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Table of Contents

Editorial

In this issue

The editors are pleased to present issue 2021/II of the Pécs Journal of International and European Law, published by the Centre for European Research and Education of the Faculty of Law of the University of Pécs.

The editorial comments of the current issue reflect upon some of the implications of the recent Carter v. Russia judgment by the European Court of Human Rights.

In the *Articles* section, Tom Drummond analyses the legality of the nuclear deterrence policy of the United Kingdom under international law. Lilla Ozoráková asks and answers the question whether the standards of international criminal proceedings in terms of the right to a fair trial are sufficient. Anna Szerencsés looks at how the protection of fundamental rights has progressed, notably in the twelve years since the EU Charter was given legal binding force. Valéria Horváth gives account of the legal responses to migration induced by the 2010 Haitian earthquake on the American continent.

In the *Case notes and analysis* section, Csongor István Nagy provides analysis of Hungarian judicial practice connected to EU private international law in family and succession matters.

Last but not least, in the *Reviews* section, Mirabella Nezdei reviews Transnational Mobility and Global Health - Traversing Borders and Boundaries by Peter H. Koehn (Routledge, 2020).

As always, a word of sincere gratitude is 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 March 2022, though submissions are welcomed at any time.

The editors

Quo vadis ECtHR? An assessment of Carter v. Russia before the European Court of Human Rights

The European Court of Human Rights (hereinafter: ECtHR or court) has recently delivered its first decision on extraterritorial assassinations in the Carter v. Russia case[1] The judgment concerned Mr. Alexander Litvinenko, former member of the Soviet Union's secret service, KGB, who had been living in the United Kingdom since 2000 until his poisoning in 2006 by Russian state agents.[2]

Before turning to the questions of law raised by the case, it is necessary to elucidate what actually is meant under the term 'assassination'. In light of the authoritative American legal scholarship, the definition of assassination is dependent upon whether it was conducted in times of war or peace.[3] During peacetime, politically motivated killings are considered to be assassinations, while within the framework of an armed conflict, perfidious or treacherous killings of individually selected adversaries are characterized as assassinations.[4] According to the views of this author, assassinations can be seen as a subcategory of 'targeted killings', a notion which describes the extraterritorial use of intentional, premeditated, deliberate lethal force against individually selected persons, who are not in the physical custody of the attacker. The use of force is attributable to a state or international organization and there is no judicial decision authorizing the killing of the target.[5]

Based on the above, the poisoning of Mr. Litvinenko can be considered a classic peacetime assassination, since the killing had an undeniable political motivation.[6]

The judgment of the ECtHR is notable – among other things – for having established the jurisdiction of the respondent state in connection with the substantive limb (or negative obligation) of the right to life – for an extraterritorial use of force, contrary to the longstanding 'precedent' of the Bankovic decision.[7] In that judgment, the court famously held that bombing a person does not create jurisdiction for the state in question in the absence of effective control on the ground.[8] In its subsequent case law, the ECtHR remained true to Bankovic, arguing that states' jurisdiction is primarily territorial, however, a number of exceptions have been identified which relied on the authority and control of a state agent on the person in question.[9] In the recent Georgia v. Russia (II) case[10] however, the ECtHR took a step back from expanding extraterritorial jurisdiction as illustrated by Al-Skeini v. The United Kingdom[11] towards the Bankovic decision,[12] finding no jurisdiction for the

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[1] *Carter v Russia* (App. no. 20914/07) ECtHR (2021) The ECtHR has found six to one, that the Russian Federation has violated Mr. Litvinenko's right to life (both the substantive and the procedural limb) and afforded EUR 100,000 as non-pecuniary damage to the widow of the late Mr. Litvinenko. See, Ibid. ratio decidendi paras. 4-5.

[2] Ibid. paras. 6. 33-34. and 169.

[3] https://www.law.upenn.edu/institutes/cerl/conferences/targetedkilling/papers/ParksMemorandum.pdf (18 October 2021). pp. 2-3.

[4] N. Melzer, *Targeted Killing in International Law,* OUP, Oxford 2008, pp. 46-47.

[5] B. Kis Kelemen, *Célzott likvidálás a nemzetközi jogban különös tekintettel a fegyveres, pilóta nélküli repülőgépek alkalmazására,* Doctoral Dissertation (Submitted for public defence) University of Pécs, Pécs 2021. pp. 38-40. The definition relies heavily on Melzer's 2008 characterization. See Melzer 2008, p. 5.

