (2 April 2020).

[84] ASEAN – Australia Development Cooperation Program – Phase II, Study on AADCP II Influence on Consumer Protection Policy in Select ASEAN Member States, The ASEAN Secretariat, May 2018, p. 14.

[85] https://talkdd.com/en/about-us (2 April 2020).

2.3.2. ASEAN ODR Network

To support and facilitate further development of the ODR system, ASEAN has already put the ASEAN ODR network as the second element of the ASEAN ODR Scheme underway. The ASEAN ODR network should compose authorities from all AMS, and upon the completion of the network establishment by 2025, the network may include the following strategies:

a) To co-ordinate and co-operate on ODR procedure and enforcement matters.

b) To share information and intelligence on ODR trends and challenges.

c) To share best practice information about key relevant laws, enforcement powers, and regulatory approaches to ODR.

Members may meet annually to discuss key ODR issues from a global perspective, exchanging their experience regarding enforcement and relevant challenges. The member may present different projects and take decisions for new initiatives and follow-up action. The meeting would also serve to strengthen the network's cohesiveness and foster better contacts between members.

2.3.3. ASEAN Cross-border Complaints and Investigations

The ASEAN Cross-border Complaints and Investigations is the third element of the ASEAN ODR Scheme. The objective is to provide a channel or facility for ASEAN consumers to complain or claim for any loss over a purchase of any goods or services in a less cumbersome, speed manner, and at a minimal cost.[86]

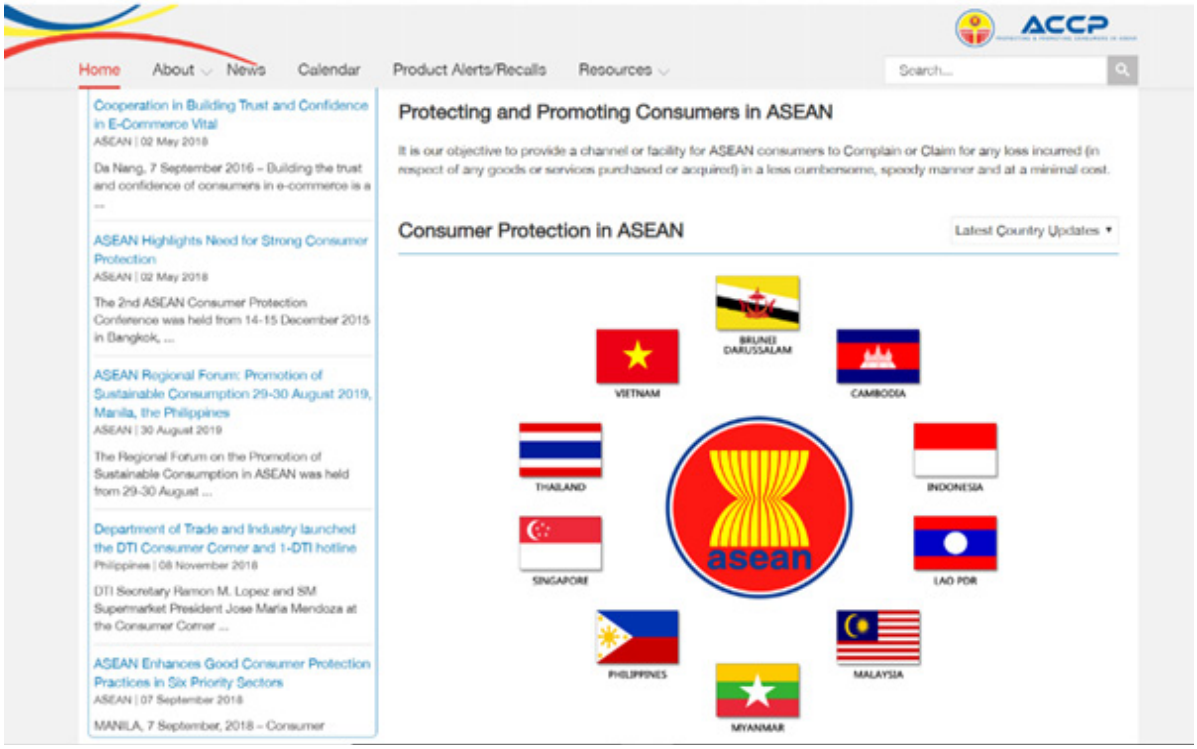
In 2012, ASEAN launched the ASEAN Consumer Protection website (www.aseanconsumer.org), which serves as the major reference point for consumer protection in ASEAN including the information provision on:

"a) AMS focal points for handling cross-border complaints; b) notifications on recalled/banned products; c) consumer protection legislation of AMS; and d) other information such as publications and workshop materials."[87]

The website has become operational for cross-border consumer complaints[88] and currently plays an important role for cross-border consumer complaints in ASEAN. However, in my view ASEAN should further consider an effective body, as it still lacks an appropriate implementation mechanism and remains long process for cross-border complains through this operational website. Hence, ASEAN may also provide research support and training in very practical areas of consumer agency design, governance, and operations, and ensure user-friendly and effective process and strengthen implementation of ASEAN Cross-border Complaints and Investigations in order to promotes the website and facilitate cross-border consumer dispute resolution with a low-cost, simple, and fast method.

[86] https://aseanconsumer.org/ (2 April 2020).
[87] https://asean.org/archive/the-asean-committee-on-consumer-protection-accp/ (2 April 2020).
[88] A. Asher & W. Dee & J. T. D. Wood, *Models for Internal Complaint Systems and External Consumer Redress Schemes in ASEAN*, ASEAN Complaint and Redress Mechanism Models, December 2013, Australian Aids – ASEAN, pp. 53-54.

The following picture shows the channel for cross-border consumer complaints in ASEAN, where consumers can select a country to claim or complain by selecting the relevant country flag and file a complaint through the focal point of relevant country.



(Source: ACCP, 2019)

The present major effort at the regional level to address the consumer protection is the ASAPCP. The ASAPCP is an implementation of ASEAN policy regarding consumer protection which has focused on information-sharing between regulators. Nevertheless, it includes more ambitious aims such as establishing a cross-border dispute resolution system, particularly the online dispute resolution mechanism, and a quick alert system on product safety.[89]

3. Summary and concluding remarks

Disputes arising from e-commerce are usually difficult to deal with, and that is especially true for disputes arising from cross-border and low-value e-commerce transactions. Hence, it is necessary to have an appropriate resolution mechanism to handle and resolve these disputes in this era of the digital world.

The UNCITRAL introduced an ODR process model for resolving disputes arising from cross-border, low-value electronic transactions concerning B2B or B2C via its non-binding documents, presenting a package model for the ODR system in three stages: negotiation, facilitated settlement, and arbitration. However, the UNCITRAL, as a major international economic and regulatory organization, should further consider and work on a comprehensive legal framework on ODR in order to handle and facilitate e-commerce growth worldwide.

At the same time, the EU, as one of the international economic actors, has developed its ODR

[89] *The Digital Economy in Southeast Asia: Strengthening the Foundations for Future Growth*. Information and Communications for Development. World Bank, Washington, D.C., 2019. p. 96.

system for facilitating cross-border e-commerce growth and consumer protection in the EU. It adopted a comprehensive legal framework at the EU level with an endeavour to strengthen the ADR/ODR system in the EU and to enable accessible and efficient out-of-court dispute resolution mechanisms for consumer disputes. The EU launched its ODR platform, offering a single point of entry to consumers and traders seeking a dispute resolution mechanism to resolve disputes arising from both domestic and cross-border online transactions. However, the EU ODR platform remains low participation of traders in the platform. Most of the disputes submitted to the ODR platform were closed automatically due to no response from the trader, which is still a big challenge for the EU ODR scheme.

Similarly, ASEAN considers e-commerce and consumer protection as an important driving force economic and social integration process, and for the smooth functioning of an integrated market. Hence, it has included consumer protection to a central place in its regional policy-making agenda leading to develop an online dispute resolution mechanism to build ASEAN citizens' confidence in domestic and cross-border transactions. ASEAN address the online dispute resolution through non-binding standards, which its online dispute resolution mechanism was highlighted by the AEC Blueprint 2025 and was further supported into specific initiatives and activities by the ASAPCP 2025.

According to the ASAPCP, the ASEAN ODR Scheme consists of three elements: the National ODR system, the ASEAN ODR Network, and ASEAN Cross-border Complaints and Investigations. The National ODR system and ASEAN ODR Network are underway, in which the National ODR system expects to complete by 2020 and the ASEAN ODR Network in 2025. And at the moment, ASEAN has a website that serves as the major reference point for consumer protection in ASEAN, including AMS focal points for handling cross-border complaints, and serves as a primary channel or facility for ASEAN consumers to complain or claim across borders. However, ASEAN should further consider the website to offer a single point of entry with register qualified dispute resolution bodies to consumers and traders so that the parties can choose a dispute resolution body for resolving their dispute online through the website.

Furthermore, ASEAN does not have any legal superstructure to establish a unified regime that could support its ODR initiatives. ASEAN legal regime depends upon harmonizing the Member Countries' national laws into the regional legal system by respecting cultural sensitivities and national sovereignty. The complex institutional and regulatory regimes can undermine regional ODR implementation and enforcement matters. Hence, in order to establish and implement an effective ODR system in ASEAN, ASEAN will require a clear and comprehensive regulatory framework, including in the areas of consumer protection laws and ADR laws.

To this end, upon the completion of the initiatives on online dispute resolution system of ASEAN, the results will allow access for a broader consumer base, offer a low cost, fast and simple method for resolving consumer disputes, and increase consumer confidence in online transactions in the region. ASEAN's ODR initiatives would only be able to advance as soon as all AMS themselves establish their own national online dispute resolution systems, which would be of utmost importance.

Behind the Efficiency of Joint Investigation Teams[1]

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This article deals with the Joint Investigation Teams (JITs) which may be established by the Member States of the European Union. It is one of the procedural legal instruments used by Member States in the field of police and judicial cooperation in criminal matters. The subject of the article goes beyond the dogmatic evaluation of the JIT and a new perspective is introduced, as after 2010 the JIT has been increasingly used by the competent law enforcement authorities of the Member States. For this reason, the article does not deal with the earlier problems of the legal instrument, which have already been studied significantly, but examines what makes it effective. The focus of the research will be on the related activities of Europol and Eurojust. Eurojust carries out important mediation tasks, thus facilitating contacts with the competent authorities of the Member States and ensuring their continuous personal contact. It also provides legal advice during the joint investigation and helps to avoid conflicts of jurisdiction. Europol, on the other hand, participates in the work of the investigation team as a service provider, which is demonstrated by the fact that it can be called upon to carry out certain investigative acts. The Europol Information System also plays an important role, since it enables competent authorities to cross-check crimes committed in multiple Member State and find out that their perpetrators are the same. Finally, the article provides practical examples of the activities carried out by Europol and Eurojust, followed by an evaluation of the importance of the work performed by these agencies in JITs.

Keywords: criminal law, European Union, criminal cooperation, joint investigation team, European criminal law, criminal procedural law, evidence, criminal legal assistance, Eurojust, Europol, investigation

1. Introduction

The need for a legal instrument regarding Joint Investigation Teams (hereinafter referred to as "JIT" or "investigation team") has already existed in the rather rudimentary state of criminal justice and police cooperation in the EU at the time of the Treaty of Amsterdam. Yet, despite major political support behind its adoption,[2] it was not a prominent tool for criminal cooperation between Member States in the decade of its creation. This is illustrated by the fact that the legal instrument created by the Convention on Mutual Legal Assistance in Criminal Matters in 2000 (from here on referred to as MLA) was only used 70 times until 2010. This figure is negligible compared to the number of

[1] The article was supported by the Kriszbacher Ildikó Ösztöndíj, a research fund granted by the University of Pécs in 2019.

[2] A vast number of strategic EU documents have supported the legal instrument (*e.g.* the 1997 Council Action Plan on Organized Crime, the Tampere Program and the Vienna Action Plan). See L. Block: *EU joint investigation teams: Political ambitions and police practices*, in S. Hufnagel & S. Bronit & C. Harfield (Eds.), Cross-Border Law Enforcement. Regional Law Enforcement Cooperation – European. Australian and Asia-Pacific Perspectives, Routledge, London, 2011, pp. 90-91.

criminal proceedings having transnational elements in the same period.[3] As for Hungary: it was in 2011 when Hungarian law enforcement authorities were first involved in a joint investigation team. According to relevant legal literature, one of the reasons why the JIT was not able to meet the initial expectations was that the competent authorities did not yet have sufficient practical knowledge of the application of joint investigation teams in combating transnational crime at the time of the introduction of the tool.[4]

However, since 2010, JIT is gaining ground. The JITs Network, in its 2016 and 2018 evaluations, has been able to examine 74 JITs that have already been closed based on feedback from Member States. The study concerned JIT evaluations received between 2014 and 2017.[5] Thus, in a much shorter reference period, the same number of JITs as between 2000-2010 was achieved. This gives us an idea of the increasing use by Member States of this legal instrument. In addition, the annual reports of Europol and Eurojust show that the number of JITs is increasing, with hundreds of cases being reported each year.[6] At the same time, by 2017, the number of investigation teams in which Hungarian authorities were involved increased to 12.[7]

Due to the boom in the use of JITs, in their evaluation of I will not focus on what was the cause of its initial problems, as it has been addressed by numerous studies, but rather on the current practice of a well evolved tool. I will also examine what added values a JIT can provide in joint investigations conducted by the competent law enforcement authorities of Member States. The intended novelty of the research is that I will approach the practice of JITs through the activities of Eurojust and Europol with an outlook to the Hungarian procedural rules in order to make understanding the procedural aspects of JITs easier.

2. Joint Investigation Team as a Legal Instrument of Criminal Justice Cooperation of Member States

A joint investigation team may be set up by an agreement of the competent authorities of Member States in order to conduct investigations in one or more Member States. A JIT may be set up in cases when a Member State has to carry out complex and costly investigations involving another Member State in the course of a criminal investigation or when several Member States conduct criminal investigations in order to explore crimes committed in a manner that makes it necessary

[3] In contrast, thanks to the activities of Europol liaison officers there had been 10.487 criminal procedures in 2009, and 13.000 criminal procedures in 2010 which had a cross-border element. See L. Block, *Joint Investigation Teams: The Panacea for Fighting Organised Crime?* European Consortium for Political Research Annual Conference 2011, p. 2.

[4] The regulation of the newly created legal instrument has given Member States a wide margin of appreciation in terms of group structure and organization, leading to conflicting practices in some Member States which have made cooperation less viable. For example, there was no decisive practice in the early years of where JIT's "headquarters" would be. The legislation does not regulate this aspect, but merely state that its actions are governed by the criminal law of Member State in which territory the JIT is predominantly active. Because of this uncertainty, the Dutch position viewed the JIT as a single team with a single leader, whereas the French and Spanish positions were that members of the authority of another participating Member State formed a quasi-autonomous group with its own leader. See Block 2008, pp. 79-80.