[6] Carter v Russia para 10. Mr. Litvinenko was engaged in activities aiming to expose corruption in Russia.

[7] *Bankovic and Others v Belgium and 16 other Contracting States* (App. no. 52207/99) ECtHR (2001)

[8] Ibid. para. 75.

[9] *Carter v Russia* paras. 124-127.

[10] *Georgia v Russia (II)* (App. no. 38263/08) ECtHR (2021)

[11] *Al-Skeini and Others v The United Kingdom* (App. no. 55721/07) ECtHR (2011)

[12] https://www.ejiltalk.org/georgia-v-russia-no-2-the-european-courts-resurrection-of-bankovic-in-the-contexts-of-

Russian Federation during the hostilities of an international armed conflict, except for persons in physical custody.[13] The court further argued that state agent authority and control beyond arrest or detention has only been established in connection[14] in relation to "isolated and specific acts involving an element of proximity."[15] This reasoning was later taken up and expanded upon by the Chamber in Carter v. Russia,[16] claiming that this "should apply with equal force in cases of extrajudicial targeted killings by State agents acting in the territory of another Contracting State outside of the context of a military operation."[17] The ECtHR also claimed that "[t]argeted violations of the human rights of an individual by one Contracting State in the territory of another Contracting State undermine the effectiveness of the Convention both as a guardian of human rights and as a guarantor of peace, stability and the rule of law in Europe."[18] It needs to be highlighted nevertheless that the court still reiterated that the case in question has occurred "in a situation of proximate targeting".[19]

Where does this leave us in terms the of judicial oversight of targeted killing programs? Well, we have reason to have confidence in the future despite the fact that the decision can still be overturned by the Grand Chamber in case of a referral to it, but the present author strongly agrees with Marko Milanovic that it is highly unlikely that the Grand Chamber would reverse the judgment as matter of legal interpretation.[20]

However, the present author also feels that jurisdiction over extraterritorial targeted killing operations is still not carved in stone, since the most prominent targeted killing operations, i.e., the use of armed drones to kill terrorist suspects can still fall outside the scope of the abovementioned test for jurisdiction for at least three reasons.

First, it can be argued that a targeted killing by an unmanned aerial vehicle is not an isolated and specific act since most contemporary targeted killing operations occur within the framework of a state policy or program.[21]

Second, targeted killing by a drone by the nature of things does not involve any level of proximity in contrast with, for example, poisoning.

Third, many targeted killings occur in times of armed conflict. The ECtHR has already held that "the active phase of hostilities which the Court is required to examine in the present case in the context of an international armed conflict is very different, as it concerns bombing and artillery shelling"[22] Although, the case in question – Georgia v. Russia (II) – occurred without doubt in a situation of an international armed conflict, but in theory it is still arguable, that the "context of chaos"[23] can exist in a non-international armed conflict as well, within which the vast majority of targeted killing operations take place.

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chaos/ (18 October 2021).

[13] *Georgia v Russia (II)* paras. 113-144. 239. and 269.

[14] Ibid. para. 131.

[15] Ibid. para. 132.

[16] https://www.ejiltalk.org/european-court-finds-russia-assassinated-alexander-litvinenko/ (18 October 2021).

[17] *Carter v Russia* para. 130.

[18] Ibid. para. 128.

[19] Ibid. para. 161.

[20] https://www.ejiltalk.org/european-court-finds-russia-assassinated-alexander-litvinenko/ (18 October 2021).

[21] Kis Kelemen 2021, pp. 46-53. and 57.

[22] *Georgia v Russia (II)* para. 133.

[23] See, for example ibid. 126.

It remains to be seen whether the ECtHR chooses to further elaborate on extraterritorial jurisdiction over targeted killing operations abroad, or whether Carter v. Russia simply becomes an interesting episode of the case-law of the court.

Nota bene: the abovementioned loopholes were not identified to argue against a strong judicial oversight of targeted killings, but rather to shed some light on the problematic conditions the ECtHR choose to rely on in its recent case-law.

Bence Kis Kelemen

UK Nuclear Deterrence Policy and International Law: Terrorism with Impunity?