[5] Concluded JITs are evaluated by the parties participating in the investigation team after the termination of the group, in order to further improve the regulatory environment of the JITs. See: http://www.eurojust.europa.eu/doclibrary/JITs/Pages/JIT-evaluation.aspx (8 August 2019).

[6] Eurojust Annual Report 2018, p. 2. http://eurojust.europa.eu/doclibrary/corporate/eurojust%20Annual%20Reports/Annual%20Report%202018/AR2018_EN.pdf (5 August 2019).

[7] T. Berzsenyi & T. Tirts, *Közös Európai Nyomozócsoportok a Készenléti Rendőrség Nemzeti Nyomozó Iroda Gyakorlatában*, in Szent Lászlótól a Modernkori Rendészettudományig, Pécsi Határőr Tudományos Közlemények 2017, p. 175.

for them to take coordinated actions.[8] Thus, according to the normative text, the purpose of the JIT is to have the competent investigative authority of several Member States involved in an investigation, which may be of particular use when the investigation takes place in the territory of several Member States.[9] However, it is clear that the Convention provides a considerable margin of discretion as to when the competent authorities may set up a joint investigation team. For this reason, other sources of law and various manuals refine the cases where it is advisable to create one.

The EU Handbook on Joint Investigation Teams refines this broad discretion by introducing practical aspects to be evaluated. According to the handbook the complexity and sophistication of the criminal organization and criminal activities under investigation, the number and complexity of the investigative actions to be carried out in the States concerned and the extent to which the States concerned are linked by the investigation shall be considered when setting up an investigation team.[10]

Currently, in the Hungarian national law, the Act on Criminal Cooperation with Member States of the European Union (Act CLXXX of 2012, hereinafter referred to as the Act on Criminal Cooperation with Member States) regulates procedural issues related to the establishment and operation of a JIT, including when to create such a group. The law makes it possible to initiate the setting up of a joint investigation team when investigating a crime involving more than one Member State is particularly difficult and where several Member States are prosecuting a crime and therefore the multiple procedures need to be coordinated. In particular, the offense may be considered as transboundary if:

1. it has been committed in two or more Member States;
2. it has been committed in one Member State but a significant part of preparation, management or conduct in relation to it is carried out in another Member State;
3. it has been committed in one Member State but the involvement of a criminal organization carrying out criminal activities in more than one Member State can be established;
4. or it has been committed in one Member State but the social or economic order of another Member State is also violated or threatened.[11]

The EU Handbook underlines that JITs are most useful in avoiding traditional channels for mutual legal assistance in cooperation between investigative authorities of multiple Member States. This enables these groups to collect and exchange information and evidence directly.[12] Moreover, not only members of the investigating authority of the Member State conducting the investigation may be present at proceedings during the investigation, but also the so-called seconded members participating in the JIT who are representing the competent authorities of another Member State. For this reason, the investigation team primarily facilitates the co-ordination of investigations and prosecutions in several states at the same time.[13] For example, if there is a pending criminal procedure against a Hungarian citizen based on the personal scope of the Hungarian Criminal Code due to the reasonable suspicion of him or her having committed a crime in another Member State, both the place of the offense and the place of residence of the victims are in another Member State. However, it can be assumed that some of the preparations for the crime were carried out in Hungary. The Hungarian authorities cannot conduct investigations in the territory of another Member State,

[8] Act CXVI of 2005. Art. 13. para. 1.
[9] T. Jávorszki, *Joint Investigation Teams as a Specific Form of Mutual Assistance*, Studia Iuridica Auctoritate Universitatis Pécs Publicata 2013, p. 47.
[10] EU Handbook on Joint Investigation Teams, p. 7.
[11] Act CLXXX of 2012. Art. 70/B. paras. 1-2.
[12] C. Rijken, *Joint Investigation Teams: Principles, Practice, and Problems - Lessons Learnt from the First Efforts to Establish a JIT*, Utrecht Law Review, Vol. 2, No. 2, 2006, p. 103.
[13] EU Handbook on Joint Investigation Teams, p. 4.

nor can the investigative authorities of other Member States do so in Hungary, so the competent authorities of both Member States would refer to letters rogatory to investigate the crime and its preparations.

Investigation teams may be set up by agreement between the competent authorities of the Member States for a specific purpose and for a limited period of time, though it may be extended if necessary.[14] The group will be chaired by a representative of the competent authority of the Member State that initiated the group.[15] Its activities will be governed by the law of the Member State in which territory it is conducting the investigation. Seconded members of the team – from the authorities of other Member States - may also be present during the proceedings. Finally, the Convention allows persons who are not representatives of the competent authorities of the Member States setting up the group to participate in the activities of the group. Such persons may include, for example, officials of bodies set up under the provisions of the Treaty on European Union, in particular Eurojust and Europol. However, the procedural rights of members of the group and of their seconded members shall not apply to them unless expressly provided for in the agreement.[16]

Earlier in Hungary, the 31/2004. (BK 21.) BM-PM Joint Order transferred the decision to set up the team to the deputy Director of the competent police authority, responsible for criminal investigations.[17] However, at present the Prosecutor General's Order on the Organization and Operation of the Prosecutor's Office refers the decision to set up and operate a Joint Investigation Team to the Department of Specialized, Corruption and Organized Crime.[18]

In summary, the JIT provides significant progress in international law enforcement compared to traditional letters rogatory and parallel proceedings, which are mostly realized through international letters of request (ILOR).[19] Compared to traditional means of cooperation, it is an innovation that seconded members of the investigation team, *e.g.* authorities from other Member States, can take part in the proceedings. It is also possible for seconded members to ask the competent authority of their Member State to carry out procedural actions in their own territory thus further enhancing the original investigation. This means that communication is simplified and there is no need for further legal assistance in order to use the result of the action of the requested authority as evidence. In addition, a significant innovation is that evidence collected during the activities of the investigation team can be used in related proceedings in all participating Member States, provided that the data can be used as evidence under the law of Member State where the team is operating.[20] Last but not least, the efficiency of the cooperation of the authorities participating in the investigation team is greatly enhanced by the activities of Eurojust and Europol.

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[14] The ad hoc agreement setting up the investigation team shall regulate in detail the activities of the investigation team. Thus, the agreement has a number of mandatory elements. The document shall include a description of the crime for which the JIT is to be established, the scope of the JIT, its composition, its leader, the duration of the joint investigation and the conditions for extension. The agreement also decides on the rights and obligations of a member of the joint investigation team and the conduct of proceedings and last but not least the means of transferring evidence. See Act CLXXX of 2012. Art. 70/C. para 2.

[15] According to the Act on Criminal Cooperation with Member States, the Hungarian prosecutor is entitled to lead the team – see Act CLXXX of 2012. Art. 70/C. para. 3.

[16] Act CXVI of 2005. Art. 13. para. 3, 12.

[17] See Order 12/2012. (VI. 8.) of the General Prosecutor on the organisation and functioning of the prosecutor's office in Hungary; for the previous situation see Joint Order 31/2004. (BK 21.) BM-PM. (These acts are only available in Hungarian.)

[18] This was ordered by the Attorney General on the basis of a mandate from the Act on Criminal Cooperation with Member States since it stipulates that a JIT may be established with the consent of the Attorney General or a prosecutor designated by him. See Act CLXXX of 2012. Art. 70/C. para. 1.

[19] Block 2011, p. 93.

[20] Block 2011, p. 89.

3. The functions of Europol and Eurojust in JITs

The European Union Agency for Law Enforcement Cooperation (hereinafter referred to as "Europol" or "the Agency") is responsible for supporting and reinforcing the activities of, and mutual cooperation between police forces and other law enforcement services of the Member States in preventing and prosecuting crime and terrorism affecting two or more Member States and crime against the common interests of the European Union. The Treaty on the Functioning of the European Union establishes two main branches of its functions. First, and foremost the agency is responsible for gathering, storing, processing, analyzing and exchanging information provided by the authorities of the Member States or third countries or other international organizations outside the EU. Another important task of Europol is the coordination, organization and conduct of investigative and operational activities with the competent authorities of the Member States.[21] The agency has been ultimately established to improve cooperation between law enforcement authorities of Member States and to cooperate directly with them in the prevention and detection of such crimes.[22]

The European Union Agency for Criminal Justice Cooperation (hereinafter referred to as "Eurojust" or "the organization") aims to promote and improve coordination between the competent judicial authorities of Member States in investigations and prosecutions involving at least two EU Member States,[23] in particular through assisting international mutual legal assistance and the application of European Arrest Warrant.[24] Another important task of the organization is to assist in resolving conflicts of competence between competent authorities of two or more Member States.[25]

So both agencies are tasked with supporting the competent law enforcement authorities of the Member States (for example the police and the prosecution) in their activities, thus increasing their efficiency almost exclusively in cases when offenses involve at least two Member States.[26] Their activities regarding facilitating coordination between authorities of Member States can be divided into two parts: strategic and operational cooperation. Strategic aspects of criminal judicial cooperation include the development of crime prevention and law enforcement techniques, strategic communication with the competent authorities of the Member States and maintaining information systems.[27] Operational tasks of the agencies include supporting criminal cooperation between two

[21] Treaty on the Functioning of the European Union, Art. 88. paras. 1-2.
[22] It started functioning in 1999. See M. E. Radu, *The Place and the Role of Europol in EU Architecture,* Cogito – Multidisciplinary Research Journal Vol. 5, No. 2, June 2013, pp. 115-116.
[23] A. Suominen, *The Past, Present and the Future of Eurojust*. Maastricht Journal of European and Comparative Law Vol. 15, No 2, 2008, p. 217.
[24] Á. Mohay & E. Szalayné Sándor, *A szabadságon, a biztonságon és a jog* érvényesülésén *alapuló térség*, in Zs. Horváth & Á. Mohay & A. Pánovics & E. Szalayné Sándor, Európai Közjog 2., PTE ÁJK, Pécs, 2016, p. 198.
[25] A. Weyembergh, *The Development of Eurojust: Potential and Limitations of Article 85 of the TFEU*, New Journal of European Criminal Law, Vol. 2, No. 1, 2011, p. 78.
[26] B. Birzu, *Cooperation between member states and Europol*, Juridical Tribune Vol. 9, No. 1, March 2019, p. 34; M. Luchtman & J. Vervaele, *European Agencies for Criminal Justice and Shared Enforcement (Eurojust and the European Public Prosecutor's Office),* Utrecht Law Review Vol. 10, No. 5, December 2014, p. 137.
[27] The operation of the Europol Information System maintained by Europol may be included in this scope. The importance of the information system has increased since the Member States' law enforcement authorities have direct access to the system. In the past, this required the assistance of the competent Liaison Office. One of the most important tasks of the Liaison Offices is to facilitate the effective collection of relevant criminal information available to the authorities of Member States. See *Interview with lieutenant-colonel Dr. Zsolt Vas, the Director of the Hungarian Europol Liaison Office* (on file with the author). Threat assessments prepared by Europol are also used by the Hungarian law enforcement authorities in the planning of the national law enforcement strategy. Ibid, and see also Z. K. Gyimesi, *B*űnügyi *együttműködés az Európai Unióban, különös tekintettel az Europol rendőrségi együttműködésben betöltött szerepére,* in T. Drinóczi (Ed.), Studia Iuvenum Iurisperitorum: A Pécsi Tudományegyetem Állam- és Jogtudományi Kara hallgatóinak tanulmányai, 2008/4, p. 136.

or more Member States for specific offenses falling within the remit of the organizations. The methods of international criminal cooperation between competent authorities includes JIT as well.

Relationship between the competence of Europol and Eurojust is also important regarding this topic. The organizations settled this in a cooperation agreement concluded in 2010. According to this, Europol is in contact with the law enforcement authorities of the Member States, while Eurojust is in contact with the judicial authorities, in particular the authorities responsible for prosecution.[28] However, it is the role of both organizations to support and strengthen cooperation between the competent authorities in relation to crimes within their remit.[29]

Europol and Eurojust are also permitted to participate in joint investigation teams set up by the competent authorities of Member States.[30] However, the roles of the two organizations are different due to their different organizational structures.

Europol participates in JITs as a service provider. This role covers a very important slice of its activities. It includes the provision of investigative techniques, which cover a great number of activities ranging from analytical-evaluative activities and the examination of objects related to crime to so-called on-the-spot support. In the latter case, the agency's staff is deployed to the crime scene in order to carry out the necessary investigative actions.[31] It is worth pointing out that one of the most widely used analytical services of Europol is the analysis of cellular information in mobile phones, as the agency has its own and recognized pan-European analysis center. These activities are carried out either upon the request of the competent authority of a Member States or during the activities of the investigation team. On the other hand, Europol may also play a role in the establishment of a JIT, since the information system set up by Europol can inform the competent authorities if suspects are being prosecuted in another Member State. This increases the need to set up a JIT as this is one of the typical cases for initiating it. Europol may also provide financial support, however, in a form different from that provided by Eurojust. Until the new Europol regulation entered into force in 2016, Europol was not authorized to provide direct support to investigation teams, but it could organize and provide financial support for coordination meetings and joint operations between participating authorities.[32] Since however the new Europol regulation came into force in 2016[33] Europol is entitled to finance JITs just as Eurojust does.

Eurojust's role is quite different from that of Europol, due to its structure. It does not have professional staff capable of carrying out investigative activities. In contrast, national members and the national experts who assist them are experts in their own national law and in criminal justice cooperation. Thus, the organization is taking a lion's share, among other things, in the process of setting up JITs. This means that Eurojust National Members are involved in JIT discussions from the moment the need arises. Furthermore, the organization even has the opportunity to propose the

[28] Agreement between Eurojust and Europol 2010. Art. 4.

[29] A. Weyembergh & I. Armada & C. Briere, *Competition or Cooperation: State of Play and Future Perspectives on the Relations between Europol, Eurojust and the European Judicial Network,* New Journal of European Criminal Law Vol. 6, No. 2, 2015, p. 261. While Europol assists the Member States' investigative authorities in their investigations, Eurojust primarily coordinates the activities of the Member States' prosecuting authorities in order to prevent possible conflicts of jurisdiction from undermining effective prosecution. See: H. Xanthaki, *Eurojust: Fulfilled or Empty Promises in EU Criminal Law?* European Journal of Law Reform, Vol. 8, No. 2/3, 2006, p. 180.

[30] An evaluation of the investigation teams set up between 2014 and 2017 shows that 91% of the JITs created over three years involved both organizations. See: JITs Network: Second JIT Evaluation Report 2018, p. 38.

[31] Europol: Catalogue of Operational and Strategic Products & Services, pp. 11-18.

[32] JITs Network: First JIT Evaluation Report 2016, p. 24.