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This article asks: does UK nuclear deterrence policy constitute terrorism under international law? In the context of international law, terrorism refers to activities which (a) involve violence (or threat of violence), fear and coercion, and (b) are unlawful by reference to law which is not terrorism-specific. UK nuclear deterrence policy (a) involves a threat of violence, fear and coercion, and (b) is unlawful in at least some respects (such as its failure to rule out first use). There is widespread agreement in the international law literature that, in principle, activities carried out by a state can constitute terrorism, but the attitudes and actions of states are not consistent on this point. On this basis, UK nuclear deterrence policy might constitute terrorism, but a clear legal answer on this point is not currently possible. The policy would fall within international legal constraints on general and nuclear terrorism, if their scope had not specifically excluded state military activities. UK nuclear deterrence policy is an offence under UK terrorism law, but there is little hope of successfully prosecuting UK Government officials. This overall effective impunity for UK nuclear deterrence policy reflects a wider concern: powerful states often drive the development of international law on terrorism (and on other issues) according to their own priorities. Strategies for change, for example to achieve a UK no-first-use policy, include applying wider, non-terrorism-specific, international law to existing UK policy.

Keywords: nuclear weapons, UK, nuclear deterrence, nuclear terrorism, state terrorism, threat

1. Introduction and Overview

It has been claimed that nuclear deterrence policies in general constitute terrorism in terms of international law.[1] It has also been claimed that nuclear deterrence policies in general constitute terrorism in a wider, non-legal context.[2] Even authors who hesitate to draw such conclusions acknowledge that nuclear deterrence has many of the characteristics which normally appear in definitions of terrorism.[3] The claim that all nuclear deterrence is terrorism, as that term is used in

[1] F. A. Boyle, *Remarks by Francis A. Boyle*, Proceedings of the ASIL Annual Meeting, Vol. 82, 1988, pp. 569-571.

[2] T. C. Schelling, *Thinking about Nuclear Terrorism*, International Security, Vol. 6, No. 4, 1982, pp. 66-68; A. Vanaik, *The Issue of Nuclear Terrorism*, Economic and Political Weekly, Vol. 45, No. 17, 2010, p. 11.

[3] C. Begorre-Bret, *The Definition of Terrorism and the Challenge of Relativism*, Cardozo Law Review, Vol. 27, No. 5, 2006, p. 1997, citing Wellman, and p. 1999, citing Merari; K. J. Greene, *Terrorism as Impermissible Political Violence: An International Law Framework*, Vermont Law Review, Vol. 16, No. 2, 1992, p. 492, citing Stohl; M. Koskenniemi, *The Police in the Temple: Order, Justice and the UN: A Dialectical View*, European Journal of International Law, Vol. 6, No. 3, 1995, p. 348; J. Poettcker, *Is Deterrence Morally and Legally Permissible and is it a Form of State Terrorism?*, in J. L. Black-Branch & D. Fleck (Eds.), Nuclear Non-proliferation in International Law - Volume IV, T.M.C. Asser

the context of international law, appears to be a claim which few authors have analysed, and none (to my knowledge) in any detail.

Rather than explore these wide claims, this article focuses on the narrower question of whether or not UK nuclear deterrence policy constitutes terrorism in terms of international law. One difficulty arising in the International Court of Justice (ICJ) 1996 *Nuclear Weapons* advisory opinion (the *Nuclear Weapons* opinion),[4] leading to its indefinite outcome, was "the attempt to cover many hypothetical proposed uses of nuclear weapons".[5] Hence, in any consideration of nuclear deterrence in the context of international law, there is merit in focusing on one fact pattern at a time: "limiting consideration to uses proposed by the United Kingdom of its particular weapons will reduce the possibility of an unclear outcome".[6] In this article I focus on the UK, for two reasons.

– Some suggest that "within the wider constitutional order derived from the UN Charter […] 'security' and 'law' are separate but related, and nuclear deterrence sits uneasily between the two".[7] Whether or not this is true, the UK accepts that nuclear deterrence is subject to law. This is clear from the UK's claim that "Maintaining a minimum nuclear deterrent is fully consistent with all our international legal obligations".[8]

– UK nuclear deterrence policy is well documented and has been subject to legal analysis which concludes that it is unlawful, in at least some respects, under international law on the use of force.[9] This conclusion is relevant to the claim that UK nuclear deterrence policy constitutes terrorism, because unlawfulness (under non-terrorism-specific law) is a core characteristic of terrorism, as will be discussed further below.

Although this article focuses on UK policy, its conclusions will apply more widely: much of its analysis is also relevant to the deterrence policies of other states.

The article asks a precise question: does UK nuclear deterrence policy constitute what a "broadly representative" group of international lawyers would consider to be terrorism? If so, then the suggestion that UK policy is terrorism becomes more "credible and authoritative".[10] Subject to

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Press, The Hague 2019. p. 321; I. Primoratz, *State Terrorism and Counterterrorism*, in G. Meggle & A. Kemmerling & M. Textor (Eds.), Ethics of Terrorism & Counter-terrorism, De Gruyter, Berlin, Boston 2013, p. 77.

[4] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, 1996 ICJ Rep. 226.

[5] B. Drummond, *Is the United Kingdom Nuclear Deterrence Policy Unlawful?*, New Zealand Yearbook of International Law, Vol. 11, 2013, p. 110.

[6] Ibid.

[7] N. D. White, *Understanding nuclear deterrence within the international constitutional architecture*, in J. L. Black-Branch & D. Fleck (Eds.), Nuclear Non-proliferation in International Law - Volume V, T.M.C. Asser Press, The Hague 2020, p. 237.

[8] UK Secretary of State for Defence and Secretary of State for Foreign and Commonwealth Affairs, *The Future of the United Kingdom's Nuclear Deterrent*, White Paper, Cm 6994, 2006, p. 21, point 7, (hereinafter: UK White Paper 2006); a similar statement appears in UK Government Guidance *The UK's Nuclear Deterrent: The Facts*, 16 March 2021, https://www.gov.uk/guidance/the-uks-nuclear-deterrent-the-facts (6 August 2021), sect. 6, (hereinafter: UK Guidance March 2021).

[9] B. Drummond, *UK Nuclear Deterrence Policy: An Unlawful Threat of Force*, Journal on the Use of Force and International Law, Vol. 6, No. 2, 2019, pp. 193-241: see Part 3 below.

[10] O. Schachter, *The Invisible College of International Lawyers*, Northwestern University Law Review, Vol. 72, No. 2, 1977, pp. 219 and 222, uses the phrases quoted in this and the previous and following sentences in suggesting how best to deal with "controversial issues of international law" noting that these "require answers that reflect global positions"; M. Sornarajah, *On Fighting for Global Justice: The Role of a Third World International Lawyer*, Third World Quarterly Vol. 37, No. 11, 2016, pp. 1972-1989, p. 1978, notes "the notion of a college of international lawyers [...] is an ideal. It has never happened that way"; see also L. Leão Soares Pereira & N. Ridi, *Mapping the 'invisible college of*

one serious constraint, this article aims to refer to a body of literature which is "internationally representative […] embracing persons from various parts of the world and from diverse political and cultural groupings".[11] The constraint is that, due to time and resource constraints, this article reflects only English-language literature, and so necessarily largely fails to take into account "all the nuances of this world" which have not "already been expressed in English".[12]

In this context, a necessary first question is: what would a "broadly representative" group of international lawyers consider to be the characteristics of terrorism? To answer that question requires either (i) a survey, for this specific purpose, of a "broadly representative" group of international lawyers; or (ii) an assumption that the views expressed in the literature, by the courts, in international humanitarian law, and among UN member states, on this point reflect the views of a "broadly representative" group of international lawyers. Lacking the resources to design and implement the survey (i), I make the assumption (ii).

Is assumption (ii) plausible? It is possible that the views expressed in the literature, by the courts, in international humanitarian law, and among UN member states reflect the views of only a *minority* of international lawyers. This would, however, require that the *majority* had rarely clearly or publicly expressed their view, let alone their legal reasons for their view. This seems less plausible than assumption (ii), and so supports the plausibility of that assumption, as made in this article.

Many acknowledge the fact that there is no agreement on the definition of terrorism,[13] either in the context of law,[14] or in wider analysis.[15] Some go further and question whether a single coherent definition of the term is possible.[16] Neither of these difficulties is necessarily inconsistent with the existence of general agreement, within international law, on the core characteristics of terrorism. If indeed there is such agreement, then the "complex and significant" difficulties in reaching an agreed definition "should not lead to impunity for clear-cut cases of terrorism".[17] Strictly speaking, without an agreed definition of terrorism in international law, this type of "clear cut case of terrorism" would not in itself be adequate in law for the purposes of responsibility, which is of particular relevance to

international lawyers' through obituaries, Leiden Journal of International Law, Vol. 34. No. 1, 2021, pp. 67–91.

[11] Schachter 1977, p. 222; see also Drummond 2019, p. 201.

[12] The phrases quoted are used in L. Mälksoo, *Civilizational Diversity as Challenge to the (False) Universality of International Law*, Asian Journal of International Law, Vol. 9, No. 1, 2019, p. 164, in recommending that "international law experts [...] in the West [...] tak[e] big non-Western languages seriously in the study of international law […] For example, international lawyers should try to gain a knowledge of either Chinese, Arabic, or Russian".