[33] Regulation (EU) 2016/794 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and replacing and repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JH, (OJ 2016 L 135/53).

setting up of a JIT. It also provides assistance in the preparation of the agreement establishing the investigation team. The added value of Eurojust's services at this stage is therefore providing a platform for communication on the JIT. This function does not disappear even after the investigation team has been established. As Eurojust has for a long time been exclusively entitled to finance investigation teams, it is still playing a much more important role in coordinating criminal cooperation in the form of JITs.[34] The most important part of this is that it does not only provide funds for the investigation team at a "local" level, but it also covers the costs of coordination meetings both prior and after the establishment of the JIT that significantly increases the effectiveness of the team. Last but not least, Eurojust is present in its original role throughout the proceedings, which is to facilitate communication between the authorities concerned and to prevent potential conflicts of jurisdiction by simply coordinating in which Member State the suspects shall be prosecuted.[35]

In criminal law, conflicts between the jurisdictions may happen when two or more Member States would be entitled to prosecute the same offense. In this case it is necessary to decide in which Member State the proceedings should continue. Ultimately, the Member State which is in a better position in terms of the procedure is generally chosen. By way of illustration, if the vast majority of evidence is available at the scene of the crime, it is worth conducting the proceedings in the respective Member State. However, in the case of an international criminal organization, it is more appropriate to institute criminal proceedings in the country in which the criminal organization operates.

Thus, the roles of the organizations can be clearly distinguished. However, it is not clear at which state of the proceeding Europol and Eurojust enters the investigation team since their respective responsibilities overlap. Moreover, the criminal law of Member States is not the same, so there are many differences regarding the competent authorities in the investigation phase which can directly affect which of these agencies may be contacted.[36] This may result in Europol being the first to be contacted in the course of investigations by the competent authorities in one Member State however the proceeding authority of another Member State may contact Eurojust in the first place.[37] This makes it difficult for a secondary legal act to correctly distinguish between the competences of Europol and Eurojust in order to avoid overlaps. As a consequence, cooperation between the two organizations needs to be established which can be best achieved by building institutional relations. This was realized by the agreement between Europol and Eurojust, which was already discussed above. It seems that it was able to resolve this problem in a satisfactory manner.

In summary, Europol is responsible for providing investigative technology, while Eurojust is primarily involved in setting up the JITs, communicating with the competent authorities and coordinating the letters rogatory.[38]

4. JITs in Practice

Today, the JIT has become an effective tool in the fight against cross-border and organized crime

[34] Of the JITs set up in the 2014-2017 period, Eurojust alone was involved in 54%, while Europol was only present in 37% of cases. See: JITs Network: Second JIT Evaluation Report 2018, p. 38.
[35] JITs Network: First JIT Evaluation Report 2016, p. 24.
[36] Weyembergh & Armada & Briere 2015, p. 269. This is evident, for example, in the so-called 'Fortune JIT', where the French proceedings were directed by the special prosecutor's office for organized crime in Nancy, while the Hungarian proceedings were directed by the first instance prosecutor's office in Szeged. See Berzsenyi & Tirts 2017, p. 181.
[37] For example, if only the prosecutor's office is competent to deal with the case, it is clear that the investigating authority will contact Eurojust due to the agreement between the two organizations. However, at an early stage of the procedure where the investigating authority is not the prosecutor's office the opposite can be achieved.
[38] Weyembergh & Armada & Briere 2015, p. 269.

in the European Union.[39] The activities of several JITs were successfully completed in 2019. I will present some of them in order to illustrate the role of the two agencies.

A JIT was established in 2014 between Belgium and Hungary. Its goal was to bring an investigation against an organized crime group that mainly consisted of Hungarian individuals. The crime group committed trafficking in human beings and fostering prostitution. They transported women from Hungary to Belgium, where they were forced into prostitution. On March 13, 2014, the joint investigation team carried out simultaneous procedural actions in Belgium and Hungary in order to arrest suspects in both countries and, at the same time, conducting search of their property in Hungary, including seizure of assets and evidence. During the search, several luxury cars, nearly 10 million HUF in cash, smaller quantities of drugs and jewelry were found and seized. The cooperation of the competent authorities resulted in the arrest of 10 persons participating in the organized crime group.[40]

In another case, a Romanian organized crime group committed crimes. Women were transported to France where they were forced into prostitution. The money gained by this practice was legitimized by various means which constituted the crime of money-laundering. The need for setting up a JIT arisen. It was funded by Eurojust. With the help the organization the French, Romanian, Italian and German authorities cooperated to prosecute the group. Finally, a coordinated operation (in which several countries participated including Hungary) has been carried out under the JIT. It resulted in the seizure of two luxury cars, 14 mobile phones, 18 SIM cards, two computers and jewelry and cash by the authorities. The operation was coordinated by Europol, which resulted in the successful dissolution of the criminal team.[41]

In a British-Lithuanian case, the Europol Information System helped coordinate the criminal proceedings that were ongoing in the UK and Lithuania. An organized crime group made profit by organizing job and accommodation for Lithuanian people in need in the UK. They were accommodated in Derby. However, in exchange for travel, accommodation and employment, they were deprived of the money they worked for. Thus, the group obtained a financial advantage from the income earned through forced labor of the victims. Criminal proceedings were pending with both the British and Lithuanian authorities. When the authorities discovered that the same group of offenders could be involved, a joint investigation team was set up in cooperation with Eurojust to help eliminate the criminal organization. In this case, the authorities had a particularly high number of 14 coordination meetings. One of the major benefits of the JIT was that it facilitated the use of evidence, since the Member States concerned finally agreed to prosecute the perpetrators in the United Kingdom. However, the British legal system sets completely different requirements for the use of evidence. Therefore, without the establishment of a joint investigation team, numerous requests for legal aid would have had to be executed in order for the evidence obtained by the Lithuanian authorities to be used in British criminal proceedings. However, the JIT helped overcome this problem, since the evidence obtained via the investigation team can be used without restriction in all participating Member States.[42]

[39] In 2018, Eurojust participated in 235 JITs. Of this, 150 JITs were set up in earlier years, and 85 investigation teams were established in 2018. Europol also reports on its participation in several successful investigation teams in its 2016-2017 report. See: Eurojust Annual Report 2018, p. 2.; Europol Review 2016-2017 pp. 43. 51. 56.

[40] Hungarian police press release: Prostituáltak kizsákmányolásából éltek luxus életet: http://www.police.hu/hirek-es-informaciok/legfrissebb-hireink/bunugyek/prostitualtak-kizsakmanyolasabol-eltek-luxuseletet (19 January 2020).

[41] Eurojust press release: http://www.eurojust.europa.eu/press/PressReleases/Pages/2019/2019-06-14.aspx (13 August 2019).

[42] Eurojust press release: http://www.eurojust.europa.eu/press/News/News/Pages/2019/2019-07-30_World-Day-against-THB.aspx (13 August 2019).

5. Conclusions

The cases featured in the article illustrate that it is not only a theory that JITs facilitate cooperation between the competent law enforcement authorities of the Member States. Direct communication, face-to-face meetings, the personal presence of seconded members in the investigation and the use of evidence without further actions are all factors that make the prosecution more effective and above all faster.[43] Another benefit of the JIT is that Member States' law enforcement authorities gain valuable experience in cooperating. Thus it can be stated that JITs are one of the most effective forms of sharing best practices among law enforcement authorities.

In the cases, it also appears that without the support of Eurojust and Europol, the application of the legal instrument would not be so widespread today. First of all, setting up a JIT has its own costs: organizing coordination meetings, traveling and accommodation of participants, and the use of interpreters and translators to communicate with members of the group.[44] For this reason, it was necessary that the EU legislator provided support for the operation of JITs over time, as these costs had to be financed by the authorities involved in the JIT. It is therefore no coincidence that, following the acquisition of Eurojust financing powers, Member States were more willing to participate in JITs.[45] The funding was made available to the organization by Council Decision 2009/426/JHA.[46] As a result, the organization funded 5 JITs in 2009 and 29 in 2010.[47] To further enhance the possibility of JITs, even Europol gained financing powers regarding setting up and operating JITs.

The national members of Eurojust shall also assist the competent authorities in contacting the appropriate authority of the Member State concerned. This is extremely important because, as I have already explained, the criminal justice systems of the Member States have different structures. This may result in the requesting party not being able to identify the appropriate authority to contact in order for international cooperation to commence. This in itself can slow down prosecution, not to mention language barriers. Unlike the law enforcement authorities of other Member States, national members are fully aware of the criminal justice system of their own Member State and can thus easily provide guidance to other competent authorities. Conversely, if the requesting party and the requested party are in direct communication, there is a high probability that continuous translation work is needed. This can be avoided by the involvement of the national members of Eurojust who mediate between each other and their own competent authorities, as there are no linguistic barriers between the national members and their own authorities. It shall also facilitate the setting up of joint investigation teams by organizing coordination meetings covering several Member States, as such meetings have preceded the investigation team in all cases examined. These face-to-face meetings are valuable before and during the JIT, partly because it replaces communication by official letters.

Eurojust also provides legal advice in the context of international criminal cooperation between Member States. In this context, the organization has many powers. For example, it can propose the initiation of criminal proceedings and the carrying out of certain investigative actions. Above all, it advises Member States if the conflict of jurisdiction cannot be resolved. Typically, this is not necessary, since close cooperation within the JIT enables Member States to agree on which of them is

[43] Speed and investigations commenced in multiple Member States affected are a sine qua non for the eradication of organized crime.

[44] Eurojust reports in its 2010 report that these were the main costs incurred by JITs when they started financing JITs. See: Eurojust Annual Report 2010, p. 49.

[45] Art. 9f. point 7 of Decision 2009/426/JHA, (OJ 2009 L 138/14).

[46] This act has since been replaced by Regulation 2018/172/EU of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision, (OJ 2018 L 295/138).

[47] Eurojust Annual Report 2009, p. 35. and Eurojust Annual report 2010, p. 49.

to use their criminal justice powers, but more and more often Eurojust will have to act *ex officio* to resolve a conflict of jurisdiction.[48] In practice, this is done through coordination meetings where it is necessary to consider how to gather admissible evidence and which jurisdiction would be better placed to hear the case.[49]

It also appears from the cases examined that, like Eurojust, Europol's role is also crucial in the setting up of JITs, as Member States typically discover through the Europol Information System that the same criminal group is involved in crimes committed in a transnational manner (this was the case in the UK -Lithuanian cooperation, for example). In addition, the Agency has an important role in organizing joint operations (so called Joint Action Days) by competent investigative authorities, which can be critical to the effectiveness of a joint investigation team (a joint operation involving Romanian, French, Italian, German, Hungarian and Slovak authorities illustrated this, during which the authorities seized evidence). Ultimately, Europol therefore contributes to the success of JITs in its classic service provider role.

In summary, the conclusions drawn so far suggest that international criminal cooperation through the JIT would be much less intensive, more difficult and ineffective without the support of Eurojust and Europol. It should also be noted that cooperation between the two EU organizations is a prerequisite for the success of the investigation teams, as neither agency can replace the coordination and service activities of the other. Thus, the quality of the institutional relationship between Europol and Eurojust also plays a very important role in the efficiency of JITs.

[48] This happened three times by 2011. However, as the international criminal cooperation between Member States intensifies, the number of conflicts of jurisdiction seems to be increasing, with 12 requests in 2014 and 34 requests in 2015 asking for help in resolving the conflict. See: Eurojust Annual Report 2011, 21.; Eurojust Annual Report 2015. p. 57.

[49] Eurojust Annual Report 2011, p. 21.

The Dorobantu case and the applicability of the ECHR in the EU legal order

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The applicability of the European Convention on Human Rights in the EU legal order has been a subject of scientific analysis and doctrinal debate ever since the relevance of fundamental rights in the EU legal order was made explicit by the Court of Justice of the European Union (CJEU). The EU not (or at least not yet) being a party to the Convention, the effects of the ECHR in EU law are indirect in nature, serving as a source of inspiration for the general principles of EU law and undoubtedly overlapping with the EU Charter of Fundamental Rights in numerous instances. In a recent judgment relating to the European Arrest Warrant, the CJEU however seemed to introduce a new way of application for ECHR law, one which in the author's view goes beyond the Court's hitherto applied method.

Keywords: autonomy of EU law, ECHR, fundamental rights, European Arrest Warrant, detention conditions

1. Introduction

The EU legal order is generally seen as a *sui generis* supranational legal order, distinct and separate from both international law and national law.[1] Within this legal order, the protection of fundamental rights takes a prominent place. Based on Article 6 TEU, the EU's fundamental rights architecture rests on three pillars: the Charter of Fundamental Rights of the European Union; the EU's accession to the European Convection on Human Rights (ECHR); and the general principles of EU law based on the ECHR and on the common constitutional traditions of the Member States. As is widely known, Opinion 2/13 of the Court of Justice of the European Union deemed the draft agreement on the accession of the EU to the ECHR incompatible with EU primary law.[2] This of course did not affect the role of the ECHR and the jurisprudence of the European Court of Human Rights (ECtHR) as "sources of inspiration" of the general principles of EU law in the case law of the CJEU.[3] In Case C-128/18 Dorobantu however, the CJEU seems to introduce a new way of application for ECHR law, one which arguably goes beyond the Court's hitherto applied method.[4]

[1] This has been stated and upheld by the Court of Justice constantly since the landmark Van Gend en Loos [EU:C:1963:1] and Costa v ENEL [EU:C:1964:66] judgments.

[2] EU:C:2014:2454. For analysis see for example Á. Mohay, *Back to the Drawing Board? Opinion 2/13 of the Court of Justice on the Accession of the EU to the ECHR - Case Note*. Pécs Journal of International and European Law, Vol. 2, No. 1, 2015, pp. 28-36. It is worth noting that the Council of the EU reaffirmed on 8 October 2019 the commitment of the Union to accede to the ECHR where and adopted supplementary negotiating directives which should enable the European Commission to „resume negotiations with the Council of Europe in the near future." https://www.consilium.europa.eu/en/meetings/jha/2019/10/07-08/ (20 January 2020).

[3] See originally Case 4/73 Nold v Commission [EU:C:1975:114] and Case 44/79 Hauer v Rheinland-Pfalz [EU:C:1979:290].

[4] Case C-128/18 Dumitru-Tudor Dorobantu [EU:C:2019:857].

2. Background and the main proceedings

In substantive terms, the *Dorobantu* case revolves around the grounds for refusal of the execution of a European arrest warrant (EAW).[5] In this regard it falls into the line of cases delivered by the CJEU in recent years regarding limits on the execution of EAWs due to fundamental rights and rule of law related concerns. Whereas that aspect undoubtedly deserves attention and analysis as well, this paper focuses not on that facet of the case, but on the CJEU's reliance on and application of the ECHR and ECtHR case law in the EU legal order.

The Dorobantu case concerned the execution of an EAW by a German court (Higher Regional Court, Hamburg). The EAW was issued by a Romanian court in respect of a Romanian citizen, Mr Dorobantu. Dorobantu was being sought by the Romanian authorities for the purposes of conducting a criminal procedure against him. The German court executing the EAW, having regard to the CJEU's *Aranyosi and Căldăraru*[6] judgment, proceeded to assess whether „as regards the detention conditions, there are in the issuing Member State deficiencies, which may be systemic or generalised, or which may affect certain groups of people or certain places of detention, and, second, check whether there are substantial grounds for believing that the person concerned will be exposed to a real risk of inhuman or degrading treatment because of the conditions in which it is intended that that person will be detained in that State."[7]

The German court was of the opinion (based *inter alia* on relevant judgments of the ECtHR) that systemic and generalised deficiencies in detention conditions were indeed discernible in Romania, however, the German court also took into account the information communicated by the issuing Romanian court and the Romanian justice ministry and finally concluded that the surrender of Mr Dorobantu was legal, since detention conditions had been improving in the issuing state, and since some measures had been implemented in order to compensate detainees for the lack of personal space. The court also considered that should the execution of the EAW be refused, the offences committed by Mr Dorobantu would remain unpunished, which would run counter to the efficacy of judicial cooperation in criminal matters.

On the basis of the German court's orders, the surrender of Mr Dorobantu was authorised – the surrender was to take effect once he had served his custodial sentence imposed on him in Germany for other offences committed. When he was released however, Mr Dorobantu lodged a constitutional complaint against the order of the German court at the Federal Constitutional Court of Germany *(Bundesverfassungsgericht).* The Federal Constitutional Court set aside the orders of the Hamburg Regional Court for three reasons: 1) Mr Dorobantu's right to be heard by a court or tribunal established in accordance with the law as enshrined in the German Basic Law had been infringed; 2) the criteria applied by the Hamburg court in its assessment of detention conditions in Romania have not been expressly accepted by the ECtHR as factors capable of compensating for a reduction of the personal space available to detainees; 3) neither the CJEU nor the ECtHR had previously ruled on the relevance of criteria relating to criminal justice cooperation in the EU and to the need to avoid impunity for offenders as factors relevant for deciding on the execution of an EAW. For these reasons the Federal Constitutional Court remitted the case to the Hamburg court.

It was this court that requested a preliminary ruling by the CJEU in order to ascertain the requirements that arise under Article 4 of the EU Charter with respect to detention conditions in the issuing

[5] Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (OJ 2002 L 190).
[6] Joined Cases C-404/15 and C-659/15 PPU Pál Aranyosi and Robert Căldăraru [EU:C:2016:198].
[7] Case C-128/18 Dorobantu, para 21.

Member State and the criteria to be used in assessing whether those requirements have been met, especially in accordance with *Aranyosi and Căldăraru*.

3. The Court's judgment

In its preliminary ruling request, the German court was enquiring about the minimum standards for custodial conditions required under the EU Charter, and about the interpretation of the concept of "real risk" as used by the CJEU in *Aranyosi and Căldăraru*. The Court began by a usual overview and reaffirmation of the EU's fundamental rights system. It underlined further the significance of mutual trust and mutual recognitions in EU justice and home affairs law, and added that exceptional circumstances may require limitations to be placed on these principles, especially in light of *Aranyosi and Căldăraru*, *Minister for Justice and Equality (Deficiencies in the system of justice)*[8], and *Generalstaatsanwaltschaft (Conditions of detention in Hungary)*[9], but only based on precise information. At this point, however, the CJEU encountered a difficulty. The Hamburg court was looking for guidance on how to assess conditions of detention as regards the personal space available to each detainee – but EU law contains no rules on this issue.

Thus the CJEU – in line with what was suggested by the Advocate-General[10] – decided to apply the ECHR to fill this *lacuna*: "On that basis, it must be noted that the Court has relied — having regard the considerations referred to in paragraph 58 of the present judgment, and in the absence, currently, of minimum standards in that respect under EU law — on the case-law of the European Court of Human Rights in relation to Article 3 of the ECHR and, more specifically, on the judgment of 20 October 2016, Muršić v. Croatia."[11] To support this, the CJEU recalled as a preliminary point that "in accordance with the first sentence of Article 52(3) of the Charter, in so far as the right set out in Article 4 of the Charter corresponds to the right guaranteed by Article 3 of the ECHR, its meaning and scope are to be the same as those laid down by the ECHR. In addition, the explanations relating to the Charter make clear, with respect to Article 52(3), that the meaning and the scope of the rights guaranteed by the ECHR are determined not only by the text of the ECHR, but also by the case-law of the European Court of Human Rights and by that of the Court of Justice of the European Union."[12]

In the following, the CJEU conducted an analysis of the necessary minimum space based on *Muršić v. Croatia*[13], supported partly by its own judgment in *Generalstaatsanwaltschaft*, and concluded that Mr Dorobantu should, once surrendered, be detained in a prison regime that would enable him to enjoy significant freedom of movement and also to work, which would limit the time spent in a multi-occupancy cell, and left it to the referring court to verify that information and to assess any other relevant circumstances for the purposes of the analysis it is required to make. As regards the other questions of the referring court, the CJEU held that a real risk of inhuman or degrading treatment cannot be ruled out merely because the person concerned has, in the issuing Member State, access to a legal remedy; it furthermore found that the real risk of inhuman or degrading cannot be weighed "against considerations relating to the efficacy of judicial cooperation in criminal matters

[8] C216/18 PPU *Minister for Justice and Equality (Deficiencies in the system of justice)* [EU:C:2018:586].
[9] C220/18 PPU Generalstaatsanwaltschaft (Conditions of detention in Hungary [EU:C:2018:589].
[10] See Case C-128/18 Dumitru-Tudor Dorobantu. Opinion of Advocate General Campos Sánchez-Bordona delivered on 30 April 2019, para 114 [EU:C:2019:334]: „In the absence of standards defined by EU law, that factor is determined by reference to the minimum requirement defined by the European Court of Human Rights, which is not an absolute minimum."
[11] Case C-128/18 Dorobantu, para 71.
[12] Case C-128/18 Dorobantu, para 58.
[13] Muršić v. Croatia (App. no. 7334/13.) ECtHR (2016)

and to the principles of mutual trust and recognition."

4. Direct applicability of the ECHR in EU law?

The ECHR – to which all EU Member States are parties to – has long played an important role in the fundamental rights architecture of the EU: since *Stauder v Ulm*, it has been referenced by the CJEU as an important source of inspiration for the general principles of EU law, and given the fact that the EU Charter only received legal binding force in 2009 via the Treaty of Lisbon, its significance cannot be overestimated: the CJEU has been relying on the ECHR and the case law of the ECtHR (alongside the common constitutional traditions of the Member States) for decades as guidelines for developing its own jurisprudence on fundamental rights as unwritten principles of EU law, a concept which was recognized and supported by a joint declaration of the European Parliament, the Council and the Commission already in 1977.[14] Thus reliance on the ECHR, the "benchmark" in European human rights protection is of course nothing new, and even though the Lisbon Treaty endowed the Charter of Fundamental Rights of the EU with legal binding force, the continuing parallel existence of the general principles in the post-Lisbon era is expressly recognized by Article 6(3) TEU.

What can however be considered new in *Dorobantu* is the method by which the CJEU introduced a direct application of Article 3 ECHR as interpreted by *Muršić v. Croatia*. Interestingly, the judgment makes no mention whatsoever of the general principles of EU law and does not reference its own jurisprudence regarding how the ECHR may have an indirect relevance in EU law. In *Dorobantu*, the EU court saw no reason to reference the general principles of EU law as the intermediary through which the ECHR can have an effect in the EU legal order. A simple gap in EU law was a sufficient reason to turn to the ECHR and the related ECtHR jurisprudence.[15]

It is of course true that the CJEU references the ECHR for other purposes as well in its case law, most notably to support elements of its argumentation, but again in a way which cannot be regarded as direct application. To make some comparisons: In the landmark joint cases *N. S. and M. E.*[16], the CJEU referenced the ECtHR's M. S. S. judgment[17], but did so in order to partly pinpoint notable similarities and – more importantly – to argue that national courts in the EU did not lack the means to assess fundamental rights compliance of other Member States in the context of Dublin procedures; it further cited the case to compare the scope of relevant rights under the Charter and the ECHR. (It is true of course that rules on the Dublin procedure were definitely not lacking in EU law, so the situation was not entirely the same.) Similarly in the aforementioned *Aranyosi and Căldăraru* case, the CJEU referenced the ECHR and ECtHR jurisprudence to argue that the right enshrined in Article 4 of the EU Charter was absolute, as it corresponded to Article 3 ECHR from which no derogation is possible under Article 15(2) ECHR. In the context of the current analysis

[14] Joint Declaration by the European Parliament, the Council and the Commission (OJ 1977 C 103) https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31977Y0427(01)&from=EN

[15] The Advocate-General further suggested in his opinion that the CJEU „does not, at present, have the necessary expertise in that regard, unlike the European Court of Human Rights and the other bodies of the Council of Europe, which have gained special expertise in the field of prison systems and a practical knowledge of the conditions of detention in the States by means of the disputes brought before the former and the reports and on-site inspections for which the latter is responsible" [para 72]. Though undoubtedly prison conditions in a human rights context are more of an issue for the ECtHR then the CJEU, still it is somewhat surprising to read an explicit reference to a perceived lack of expertise at the CJEU in an AG opinion.

[16] Joined Cases C-411/10 and C-493/10 N. S. v. Secretary of State for the Home Department and M. E. and Others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform (EU:C:2011:865)

[17] M.S.S. v. Belgium and Greece (Application no. 30696/09). ECtHR (2011)

it is also worth noting that the referencing German court was prompted to initiate a preliminary ruling procedure partly by the earlier ECtHR pilot judgment in *Varga and others v. Hungary*[18], a case unrelated to EU law but concerning prison overcrowding and prison conditions in Hungary.

Furthermore, since *Kamberaj* it is known that the ECHR does not "enjoy the benefits" of direct effect and primacy of application over national law by virtue of Article 6 (3) TEU, as the TEU does not govern the relationship between the ECHR and the Member States' legal systems, and thus it cannot have the effect of transforming the ECHR into a directly applicable quasi-EU law norm with primacy over national law.[19] Based on *Kamberaj* it can thus be ruled out that the ECHR was applied in *Dorobantu* via the principles of direct effect and primacy.

Even though the method utilised by the Court of Justice in *Dorobantu* is new in the context of the ECHR, it does bring to mind a similar method the Court applied in *Poulsen and Diva Navigation.*[20] In the fisheries-related dispute, a national court was *inter alia* asking the CJEU in a preliminary ruling procedure whether EU law (more precisely Community law at the time) contained any provisions on the situation of distress. The Court of Justice found that it did not, and then proceeded to point the national court towards international law, by proclaiming that "[i]n those circumstances, it is for the national court to determine, in accordance with international law, the legal consequences which flow (…) from a situation of distress involving a vessel from a non-member country."[21] Thus in *Poulsen and Diva* the CJEU essentially encouraged the national court to fill a lacuna existing in EU law with customary international law.[22]

5. Concluding remarks

As research has shown, the CJEU tends to cite the ECHR and the case law of the ECtHR less frequently since the entry into force of the Lisbon Treaty.[23] Accession to the ECHR could have affected this new dynamic, were it not for the CJEU's – heavily autonomy-centric and much discussed – *Opinion 2/13*, as a result of which this process has stalled, at least until recently. It will be interesting to see whether the novel method of reference applied in Dorobantu (*nota bene*: by the Grand Chamber) will be utilized in other cases and whether the Court of Justice will tend to rely on it as a temporary substitute until formal ECHR accession eventually happens. In any case the *Dorobantu* judgment also underlines the relevance and significance of judicial dialogue between European courts.[24]

Finally*, Dorobantu* is also relevant more generally as regards the relationship between international law and EU law and the applicability of international law norms within the EU legal order. This recent judgment seems to fall into the line of cases (such as *Haegeman*[25], *Racke*[26], *ATAA*[27] or *Front*

[18] Application nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13.
[19] Case C-571/10 Kamberaj v. Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and others [EU:C:2012:233].
[20] Case C-286/90 Poulsen and Diva Navigation [EU:C:1992:453].
[21] Case C-286/90 Poulsen and Diva Navigation, para 38.
[22] L. Blutman, *Az Európai Unió joga a gyakorlatban (Második, átdolgozott kiadás).* HVG-Orac, Budapest 2013, p. 249.
[23] J. Krommendijk, *The Use of ECtHR Case Law by the Court of Justice after Lisbon: The View of Luxembourg Insiders*, Maastricht Journal of European and Comparative Law, Vol. 22, No. 6, 2015, pp. 812-835.
[24] In the context of the EU's ECHR accession, see e.g. P. Eeckhout, *Opinion 2/13 on EU Accession to the ECHR and Judicial Dialogue: Autonomy or Autarky*, Fordham International Law Journal, Vol. 38, No. 4, 2015, pp. 955-992.
[25] Case 181/73 Haegeman v Belgium [EU:C:1974:41].
[26] Case C162/96 Racke v Hauptzollamt Mainz [EU:C:1998:293].
[27] Case C-366/10 Air Transport Association of America and others v Secretary of State for Energy and Climate Change

Polisaro[28]) that demonstrate a strong *Völkerrechtsfreundlichkeit* (or a monist approach, if you will) on behalf of the CJEU and seems at odds with judgments based on an more autonomy-centric (or dualist) approach (such as *Kadi*[29], *Achmea*[30] or indeed *Opinion 2/13*).

On a final note, one cannot but note the slight irony in the following. In *Opinion 2/13*, the CJEU found it problematic that the EU Member States could take each other to court in Strasbourg for the infringement of the ECHR, because EU law on the other hand required them to rely amongst themselves on the principle of mutual trust.[31] Now in yet another judgment regarding the EAW, the CJEU (similarly as it did in *Aranyosi and Căldăraru, Minister for Justice and Equality*, and *Generalstaatsanwaltschaft*[32]) has relied – one way or another – on the ECtHR jurisprudence to underline the existence of exceptional circumstances under which Member States are required to derogate from the principle of mutual trust.

[EU:C:2011:864].

[28] Case C-104/16 P Council v Front Polisario [EU:C:2016:973].

[29] Joined Cases C-402/05 P and C-415/05 Kadi and Al Barakaat International Foundation v Council [EU:C:2008:461].

[30] Case C-284/16 Slowakische Republik v Achmea BV [EU:C:2018:158].

[31] Opinion 2/13, paras 191-195.

[32] For analysis of the mutual trust question in the context of these judgments see V. Mitsilegas, *Resetting the Parameters of Mutual Trust: From Aranyosi to LM,* in V. Mitsilegas & A. di Martino & L. Mancano (Eds.), The Court of Justice and European Criminal Law. Leading Cases in a Contextual Analysis. Hart, 2019, pp. 421-436.

The Concept of 'Junction Area' – *Sui Generis* Solution to Reconciling the Integrity of Territorial Sea and 'Freedoms of Communication'?

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The rendering of the Final Award in the arbitration proceeding between Croatia and Slovenia in June 2017 immediately triggered the rise of a new and still ongoing dispute. Croatia does not accept the application of the Award and refuses to implement it, claiming that the arbitration process was irreversibly compromised; Slovenia, on the other hand, insists on the Award's implementation. The focus of this Article is not on the deeper elaboration of the Final Award, but rather on the examination of the 'Junction area' concept, which has been introduced by the Award. It represents a unique and challenging regime of a 'freedoms of communication' that is to be implemented in part of the Croatian territorial sea with the purpose of reconciling both the Slovenian request for access to the High Seas and the Croatian sovereignty in its territorial sea.

Keywords: Junction area, Croatia, Slovenia, arbitration, maritime dispute, law of the sea

1. Introduction

Croatia and Slovenia are neighbouring countries that share a common history, EU membership, land and maritime boundaries, good relations between their citizens, but also a long-standing border disagreement.[1] After proclaiming their independence, both Croatia and Slovenia, as successor states of the former Yugoslavia, arranged their land borders by using the principle of *uti possidetis juris*.[2] This means that in a situation of succession, the boundaries of the predecessor state become

[1] About the events during almost two decades of misunderstandings, see more in: T. Bickl, *Reconstructing the Intractable: The Croatia-Slovenia Border Dispute; and Its Implications for EU Enlargement,* Croatian Political Science Review, Vol. 54, No. 4, 2017, pp. 11-17; V. Đ. Degan, *Consolidation of Legal Principles on Maritime Delimitation: Implications for the Dispute between Slovenia and Croatia in the North Adriatic*, Chinese Journal of International Law, Vol. 6, No. 3, 2007, pp. 619-634; V. Đ. Degan, *Spor o granicama između Hrvatske i Slovenije [The boundary dispute between Croatia and Slovenia]*, Poredbeno pomorsko pravo [Comparative Maritime Law], Vol. 58, No. 173, 2019, pp. 18-30; P. Pipan, *Border Dispute Between Croatia and Slovenia Along the Lower Reaches of the Dragonja River*, Acta Geografica Slovenica, Vol. 48, No. 2, 2008, pp. 332-356; V. Sancin, *Slovenia-Croatia Border Dispute: From „Drnovšek-Račan" to „Pahor-Kosor" Agreement*, European Perspectives – Journal of European Perspectives of the Western Balkans, Vol 2, No. 2, 2010, pp. 93-111; D. Vidas, *The UN Convention on the Law of the Sea, the European Union and the Rule of Law - What is going on in the Adriatic Sea?*, The International Journal of Marine and Coastal Law, Vol. 24, No. 1, 2009, pp. 9-40; T. Vuk, *Arbitraža kao sredstvo mirnog rješavanja sporova s posebnim osvrtom na hrvatsko-slovenski granični spor [Arbitration as a Means of the Peaceful Settlement of Disputes with a Special Focus on the Boundary Dispute between Croatia and Slovenia]*, Poredbeno pomorsko pravo [Comparative Maritime Law], Vol. 58, No. 173, 2019, pp. 79-80.

[2] The principle of *uti possidetis juris* is considered as a general principle "logically connected with the phenomenon of the obtaining of independence, wherever it occurs." Its application "freezes the territorial title" and "stops the clock" at the moment of independence in order to produce the "photograph of the territory at the critical date" and to "secure the territorial boundaries at the moment when independence is achieved." For more see: Case Concerning the Frontier Dis-

boundaries of the newly existing successor state, unless the states concerned agree otherwise. Since both the Croatian and Slovenian land had already been framed by their borders, the application of *uti possidetis* was applicable to their land delimitation, transforming their internal land borders within the predecessor state into external ones. However, since the former Yugoslavia had never introduced maritime borders in the Adriatic between its republics, including Croatia and Slovenia, the same principle was not applicable for their maritime delimitation.[3] It was, therefore, left to the successor states to arrange these boundaries among themselves, which resulted in a long-standing border dispute that unfortunately still has not been resolved.

One of the main problems that occurred during the negotiation process on maritime delimitation was the (non)existence of a direct/territorial contact of Slovenia's territorial sea with the High Seas. Due to geographic reasons, Slovenia's territorial sea remains boxed-in between the territorial seas of Croatia and Italy, and no physical connection or contact exists between Slovenia and the High Seas. However, by recalling the importance of its vital interests, Slovenia has always insisted on establishing a direct contact with the High Seas, not merely the right of innocent passage throughout the territorial seas of either Croatia or Italy.

Even though the discussions on the border delimitation have started in the early 1990s and – at one point – it seemed that the two states had come close to a final resolution, the unresolved border dispute still poses a burden on their political relationship, although in a somewhat different manner, starting from the end of June 2017.

After almost two decades of disagreements, in November 2009, the Arbitration Agreement between Croatia and Slovenia was signed.[4] It seemed at that point that this long-standing border dispute would be brought to its end.[5] The parties entrusted the Arbitration Tribunal to resolve their dispute by determining: (a) the course of the maritime and land boundary between Slovenia and Croatia; (b) Slovenia's Junction to the High Seas; and (c) the regime for the use of the relevant maritime areas.[6] In exercising its task, the Tribunal was authorised to apply different rules for different assignments: the rules and principles of international law were to be applied for the determination of the course of the maritime and land boundary. However, in order to achieve a fair and just result by taking into account all relevant circumstances for the determination of Slovenia's Junction to the High Seas and the regime for the use of relevant maritime areas, the Tribunal was entitled to apply – not only the international law – but also the equity and the principle of good neighbourly relations.[7] Since the parties were deeply divided over the meaning of Slovenia's Junction to the High Seas,[8] it was apparent that its determination will be challenging for the Tribunal. It was also evident that the Tribunal will not discuss whether Slovenia has the right to the Junction to the High Seas, but will rather confirm its existence and find the course and the area where the Junction will be placed. That was exactly what the Tribunal had done.

The provided solution represents a challenging, hybrid, and in a way *sui generis* system that has not been previously apparent in international case law. At the same time, its implementation should meet the requirements of a friendly relationship and the demands for a peaceful settlement of the

pute (Burkina Faso/Republic of Mali), Judgment, International Court of Justice, 22 December 1986, paras. 20, 23, 30.

[3] S. Fabijanić Gagro, *Border Dispute in the Adriatic Sea between Croatia and Slovenia*, Acta Universitatis Danubius, Vol. 9, No. 3, 2013, p. 6.

[4] Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia (hereinafter: Arbitration Agreement 2009), 4 November 2009. Text available in both Croatian and English: https://narodne-novine.nn.hr/clanci/medunarodni/full/2009_11_12_140.html (14 November 2019).

[5] More about the genesis of the Arbitration Agreement see in Bickl 2017, pp. 17-23.

[6] Arbitration Agreement 2009, Art. 3.

[7] Ibid. Art. 4.

[8] Degan 2019, p. 35.

disputes. Its main purpose is to reconcile the protection of the integrity of Croatian territorial sea, but also to allow the enjoyment of 'freedoms of communication' of other countries (including Slovenia) in that same area. However, these freedoms are not commonly exercisable in territorial sea of the coastal state. All these issues, as well as the examination on how the Tribunal determined the 'Junction', where it is supposed to be settled and what rights are given both to Croatia and Slovenia, but even to other countries, are going to be elaborated in this paper.

However, despite the fact that the arbitration proceeding had come to its end and the Tribunal rendered its decision in June 2017, the Croatian-Slovenian dispute still stands and the final agreement has not been reached. Croatia refuses to implement the Final Award, while Slovenia insists on its implementation. Even though this paper is not going to delve into a deeper examination of the Arbitral awards, for the sake of trying to make the 'framework' of the Junction proposal more understandable it will provide a short overview of the challenges of the arbitration process.

2. Challenges of the arbitration process

The arbitration began in April 2012. The written pleadings were closed in spring 2014, while the hearings were concluded in June 2014. All the efforts that had been made[9] became doubtful in July 2015 when a conversation between the arbitrator appointed by Slovenia and the Slovenian agent was intercepted and leaked to the public.[10] That led to a significant reversal of the process, redirecting the path that was expected in 2009 and undoubtedly changed further positions of the parties. Although both the arbitrator and the agent later resigned, that conversation, according to Croatia, "reveal[ed] that the most fundamental principles of procedural fairness, the due process, impartiality, and integrity of the arbitral process have been systematically and gravely violated."[11] At the end of July 2015, Croatia notified its intention to terminate the Arbitration Agreement and informed the Tribunal that it "cannot further continue the process in good faith."[12] Slovenia, on the other hand, expressed the regret and apology for the "inappropriate and intolerable" conduct which affected "the course of the arbitral proceeding."[13] However, it maintained that "this does not free the Arbitral Tribunal from its basic function – to settle the dispute submitted to it," and requested the Tribunal to declare that the proceedings "shall continue until the Tribunal issues a final Award."[14]

Since the parties were in disagreement as to whether the Tribunal had jurisdiction to resolve the dispute concerning the validity of Croatia's termination of the Arbitration Agreement[15], the Tribunal – in applying the principle of *compétence de la compétence* – confirmed its own jurisdiction.[16] In determining as to whether the "arbitration process as a whole has been compromised to such an extent that… the arbitration process cannot continue"[17], the Tribunal's decision was unanimous:

[9] During the process, the parties included into their pleadings nearly 1,500 documentary exhibits and legal authorities, as well as over 250 figures and maps. See https://pcacases.com/web/sendAttach/1308 (17 January 2020).
[10] See more M. Ilić, *Croatia v. Slovenia: The Defiled Proceedings,* Arbitration Law Review, Vol. 9, Article 11, 2017; Vuk 2019, pp. 81-86.
[11] In the Matter of an Arbitration Under the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, Case No. 2012-04, Partial Award (hereinafter: Partial Award 2016), 30 June 2016, https://pcacases.com/web/sendAttach/1787 (17 November 2019), para. 169. More about the Croatia's reactions see Ilić 2017.
[12] PCA Press Release, 5 August 2015, https://pcacases.com/web/sendAttach/1389 (17 November 2019).
[13] Partial Award 2016, paras. 170, 171.
[14] Ibid. para. 171. More about the Slovenia's reactions see in: Ilić 2017.
[15] Partial Award 2016, para. 159.
[16] Ibid. para. 162.
[17] Ibid. para. 168.

although Slovenia had violated the provisions of the Arbitration Agreement, it remains in force and the arbitral proceeding continues.[18] Many further elaborations have been mainly focused on Croatia's rejection to implement the Tribunal's Final Award. However, this particular moment in the proceedings requires a special emphasis.

One could argue that this was rather a controversial decision. Procedural fairness and the arbitrator's impartiality are immanent elements of arbitration.[19] They require not only the judges' fairness and unbiasedness, but also require the judges to create in the parties and the community a sense of confidence in their justness.[20] The parties' expectations rely in the presumption of the arbitrators' impartiality and independence. It is at the heart of the arbitral process.[21] When a party engages in *ex parte* communication with a party-appointed arbitrator, one could easily claim that the arbitral process is jeopardized.[22] Even more so, in this particular case, the Arbitration Agreement requires the parties to refrain "from any action or statement which might intensify the dispute or jeopardize the work of the Arbitral Tribunal."[23] Some authors also emphasize that such *ex parte* communication is "completely incompatible with the principle of good neighbourly relations."[24] It also represents a material breach of the 2009 Arbitration Agreement, since its object and purpose were defeated.[25] One could agree with the conclusion that the arbitrator's impartiality and procedural fairness were not given enough weight in this case.[26] The fear was also expressed that this episode "will cause tremendous harm to the system of international arbitration."[27] On the other hand, some authors emphasize that Croatia – with respect to the existence of the Arbitration Agreement – disregarded the *compétence de la compétence* principle and the rule of *pacta sunt servanda*.[28]

The Tribunal had the 'power' to decide on these matters. However, by respecting the principle of *nemo judex in causa sua*, it "should not be the one, or at least not the only one, deciding on the consequences of its own procedural irregularities."[29] The Arbitration Tribunal had a justification to terminate the procedure[30] and ultimately did not take the right position[31] when deciding to continue with the proceedings. The process has been "totally and irreversibly compromised."[32]

However, since the Court was recomposed later, the Tribunal came to the conclusions that "no doubt has been expressed on the independence and impartiality"[33] of such a recomposed Tribunal.

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[18] Ibid. para. 231.
[19] Ilić, 2017.
[20] P. Perišić, *Maritime Delimitation between the Republic of Croatia and the Republic of Slovenia in the Bay of Piran*, Proceedings of the 2nd Law and Political Science Conference, Prague, 2013, p. 40.
[21] P. Sands, *Developments in Geopolitics – The End(s) of Judicialization?*, 2015, https://www.jus.uio.no/pluricourts/english/blog/guests/2015-10-22-sands-final-lecture-esil.html (18 January 2020).
[22] Ilić 2017.
[23] Arbitration Agreement, 2009, Art. 10(1).
[24] L. Runjić, *Consequences of the Ex Parte Communications in the Arbitration between Croatia and Slovenia*, Pécs Journal of International and European Law, Vol. I-II, 2019, p. 20.
[25] Ibid.
[26] Ilić 2017; Bickl 2017, p. 26.
[27] "I do not see how the arbitration can possibly continue, and what is now needed is a transfer to another procedure." Sands 2015; Ibid.
[28] Degan 2019, p. 59.
[29] P. Tzeng, *The Annulment of Interstate Arbitral Awards*, Kluwer Arbitration Blog, 2017, http://arbitrationblog.kluwerarbitration.com/2017/07/01/the-annulment-of-interstate-arbitral-awards/ (18 November 2019).
[30] See Art. 34(2) of the PCA Optional Rules: If, before the award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible for any reason not mentioned in paragraph 1, the arbitral tribunal shall inform the parties of its intention to issue an order for the termination of the proceedings.
[31] Perišić 2018, p. 40.
[32] Partial Award 2016, para. 94.
[33] Ibid. para. 224.

Even more so, the Tribunal noted that "neither Party raised any further issues"[34] and expressed its satisfaction because "the procedural balance between the Parties is secured."[35]

It would have been more appropriate for the Arbitration Tribunal to have terminated its work after the conversation between the Slovenian agent and the arbiter appointed by Slovenia had been revealed. The termination of such proceedings would have allowed the parties to start a new process or to come to an agreement on some other method of peaceful dispute resolution. Such proposals were expressed by some authors even before the Partial Award was rendered. As *Sarvarian and Baker* concluded, the self-termination of the process would "avoid more undesirable outcomes."[36] They emphasized that irespective of the outcome of the Award, it "would be open to doubt" and its enforcement "would be highly challenging."[37] Unfortunately, their conclusions have become reality.

The Final Award[38] did not resolve the dispute between Croatia and Slovenia. On the contrary, it has made the disagreement even more obvious and has lifted their positions to the next level. Not only does the border dispute remain unresolved, they are now also involved in a new dispute over the non(implementation) of the Arbitral Award. Because of the aforementioned events, Croatia does not recognize its existence nor accept its application; Slovenia, on the other hand, insists on its implementation. Confronting Croatia's refusal to implement the Award, Slovenia decided to initiate the proceeding before the Court of Justice of the European Union (CJEU) in Luxembourg, claiming that Croatia had violated EU law.[39] In January 2020 the CJEU decided that this case did not fall within its jurisdiction.[40]

3. What is the meaning and the location of Slovenia's Junction to the High Seas?

As already emphasized, one of the tasks of the Arbitral Tribunal was to determine Slovenia's Junction to the High Seas. However, the definition of 'Junction' was not provided by the Arbitration Agreement and its meaning – as will be shown – had become disputable between the parties.[41] Therefore, the task given to the Tribunal, the content of which had resulted in contradictory views of the parties, immediately opened the following questions: what does 'Junction' actually mean and how could it be implemented in this particular case?

In accordance with the standard dictionaries of the English language, the term 'junction' represents a "place at which two things join or are joined; meeting-place."[42] However, since Slovenia – due to its geographic location and 'restrictions' of the applicable rules of international law of the sea – does not have a territorial contact with the High Seas, what options did the Tribunal have in determining a 'meeting place'? In other words, should 'Slovenia's Junction to the High Seas' be

[34] Ibid.
[35] Ibid.
[36] A. Sarvarian & R. Baker, *Arbitration between Croatia and Slovenia: Leaks, Wiretaps, Scandal (Part 2)*, August 7 2015, EJIL:Talk! https://www.ejiltalk.org/arbitration-between-croatia-and-slovenia-leaks-wiretaps-scandal-part-2/ (18 November 2019).
[37] Ibid.
[38] In the Matter of an Arbitration Under the Arbitration Agreement between the Government of the Republic of Croatia and the Government of the Republic of Slovenia, Case No. 2012-04, Final Award (hereinafter: Final Award 2017), 9 June 2017, https://pcacases.com/web/sendAttach/2172 (19 November 2019).
[39] Case-457/18 Republic of Slovenia v. Republic of Croatia (EU:C:2020:65), .
[40] CJEU Press Release No. 9/20, Republic of Slovenia v. Republic of Croatia (Case-457/18), 31 January 2020 https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-01/cp200009en.pdf (31 January 2020).
[41] Degan 2019, p. 32.
[42] The Compact Oxford English Dictionary 1987, p. 903.

interpreted as a physical connection, corridor or an access to the High Seas?

The High Seas are open to all states and all states are entitled to exercise the freedoms of the High Seas.[43] The desire not to be cut off from access to the High Seas was understandable and not controversial whatsoever. However, what has been seen by some as controversial in this case was the question whether that access should be territorial or not.[44] The controversy of territorial contact lies in the beforementioned geographical location of Slovenia and its impossibility to reach the High Seas. Slovenia's entire territorial sea boundary is adjacent to the territorial seas of two countries – either Croatia or Italy. Moreover, the length of the area between Slovenia's baseline and the High Seas exceeds the limit of 12 nautical miles (NM), required for the breadth of territorial sea.[45] Therefore, if the standard definition of junction is to be applied in this case and Slovenia's junction becomes its territorial connection or a 'meeting place' with the High Seas, but through the Croatian territorial sea, what influence would it have on Croatian sovereignty in that area?

Since sovereignty is never to be taken lightly, these issues encouraged further discussions in both countries. It became apparent that finding the answer to what the Junction means would not be a simple task to achieve, since the parties have been deeply divided over its meaning. Even more so, both states enclosed unilateral statements to the Arbitration Agreement. Croatia claimed that nothing in the Arbitration Agreement "shall be understood as Croatia's consent to Slovenia's claim to its territorial contact with the High Seas."[46] Slovenia, on the other hand, emphasized that "the task of the Tribunal is to establish territorial Junction of Slovenian territorial sea with the High Seas, therefore the right for the contact with the High Seas, which Slovenia has on the day of independence on June 25th, 1991."[47]

Slovenia has been repeating that position during the arbitration process, holding the view that the 'Junction to the High Seas' means "a direct junction without having to pass through the territorial sea of another state."[48] Slovenia asserted that the right of innocent passage "through the territorial sea of Croatia has never been acceptable" since it could be temporarily suspended.[49] On the other hand, the necessity of economic, security, and safety interests requires that maritime traffic to and from Slovenia's port of Koper should be "subject to no restrictions, impediments, or delays."[50] Slovenia also noted that even though coastal states were entitled to a territorial sea up to a maximum breadth of 12 NM from its coast or baselines, they "cannot claim the maximum entitlement if special circumstances exist."[51] In Slovenia's view, such circumstances do exist in this particular case. Slovenia also claimed that the emphasis of these special circumstances was the very *raison d'être* of both the reference to the Junction in Article 3(1)(b) of the Arbitration Agreement and the inclusion of equity and the principle of good neighbourly relations in the applicable law.[52] Therefore, in order to take these very special circumstances of the case into consideration, while – in Slovenia's opinion – no legal obstacle exists on partly limiting the extent of Croatia's territorial sea, Slovenia proposed the Junction as a corridor of the High Seas, 3 NM wide, between its territorial sea and the

[43] See 1982 UN Convention on the Law of the Sea, 1833 UNTS 397 (hereinafter: 1982 UNCLOS), Art. 87.
[44] Vidas 2009, p. 32.
[45] 1982 UNCLOS Art. 3.
[46] https://narodne-novine.nn.hr/clanci/medunarodni/full/2009_11_12_140.html (19 November 2019).
[47] Text in Slovenian, available in Uradni list Republike Slovenije-Mednarodne pogodbe, No. 11/16.7.2010, p. 574, http://www.uradni-list.si/glasilo-uradni-list-rs/vsebina/2010-02-0085?sop=2010-02-0085 (19 November 2019).
[48] Final Award 2017, para. 1028.
[49] Ibid. para. 1029.
[50] Ibid. para. 1030.
[51] Ibid. para. 1056.
[52] Arbitration Agreement 2009, Art. 4(1)(b).

High Seas.[53]

Croatia contested Slovenia's claims, emphasizing that the understanding of Slovenia's Junction must be denied if it represents a claim to a territorial contact with the High Seas.[54] It also asserted that from the moment of its independence, "the High Seas and Slovenia are in any event separated from each other by a certain maritime area lying in-between and belonging to one or other of two third states."[55] Since that area exceeded 12 NM, "regardless of how the Tribunal determines the land and maritime boundary in the Bay,"[56] and Slovenia's territorial sea "does not and cannot stretch as far as to reach the High Seas," Slovenia is geographically deprived of having territorial or geographical contact with the High Seas.[57] On the other hand – Croatia claimed – Slovenia "has always enjoyed uninterrupted access to the High Seas," that has never been suspended, not even during the years of the Homeland War.[58] Therefore, by giving the term of Junction "more functional and purposive meaning,"[59] Croatia concluded that 'Junction' can only be understood as non-suspendable and secure maritime access between the High Seas and Slovenian territorial sea.[60]

Since it was evident that the parties are deeply divided over the question of Junction, the Tribunal decided to approach the interpretation of the Arbitration Agreement "in accordance with the rules of international law on treaty interpretation."[61] It finally offered its own, single interpretation of Junction. In its conclusion, the term 'Junction' signifies the "physical location of a connection between two or more areas."[62] In this particular case it represents the "connection between the territorial sea of Slovenia and an area beyond the territorial seas of Croatia and Italy".[63] Since the term may be understood to mean "either a geographical point or line, without spatial extension, or an area,"[64] the Tribunal decided that the Junction in this particular case is an *area* of approximately 2,5 NM wide.[65] That area is situated in the Croatian territorial sea, immediately adjacent to the boundary established by the Osimo Treaty and determined by five geodetic lines that join six points.[66]

[53] Final Award 2017, paras. 1028, 1057, 1058, 1059.
[54] Ibid. para. 1047.
[55] Ibid. paras. 1025, 1052.
[56] Ibid. para. 1021.
[57] Ibid. para. 1048.
[58] Ibid. para. 1036. See also Degan 2019, p. 54.
[59] N. Bankes, *The Maritime Aspects of the Award in the Arbitration between Croatia and Slovenia,* 2017, http://site.uit.no/jclos/2017/07/19/the-maritime-aspects-of-the-award-in-the-arbitration-between-croatia-and-slovenia/ (14 November 2019).
[60] Final Award 2017, para. 1027.
[61] Ibid. paras. 1075, 1076.
[62] Ibid. para. 1076.
[63] Ibid.
[64] Ibid. para. 1077.
[65] See also Degan 2019, p. 56.
[66] Final Award 2017, para. 1083.

Source: Final Award 2017, p. 347.

Therefore, contrary to Slovenia's proposal that the Junction should be a corridor of the High Seas, the Tribunal decided not to change sovereignty in this area[67] – the Junction area is to be settled in Croatian territorial waters.

4. What regime should be applied in the Junction area?

The authority of the Tribunal to create such a unique, "hybrid," *sui generis* regime could be derived from one of its tasks established by the Arbitration Agreement: the one to determine "the regime for the use of the relevant maritime areas," which also includes the regime of the Junction area. One could agree that by establishing a "Junction area"[68] instead of a "Junction" the Tribunal "has conflated the second and third tasks entrusted to it."[69] Looking at it this way, within the authority to determine 'Slovenia's Junction to the High Seas', it was not questionable whether the Tribunal was going to do so or not, but rather what direction it was going to take in that determination. Since the use of 'ordinary' maritime areas is prescribed by relevant international law of the sea, that particular task referred to the possibility that some 'ordinary' areas were going to be recreated in a somewhat different manner. That is what has been decided in this case. The area of the Junction is still Croatian territory, but the rights and obligations given to Croatia, Slovenia, and/or other countries are different from those that are 'normally' exercised in the territorial sea of the coastal state.

In determining the regime for the use of the Junction area, the Tribunal was authorized to apply "international law, equity, and the principle of good neighbourly relations in order to achieve a fair and just result by taking into account all relevant circumstances."[70] With no doubt, a broad choice

[67] See also Degan 2019, p. 57.
[68] Final Award 2017, para. 1081.
[69] Bankes 2017, ibid.
[70] Arbitration Agreement 2009, Art. 4(1)(b).

of law in respect of the Tribunal's tasks was given in that way.[71] As the Tribunal emphasized, the power and duty to determine the regime for the use of the relevant maritime areas actually implies that the "Tribunal is not to regard itself as confined to an indication that the 'regime' in any particular location is whatever it would be if each Party were to assert to the fullest extent its rights under UNCLOS at the relevant distance from the coast."[72] The obligation to achieve "a fair and just result by taking into account all relevant circumstances" includes consideration of the vital interest of the Parties and requires the Tribunal "to consider what modifications might be necessary" in order to achieve that particular result.[73]

Taking into account all the given circumstances, through the content and scope of the freedoms and limitations of communications in the Junction area, the Tribunal, therefore, proposed a very specific regime, previously unknown in the case law of territorial disputes.[74] It represents a combination of different regimes in the narrow stripe of the Croatian territorial sea. The purpose of such a regime is to reconcile both the integrity of the Croatian territorial sea, and Slovenia's freedoms of communication between its territory and the High Seas.

In an attempt to complete that 'mission', the Tribunal proposed freedoms of communication, which apply to "all ships and aircraft, civil and military, of all flags or States of registration,"[75] not just Slovenian. The purpose of that freedom is to allow an "uninterrupted and uninterruptible access to and from Slovenia, including its territorial sea and its airspace."[76] It consists of the freedoms of navigation and overflight as well as of the laying of submarine cables and pipelines and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft, submarine cables, and pipelines.[77] When observed carefully, in Article 58 of the UNCLOS, these freedoms go beyond the right of innocent passage in the territorial sea of the coastal state and are very similar to those applied in the coastal state's exclusive economic zone (beyond and adjacent to its territorial sea). Taking that into account, such a 'transfer' of rights (which 'others' enjoy in the exclusive economic zone) into the area of territorial sea, could be considered as a burden to Croatia's sovereignty. Although the Tribunal did not use these terms, the purpose and similarity is obvious.

The Tribunal provided that the laying of submarine cables and pipelines is subject to the conditions set out in Article 79 of the UNCLOS, including the right of Croatia to establish conditions for such cables and pipelines entering other parts of Croatia's territorial sea. It has to be noted that Article 79 refers to submarine cables and pipelines on the continental shelf. This could be seen as challenging since the "continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend *beyond* its territorial sea,"[78] and the area where the Junction is proposed to be established is *within* the Croatian territorial sea.

However, that provision additionally emphasizes the conclusion that Slovenia is not entitled to enjoy and exercise the rights of the continental shelf outside the line of its territorial sea. Slovenia made a claim to the continental shelf that – in its suggestion – should be settled in the area of the "corridor of the High Seas in which Slovenia invites the Tribunal to restrict Croatia's right to es-

[71] Bankes 2017, ibid.
[72] Final Award 2017, para. 1079. UNCLOS stands, of course, for the 1982 United Nations Convention on the Law of the Sea.
[73] Ibid.
[74] Sancin 2010, p. 108.
[75] Final Award 2017, para. 1124.
[76] Ibid. para. 1123.
[77] Ibid.
[78] UNCLOS Art. 76(1).

tablish a territorial sea."[79] The base for this claim was the identification of the proposed corridor as an area of the High Seas. However, since the Tribunal concluded that the "maritime boundary between Slovenia and Croatia extending from Point A at the mouth of the Bay to Point B of the Treaty of Osimo is the boundary for all purposes,"[80] Slovenia's territorial sea has no contact with the High Seas and consequently Slovenia has no continental shelf. Therefore, the question of continental shelf delimitation did not arise before the Tribunal and there was no need for the Tribunal to establish any particular usage regime.[81]

Without contact with the High Seas, Slovenia has no right to proclaim an exclusive economic zone either. As noted in the Award, freedoms of communication do not include the freedom to explore, exploit, conserve, or manage the natural resources, whether living or non-living, of the waters or the seabed or the subsoil in the Junction area. They also do not include the right to establish and use artificial islands, installations, or structures, the right to engage in marine scientific research, or the right to take measures for the protection or preservation of the marine environment.[82]

However, in order to secure the freedoms of communication, the implementation of the Junction area imposes limits on Croatia's rights. These freedoms are not conditioned upon any criterion of innocent passage. They are not suspendable under any circumstances nor subject to any duty of submarines to navigate on the surface, nor to any costal state controls or requirements "other than those permitted under the legal regime of the exclusive economic zone" in accordance with the UNCLOS.[83] When a ship or aircraft passes through or over the Junction area, Croatia is not entitled to interfere. Exercising the prescribed freedoms in the Junction area – in the Tribunal's view – is not subject to board, arrest, detention, diversion, or any other form of interference by Croatia.[84] Freedoms of communication are exercisable as if they are High Seas freedoms exercisable in an exclusive economic zone.[85] However, knowing that every coastal state is entitled to temporarily suspend the innocent passage of foreign ships in specified areas of its territorial sea[86], the Tribunal's restriction towards Croatia on not being entitled to suspend the rights that are not even exercisable in its territorial sea could be considered as challenging.

Nevertheless, while having a passage through the Junction area, ships and aircrafts are obliged to comply with Croatian laws and regulations.[87] The Tribunal emphasized that Croatia remains entitled to adopt laws and regulations applicable to foreign ships and aircraft in the Junction area, "giving effect to the generally accepted international standards in accordance with UNCLOS Article 39(2) and (3)."[88] These provisions refer to the duties of ships and aircrafts while exercising the right of transit passage. The Tribunal also underlined that Croatia's rights to enforce its laws and regulations in all other areas of its territorial sea and other maritime zones remain unchanged in accordance with the UNCLOS. It notably means that Croatia remains entitled to take enforcement actions outside the Junction area for the violations of its law that had been committed within that area.[89] In addition, the Tribunal considered it as necessary for Croatia to be engaged in responding to requests made by the master of a ship or other persons authorized by the flag State for the assistance in the Junction area, as well as to retain the right of exercising powers in respect of maritime

[79] Final Award 2017, para. 1084.
[80] Ibid. para. 1103.
[81] Ibid. para. 1141.
[82] Ibid. para. 1126.
[83] Ibid. para. 1127.
[84] Ibid. para. 1129.
[85] Ibid. para. 1128.
[86] UNCLOS Art. 25(3).
[87] Final Award 2017, para. 1130.
[88] Ibid. para. 1130.
[89] Ibid. para. 1131.

casualties.[90]

5. Conclusion

While, on the one hand, trying to allow the freedoms of communication, the content of which is not usually enforceable in territorial sea of the coastal state, and to preserve the integrity of Croatian territorial sea, on the other, it is evident that the Tribunal decided to propose an interesting solution – an uncommon *sui generis* system of the Junction area as a specific 'transit zone' between Slovenia's territorial sea and the High Seas.

This system has been seen by some authors as a "creative and balanced resolution of the contradicting interests,"[91] which "offers Slovenia the guaranteed EEZ-fashioned access that it sought"[92] while "limiting the authority of Croatia within its territorial sea as little as possible."[93] One could also assert that "Slovenia is in full functional meaning assured the Junction to the High Seas."[94] However, looking at Slovenia's arguments during the arbitration, the Junction area – as defined and proposed by the Tribunal – does not represent Slovenia's requested territorial connection with the High Seas. It further means that Slovenia has no right to proclaim an exclusive economic zone or a contiguous zone, nor that the rights arisen from the continental shelf could be exercised by Slovenia. The impossibility of its territorial sea to 'touch' the waters of the High Seas simply means that – regardless of the idea of the Arbitration Tribunal to mitigate the consequences of boxing-in effect[95] – it represents an insurmountable obstacle determined by its geographic position and applicable rules of international law of the sea. The Junction, which – in Slovenia's proposition – was supposed to create a territorial contact between its territorial sea and the High Seas, remains part of the Croatian territorial sea.

Nevertheless, although the sovereignty over the Junction area – in the application of the proposed system – is not to be changed, Croatia's rights and their enforcement on that small portion of the sea would be modified in a challenging hybrid manner. Croatian sovereignty over the Junction area would be exercised not in accordance with the relevant international rules applicable in the territorial sea. As mentioned before, since the sovereignty issue is never to be taken lightly, this could be perceived as a limiting factor.

However, despite the different and divided positions towards the implementation of the Final Award, its proposals could be considered as a framework for further negotiations, which consequently could pave the way and encourage the achievement of the final agreement. As noted by the Award,[96] its provisions, including those for the Junction area, shall subsist unless and until they are modified by another agreement concluded between Croatia and Slovenia. Since the CJEU declared that it lacks jurisdiction to rule on the action brought by Slovenia against Croatia, and encouraged the states "to strive sincerely to bring about a definitive legal solution consistent with international law, in order to ensure the effective and unhindered application of EU law,"[97] it remains to be seen

[90] Ibid. para. 1132.
[91] E. Petrič, *"Junction area" – a new legal regime, Permanent Court of Arbitration (PCA), Case No. 2012-04 (Slovenia v. Croatia)*, Czech Yearbook of International Law, Vol. 8, 2017, p. 375.
[92] Bankes 2017, ibid.
[93] Ibid.
[94] Petrič 2017, p. 376.
[95] Final Award 2017, paras. 1012, 1014.
[96] Ibid. para. 1139.
[97] CJEU Press Release No. 9/20, Republic of Slovenia v. Republic of Croatia (C-457/18), 31 January 2020 https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-01/cp200009en.pdf (31 January 2020).

which further steps are going to be taken and whether the final solution – whenever it comes along – will embrace the proposal(s) from the Final Award, including those regarding Slovenia's Junction to the High Seas.

Review

Helmut Kury and Slawomir Redo (eds.): Refugees and Migrants in Law and Policy. Challenges and Opportunities for Global Civic Education.

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The edited volume *Refugees and Migrants in Law and Policy*[1] showcases an ambitious project as it aims at offering a comprehensive overview of fresh insights and empirical analyses about refugees and irregular migrants, as well as government reactions and policy options amidst the ongoing "immigrant challenge" (if not "refugee crisis"). The 35-chapter anthology (complete with forewords, prologue and epilogue) declares that it intends to put education in general, and global civic education in particular high on its intellectual agenda. Already in the editors' Prologue we read that the volume subscribes to the UN's Sustainable Development Goals approach as far as the role of education is underscored in the sense of "averting negative developments involving undocumented migration, hence contributing to responsible migration and mobility of people."[2] It speaks about "multipronged education in kindergartens and schools as a global challenge, commensurate with the level of countries' development."[3]

The studies in the anthology are grouped into five parts: The Background of the "Refugee Problem": History, Present, and Future in the Light of Research – The Role of the Media (Part I), The Two Sides of One Coin: Integration of Refugees/Migrants in Host Countries (Part II), Meeting the Challenges for a Global Civic Education: Country Studies with Practical Experiences (Part III), Refugees and Social/Criminal Behaviour (Part IV), and Next Steps (Part V). Each of the chapters is structured in the same way: after a clear abstract and keywords, learning outcomes are defined in a box, indicating the knowledge and skills the reader can acquire by reading the paper, which is closed off by some Questions, which surely can add to a deeper study process. All these are useful for students, academics as well as the public in general in case they would wish to widen their horizons regarding these topics. The editors and the publisher did a great job by editing all the texts in this coherent way, as this helps the readers in their navigation throughout the book. At the same time, they could have prepared an even more nuanced and sophisticated volume by keeping to a consistent style and format of regarding illustrations, graphs, charts and tables included in the texts, which vary tremendously in quality and even colour.

Part I covers six chapters opened by Walter Baar, who addresses the issue of demography in the context of migration and the European welfare state. His goal is to provide answers to his original

* MTA Bolyai Research Fellow 2018-21. His research is supported by the Bolyai Fellowship of the Hungarian Academy of Sciences.

[1] H. Kury & S. Redo (Eds.), *Refugees and Migrants in Law and Policy. Challenges and Opportunities for Global Civic Education*, Springer, Cham, 2018.
[2] Ibid. p. xxxv.
[3] Ibid. p. xxxvi.

question, i.e. "Can immigration be the solution for Europe's shrinking and aging societies and the European welfare state, or will it bring it to an end?" He pays focal attention to the European welfare state in relation to global migration. Rita Haverkamp's chapter deals first with the asylum laws, procedures and reforms of six Member States, namely Austria, Belgium, France, Germany, the Netherlands, and the United Kingdom (the latter not being a Member State after Brexit any more, of course), and subsequently shifts the focus to civic education undertakings. She underscores that it is "even [a] higher priority than global civic education as a subject [to provide] the safeguards for guaranteeing that refugee children have access to formal schooling."[4] Szilveszter Póczik and Eszter Sárik discuss in their chapter the Hungarian point of view over immigration in light of the country's geopolitical position in the macro region of the Balkans. After summarizing the historical heritage and characteristic of the region different from that of Western Europe, the authors also comment on how "threats" and "dangers" are viewed differently in the western and eastern parts of the continent, and conclude that "in the context of civic education, Eastern European countries still have a lot to learn and have legal and ethical space to develop."[5] By presenting the case of the Roma having migrated from the Balkans to Germany, Albert Scherr then discusses "Who Can Claim Protection as a Refugee?", and suggests that the concept of "refugee" is to be broadened. The last two chapters of the first part offer insights into media-related depictions and interpretations of refugees and migrants. First, Thomas Hestermann provides an empirical analysis of the German situation by tackling the new scientific term "crimmigration" and pointing out that "journalists should [rather] be curious and inquisitive about the whole scene in order to show the whole picture."[6] Next, Aleksandra Ilic writes about "Media Reporting on Refugees and Related Public Opinion in Serbia", bearing in mind the country's special context of accession to the European Union in the forthcoming years. In order to provide "truthful, complete, and accurate media reporting," she says, "the education of journalists about the refugee topic is very important."[7]

Part II includes twelve chapters centred around the issue of integration of those arriving in the host countries. This section starts off with a piece by Ineke Haen Marshall and Chris E. Marshall about the findings of the Third International Self-Report Delinquency Study (ISRD3), which among others tell us that "youth who have a strong bonding with school and teacher, low rate of skipping school, and an above level of performance tend to have considerably stronger condemnation of antisocial behaviours and express higher levels of shame."[8] Michael Platzer in his chapter addresses the question of "Refugee Access to Tertiary Education", which is so "important for the individual, the hopes of the family, and better integration into host societies, providing economic benefits for all, [and] also helps to prevent countries from falling into disintegration, in countering the potential for terrorism, and in building a more peaceful world."[9] One of the editors of the anthology, Slawomir Redo, talks about the "Importance of Preschool Civic Education for the Global Culture of Lawfulness" in his chapter. Acknowledging that "adapting social norms for kindergarten education […] in the migration process is rather a very long and complex challenge," Redo underlines that: "Progressive preschool education is a direct investment into human and social capital for prosperous societies anywhere."[10] Andrea Lehner-Hartmann and Viera Pirker introduce in their chapter a tangible case study of Austrian public schools, "seen as a nucleus for current societal changes"[11] in general, and the integration of refugees, in particular. The fifth paper in the section discusses civic education activities and their efficiency in the ECOWAS region of the African continent. Here,

[4] Ibid. p. 63.
[5] Ibid. p. 105.
[6] Ibid. p. 135.
[7] Ibid. p. 159.
[8] Ibid. p. 187.
[9] Ibid. p. 193.
[10] Ibid. pp. 227-229.
[11] Ibid. p. 235.

Akemi Yonemura also emphasizes that the major barriers to education include access, quality, and management, and among the recommendations to integrate Global Citizenship Education in policies and practices areas such as advocacy, capacity development, educational tools both for teaching and learning, methodological support, and regional and international cooperation should be strengthened.[12] The following six chapters conduct an analysis of the integration process from various perspectives: Ronald Freytag, Justin Reichelt and Vaishnavi Upadrasta look at the "Political Attitudes Among Refugees in Berlin in Summer 2016"; the other editor of the book, Helmut Kury, together with John P. J. Dussich and Maximilian Wertz take an international comparative approach to understanding the "Psychotraumatic Stress Among Refugees", particularly from a German perspective. Then, Jennifer Hillebrecht, Tina Zeiss and Jürgen Bengel investigate the humanitarian admissions programme called Special Quota Project Baden-Wuerttemberg focussed on the Yazidis of northern Iraq. Yet another German example from Freiburg is illustrated by Jasmin Ateia, Philip Bona and Stephan Schmieglitz who shed light on "Labour Market Access and Labour Opportunities for Refugees". Sticking with the Freiburg case, Hans Steiner and Antje Reinhard give an "overview of the development of the voluntary work for refugees"[13] in the city. Steve S. Olweean continues the examination of the psychological and emotional aspects of integration into their new communities by advocating for "Multimodal and Whole-Person Approaches" in his chapter. The last chapter in Part II, written by Alfonso Serrano-Maillo offers the readers some other regional particularities by showing "Generalized Trust and Attitudes Toward Refugees in Portugal and Spain" based upon data "collected in the frame of the seventh wave of the European Social Survey."[14] This other well-structured empirical research reveals that each of the different dimensions and kinds of trust "might have a different impact on attitudes toward refugees",[15] and the temporal understanding is closely connected to the different periods of socialization of the individuals, pointing out that "factors established early in life play an important role in shaping attitudes toward immigrants and refugees."[16]

Part III collects seven papers addressing the "Challenges for a Global Civic Education" via country studies from four continents. While John P. J. Dussich elaborates on "Refugees in the United States of America from a Victimological Perspective", Anastasia Chalkia and Anastasios Giouzepas present the "EU's and Greece's Responses to the Current Refugee and Migration Flows". Witold Klaus, Miklós Lévay, Irena Rzeplinska and Miroslav Scheinost, then, debate the "so-called migration 'crisis' of 2015/2016" putting forward summaries of attitudes of societies at large towards refugees from three Central European countries (the Czech Republic, Hungary and Poland), as well as discussing the "changes in legal provisions concerning refugees' and asylum seekers' rights"[17] in two of these respective countries. Gorazd Mesko, Rok Hacin, Urska Pirnat and Katja Eman extend the regional perspective by adding "Migration Issues in Slovenia: Beyond the Rhetoric of University-Level Criminology and Crime Prevention Education for Sustainable Development", expanding upon some best practice examples. Swati Shirwadkar's chapter on "Refugees and (Irregular/Non-documented) Immigrants in India" seeks to draw attention to South-South migration by stressing the necessity of "a more sensitive approach"[18] needed to reveal the different characteristics, as well as complexities of the movements of population. Tilmann Feltes, Saul Musker and Philine Scholz in their chapter move to the another Regional Economic Community in the African continent, the Southern African Development Community (SADC), and deal with "Migration Regimes and Their Implications for the Experience of Refugees and Migrants in South Africa". They, however, begin

[12] Ibid. pp. 289-290.
[13] Ibid. p. 379.
[14] Ibid. p. 401.
[15] Ibid. p. 416.
[16] Ibid. p. 417.
[17] Ibid. p. 457.
[18] Ibid. p. 550.

by outlining the history of intraregional migration within ECOWAS in West Africa, after which they explain the situation in Johannesburg. In their conclusion the authors state that "SADC remains closed to most cross-border flows"[19] as a result of the South African government to impose restrictions on movements into the country. Finally, Mally Shechory-Bitton and Esther Shachaf Friedman provide comparative research of rates of "Fear of Crime and Terrorism Among Israeli and Swedish Citizens."

With its three chapters, Part IV is devoted to "Refugees and Social/Criminal Behaviour". Thomas Feltes, Katrin List and Maximilian Bertamini work with data from Germany as they present their assessment on the topic of correlations between refugee numbers and crime statistics, and special topic about crimes committed against refugees, also with a gender distinction, rather looking at such crimes against refugee women. They underline that due to the multiple facets of migration and crime, it is to be acknowledged that: "Migrants and refugees are both offenders and victims of crime. […] The one who commits a crime today might be a victim tomorrow and vice versa."[20] The authors are right in saying that: "For young, male refugees and migrants, education is a crucial condition for integration, and more and better preventive measures for women and children are necessary to avoid second or even third victimizations."[21] Janet P. Stamatel and Chenghui Zhang analyse in their contribution the "Risk Factors for Violence Against Refugee Women." The third paper in this section by Bernadette Schaffer and Joachim Obergfell-Fuchs uses police crime statistics for an analysis of "Refugees and Migrants in German Prisons: Outlining Problems and Solutions."

Part V embraces the last seven chapters about the "Next Steps" that can or should be taken for a more holistic asylum and integration strategy bearing in mind the requirements of sustainable development. First, Rita Haverkamp looks at "International and Supranational Aspects of Legal Reform and Integration" and concludes that such a holistic view on behalf of the EU "would be vastly preferable." [22] Second, Slawomir Redo delivers a paper which embarks on the UN 2016–2030 Sustainable Development Agenda and the New York Declaration for Refugees and Migrants, and deals with the "Golden Rule" of reciprocity in the case of urban stewardship. He concludes[23] that empowering women from this angle may "help to display and address urban concerns that may successfully be met as a part of healthy ideology of sustainable development." Third, Jebamalai Vinanchiarachi and Inez Wijngaarde tackle "The Role of UNIDO", the United Nations Industrial Development Organization via the angle of inclusive sustainable industrial development. Fourth, Michael Reiss speaks out in an eloquent way for more attention to be given to "managing a 'nexus' of interconnected conflicts",[24] and in his paper entitled "Conflict Management for Refugee Management" he underscores that: "Multiconflict management affords a reframing of mindsets, together with a new architecture of management models."[25] Fifth, Wolfgang Roth writes about how "Volunteers Change the Lives of Refugees and the Entire Society". Sixth, Magdalena Ickiewicz-Sawicka and Aleksandra Borkowska in their papers use different aspects of the game theory in the 'migration crisis' context. They also discuss the results of a research on Polish migrants in Canada and the Netherlands. Finally, the seventh paper of the last section of the volume by Werner Wintersteiner discusses the notion of "Homeland Earth", of which all of us belong to as its citizens, and stresses the need of "moving toward the goal of global citizenship",[26] which would obviously require a number of new political approaches and in general, "fundamental changes in human at-

[19] Ibid. p. 572.
[20] Ibid. p. 621.
[21] Ibid.
[22] Ibid. p. 694.
[23] Ibid. p. 716
[24] Ibid. p. 741
[25] Ibid. p. 766.
[26] Ibid. p. 835.

titudes and civic behaviour."[27] This a good closing contribution to such an extensive project, as it highlights mindset-related challenges as well as education-related tasks, in particular with regard to refugees and migrants.

The 44-page-long Epilogue by the editors draws a neat scholarly set of concluding and summarizing thoughts of the lengthy, but rich book, which has undoubtedly become one of the major sources of reference in the field. In fact, this volume presents as well as encourages an interdisciplinary approach to the study of refugees and migrants from the overarching perspective of Global Civic Education. It is a handbook of strong research pieces of skilled experts, which can support others in their efforts to understand better and more of the multifaceted nature of international migration.

[27] Ibid.

Review

Harold Hongju Koh: The Trump Administration and International law

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The author is Harold Hongju Koh, who is a Sterling Professor of International law and former Dean of the Yale Law School. He served at the U.S. Department of State from 2009 to 2013 as Legal Adviser, and as Assistant Secretary of State for Democracy, Human Rights and Labor between 1998-2001.

The Trump Administration and International Law[1] is an exceptionally well-written analysis of the foreign policy and attitude towards international law of the first two years of Donald J. Trump's presidency's. The Trump Administration has been in office since 2017, and before the campaign in the United States intensifies in late 2020, the opportunity presents itself to review Professor Koh's examination of some foreign policy decisions of the current U.S. president, along with his administration's position on some issues of international law.

First of all, it has to be noted that although Professor Koh has written his book in a delightful style, – which can be illustrated for example by one of the main questions of the book: "[s]o will Donald trump international law, or vice versa?"[2] – I strongly feel that title of the publication was chosen rather poorly, for the main emphasis within the volume is not on international law questions, but on foreign policy *i.e.* what should/could the United States in a given situation do and what should or could not. Therefore, a better choice of title would have been "*The Trump Administration and the Transnational Legal Process"*. The latter phenomenon is emphasized throughout the whole work. The author argues that law, policy and politics are intertwined, therefore they cannot be examined separately,[3] which might resolve the issues regarding the choice of the title.

The Trump Administration and International Law is divided into six chapters, with an additional introduction and a bibliographical note, acknowledgments and an afterword, which elaborates more on the issues examined within the main chapters of the book.

The first chapter is entitled "Trump's "Strategy" and the Counterstrategy of Resistance" which deals with the current U.S. president's approach that can be characterized by disengagement from globalization, undermining of international institutions and resignation from global leadership.[4] Professor Koh argues that an effective counterstrategy against the Trump "Strategy" would be the *transnational legal process*. Transnational law is – according to him – "a hybrid body of international and domestic law developed by a large number of public and private transnational actors."[5] This

[1] H. H. Koh, *The Trump Administartion and International law*, Oxford University Press, Oxford 2019. ISBN: 9780190912185.
[2] Ibid. p. 15.
[3] Ibid. pp. 17-18.
[4] Ibid. p. 5.
[5] Ibid. pp- 6-7.

new set of rules has a wide range actors from states, to non-governmental organizations and even committed individuals.[6] This counterstrategy can be applied in a twofold manner, as an inside-outside strategy. The so-called 'outside strategy' – which could be employed by non-governmental organizations – can be characterized by "interaction-interpretation-internalization". This means that these organizations have to generate some kind of *interaction* with the government, by *e.g.* suing it for illegal conduct, that would lead to a judicial *interpretation*, which will lead to *internalization* of norms at hand which in turn will be binding for the state.[7] On the other hand, the 'inside strategy' requires "engagement-translation-leverage" or in other words, using international law as a "smart power". Essentially, this obligates the government to *engage* with other states instead of choosing unilateral action. The strategy also calls for *translation* of laws, which means that there should be no legal black holes: existing law should be used to deduce the applicable legal framework from previously unforeseen state action such as drone strikes or cyberwarfare. In the end, states should *leverage* international law with foreign policy, *i.e.* using soft powers together with hard powers to achieve desired goals.[8] Conversely, Trump's "America First" uses "disengage-black hole-hard power" as a tool to handle foreign policy.[9] According to this approach, the U.S. should *disengage* from global leadership and from international cooperation; use whatever policy action it desires, for there are no specific legal rules governing new and unforeseen situations. In other words, it is a legal *black hole*. At the end instead of using diplomatic, legal and military power in combination to solve a foreign policy issue, the U.S. should lean on *hard power* instruments.

I found it necessary to deal with the transnational legal process in a more "in-depth" fashion, for this will be the counterstrategy employed by many actors described in the book's subsequent chapters. The second chapter illustrates this transnational legal process in action, in light of the immigration and refugee policy[10] and the human rights policy[11] of the Trump Administration. In the first half of the chapter, Professor Koh offers a comprehensive history and critic of President Trump's executive order, the so called "Travel Ban", which essentially "blocked entry into the United States by citizens of seven predominantly Muslim countries […]".[12] The author argues that the executive order, and its successors (up to Travel Ban 3.0) is not simply contrary to international law, but it breaches domestic law as well, without mentioning its unnecessary and discriminative nature.[13] Professor Koh then goes on to describe the transnational legal process in action against the Travel Ban and how U.S. government reacted to these actions.[14] A summary of the judicial proceeding in relation to the Travel Ban can be found in the Afterword.[15] In the second half of the first chapter, the author describes the counterstrategy offered in the field of human rights, namely the fight against the presidential plan to use waterboarding *i.e.* torture as an interrogation technique. These prospective human rights violations have been successfully deflected by the transnational legal process.[16]

The third chapter is entitled "Resigning Without Leaving" which lists international treaties and agreements as regards which President Trump announced some kind of withdrawal by the United States such as the Paris Agreement, various trade agreements *e.g.* the Trans-Pacific Partnership, and the Iran Nuclear Deal,.[17] Professor Koh carefully analyses the steps that the Trump Administration

[6] Ibid. p. 7.
[7] Ibid. p. 9.
[8] Ibid. pp. 8-13.
[9] Ibid. p. 13.
[10] Ibid. pp. 22-33.
[11] Ibid. pp. 33-37.
[12] Ibid. p. 22.
[13] Ibid. pp. 23-24.
[14] Ibid. pp. 24-33.
[15] Ibid. pp. 199-212.
[16] Ibid. pp. 33-37.
[17] Ibid. pp. 39-70.

has taken to withdraw from the agreements, and finds for example in case of the Paris Agreement that the United States cannot fully withdraw from the agreement, only after President Trump's first term has ended.[18] The author also argues that international agreements do not collapse after the U.S. withdraws from them. For instance, the Trans-Pacific Partnership turned into the Comprehensive and Progressive Agreement for Trans-Pacific Partnership and the Iran Nuclear Deal was still intact until January 2020.[19] Thus, states either hold up the working international institutions or improve them without the participation of the United States. It is this phenomenon of disengagement from international agreements, short of breaking the ties of the state to international institutions legally that Professor Koh illustrates as "resigning without leaving."[20]

In the fourth chapter, the author investigates foreign policy decisions of the Trump Administration in "Countries of Concern" which is also the title of this part of the volume. The author offers a comprehensive analysis of the foreign policy issues concerning North Korea, most prominently in light of the denuclearization of the Korean Peninsula and U.S. relations towards South Korea.[21] Professor Koh also examines the election hacking in the U.S. by the Russian Federation[22] and the Russian interference in Ukraine from 2014.[23]

The fifth chapter is entitled "America's Wars" which deals with a number of international law questions in connection with *jus ad bellum* and *jus in bello*, although it does most of these from a policy perspective, stemming from the intertwined approach applied by Professor Koh. In the first part, which is connected to Al Qaeda and the Islamic State, the author goes on to explain how the "Global War on Terror" has transformed under the Obama Administration to a more specific armed conflict with various terrorist organizations.[24] After a detailed analysis of the policy decisions and considerations behind the Obama Administration's counter-terrorist strategies,[25] Professor Koh warns about the Trump Administration's loosening of various standards that were employed under its predecessor.[26] A great emphasis has been placed on "ending the forever war" which according to the author has to happen in three steps: 1) disengaging from Afghanistan; 2) closing Guantánamo and the military commissions; finally 3) formally ending the war by repealing or/and reforming the Authorization for Use of Military Force both for Iraq and the Al Qaeda.[27] The author also focuses on the notion of "associated forces" with which the United States are already at war. According to Professor Koh, an associate force has to bear three characteristics: it is1) an organized armed group, 2) which has entered the fight alongside the Al Qaeda against the U.S., 3) making it a co-belligerent in the ongoing hostilities.[28] Another fascinating claim can be found in the part dedicated to Syria, in which the author argues that unilateral humanitarian intervention – *i.e.* intervention in the absence of a United Nations Security Council resolution – is not always illegal, which was brought up in connection with the 2017 and 2018 spring airstrikes in response to suspected use of chemical weapons.[29] Professor Koh claims that he does not "broadly endorse[…] unilateral humanitarian intervention as a matter of law or policy"[30], but rather considers the humanitarian claim as a "defense"

[18] Ibid. pp. 39-54.
[19] *Iran rolls back nuclear deal commitments,* BBC News (5 January 2020) https://www.bbc.com/news/world-middle-east-51001167 (25 February 2020).
[20] Koh 2019, pp. 54-70.
[21] Ibid. pp. 71-81.
[22] Ibid. pp. 81-87.
[23] Ibid. pp. 87-90.
[24] Ibid. p. 95.
[25] Ibid. pp. 97-101.
[26] Ibid. p. 101.
[27] Ibid. p. 106.
[28] Ibid. p. 119.
[29] Ibid. p. 130-132.
[30] Ibid. p. 134.

which would serve as an exemption from a state of legal wrongfulness.[31]

In the last chapter, the reader is faced with the question: "What's at Stake"? Professor Koh identifies the election of President Trump as not the cause, but rather a symptom of a globalized shift in political direction. Instead of pursuing the Kantian legal order that was established after World War II, populist political parties all over the world are seeking the create an Orwellian society of states, where spheres of influence dominate.[32] At the beginning of this review I have highlighted a well-framed question that the volume seeks to find answers to: Will Donald trump international law? According to the author: "we shall see", but Professor Koh calls for optimism seeing the transnational legal process in action within the tally to date (*i.e.* Autumn of 2018), when the Travel Ban was only narrowly upheld by the Supreme Court of the U.S. with possible blockage at lower level courts; various trade agreements are still operating and President Trump might want to reenter one or two of these, and policy constraints are loosened on the conduct of hostilities against Al Qaeda.[33]

Apart from the choice of its title, I believe this book is an exceptionally well-written analysis of U.S. foreign policy under the Trump Administration. As Professor Koh himself aptly put it "[o]bviously, I am no fan of the Trump administration"[34] and this can be felt throughout the whole work, but it is not biased in any way. The author uses his own understanding of the transnational legal process and international law, which he applies either in favor of or against the Trump Administration. Professor Koh's work sheds light on the phenomenon that law, policy and politics are intertwined with each other, therefore their separate examination will not lead to the correct results at all times. The book is a recommended read to all who are interested in U.S. foreign policy and the international law behind that foreign policy. It is however definitely not a comprehensive examination of the entirety of the Trump Administration's conduct in the president's first two years from an international law point of view.

I certainly feel that the publication of the book had perhaps been a bit premature since many events and incidents have happened since the manuscript was closed that would be worth the attention of Professor Koh and his theory of the transnational legal process. To name but a few: the death of Abu Bakr al-Baghdadi, the head of the Islamic State, who killed himself when U.S. troops were conducting a targeted killing operation against him[35]; the withdraw of U.S. troops from Syria[36]; the Soleimani strike[37]; withdrawal from the U.N. Human Rights Council[38]; calling the International Court of Justice "politicized"[39] and many more. Of course, history and international relations do not stand still for the sake of the publication of a scientific work. I hope that we shall see a second edi-

[31] Ibid. p. 134.
[32] Ibid. pp. 141-147.
[33] Ibid. pp. 147-153.
[34] Ibid. p. 131.
[35] M. Ryan & D. Lamothe, *Trump says Islamic State leader Abu Bakr al-Baghdadi blew himself up as U.S. troops closed in*, Washington Post (27 October 2019). https://www.washingtonpost.com/world/national-security/us-forces-launch-operation-in-syria-targeting-isis-leader-baghdadi-officials-say/2019/10/27/081bc257-adf1-4db6-9a6a-9b820dd9e32d_story.html (23 January 2020).
[36] M. Landler & H. Cooper & E. Schmitt, *Trump to Withdraw U.S. Forces From Syria, Declaring 'We Have Won Against ISIS,* The New York Times (19 December 2018) https://www.nytimes.com/2018/12/19/us/politics/trump-syria-turkey-troop-withdrawal.html (25 February 2020).
[37] *Quasem Soleimani: US kills top Iranian general in Baghdad air strike,* BBC News (3 January 2020) https://www.bbc.com/news/world-middle-east-50979463 (25 February 2020).
[38] G. Harris, *Trump Administration Withdraws U.S. From U.N. Human Rights Council,* The New York Times (19 June 2018) https://www.nytimes.com/2018/06/19/us/politics/trump-israel-palestinians-human-rights.html (25 February 2020).
[39] R. Rampton & L. Wroughton & S. van den Berg, *U.S. withdraws from international accords, says U.N. world court ,politicized',* Reuters (3 October 2018) https://www.reuters.com/article/us-usa-diplomacy-treaty/us-reviewing-agreements-that-expose-it-to-world-court-bolton-idUSKCN1MD2CP (25 February 2020).

tion of this book that will include some of the abovementioned incidents and developments as well.

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