[13] A. P. Schmid, *The Definition of Terrorism*, in A. P. Schmid (Ed.), The Routledge Handbook of Terrorism Research, Routledge, Abingdon 2011, p. 39.

[14] B. Saul, *Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism*, Leiden Journal of International Law, Vol. 24, No. 3, 2011, pp. 683-684.

[15] L. Burns, *Toward a Contemporary Definition of Terrorism*, Forum on Public Policy Online, Vol. 2011, No. 3, 2011, p. 1; C. Card, *Recognizing Terrorism*, Journal of Ethics, Vol. 11, No. 1, 2007, pp. 3-8; V. Held, *Terrorism and War*, Journal of Ethics, Vol. 8, 2004, p. 62; Schmid 2011.

[16] U. Baxi, *The War on Terror and the War of Terror: Nomadic Multitudes, Aggressive Incumbents, and the New International Law; Prefatory Remarks on Two Wars*, Osgoode Hall Law Journal, Vol. 43, No. 1/2, 2005, p. 8; R. Higgins, *The General International Law of Terrorism*, in R. Higgins & M. Flory (Eds.), Terrorism and International Law, Routledge, London 1997, p. 14; J. S. Hodgson & V. Tadros, *The Impossibility of Defining Terrorism*, New Criminal Law Review, Vol. 16, No. 3, 2013, pp. 524-525; R. Jagtap, *Defining International Terrorism: Formulation of a Universal Concept out of the Ideological Quagmires and Overlapping Approaches*, Journal of Philosophy of International Law, Vol. 4, No. 1, 2013, pp. 73-74; A. Richards, *Conceptualising Terrorism*, Studies in Conflict & Terrorism, Vol. 37, 2014, pp. 217-218; A. Tiwari and P. Kashyap, *Countering Terrorism Through Multilateralism: Reviewing the Role of the United Nations*, Groningen Journal of International Law, Vol. 8, No. 1, 2020, pp. 118-119.

[17] M. Gillett & M. Schuster, *Fast-track Justice: The Special Tribunal for Lebanon Defines Terrorism*, Journal of International Criminal Justice, Vol. 9, No. 5, 2011, p. 1008.

state actions. Identifying a state activity with such characteristics would, therefore, not necessarily lead to state responsibility. As noted below, however, it may motivate other states and other actors to find other routes in law to constrain the 'offending' state and so bring the activity to an end.

Part 2, therefore, assesses to what extent there is agreement on the core characteristics of activity described as terrorism in international law. Part 3 goes on to consider whether or not UK nuclear deterrence policy has these characteristics. Establishing that UK nuclear deterrence policy has the characteristics of terrorism is, however, quite distinct from assessing whether or not that particular terrorism is constrained by existing terrorism-specific law. Part 4 makes that assessment, and reviews the efforts, in international and UK law, to constrain general and nuclear terrorism. Part 5 notes that these efforts fail to constrain the UK Government. The remaining two parts, respectively, consider the prospects for change and draw conclusions.

The distinctions between (i) unlawfulness, (ii) characteristics of terrorism in an international law context, and (iii) activities within the scope of terrorism-specific international law, are crucial to the analysis in this article.

- If an activity is unlawful (under non-terrorism-specific law) then it has one of the characteristics of terrorism in an international law context (Part 2).

- If such an activity also has other characteristics of terrorism in an international law context, then whether or not it is within the scope of terrorism-specific international law might depend on whether or not the activity is carried out by a state (Parts 2 and 4).

- When unlawful activity, which also has other characteristics of terrorism, is carried out by a state, and is not within the scope of terrorism-specific international law, it may be difficult to enforce the other law under which the state activity is unlawful (Part 5).

This article,[18] therefore, refers to a "broadly representative" group of international lawyers, without claiming that their views might represent "the teachings of the most highly qualified publicists of the various nations" and so be a "subsidiary means for the determination of rules of law" under the ICJ Statute.[19] Assessing which lawyers are "the most highly qualified" might be relevant to establishing the content of international law on terrorism. It is not relevant to establishing the characteristics of activities described as terrorism in the context of international law (the task in Part 2).

The distinctions and facts just noted are also crucial to the motivation of this article. If an activity is unlawful under non-terrorism-specific international law then, at first sight, there might seem no reason to consider whether it is also unlawful as terrorism under international law. The international law analysis of UK nuclear deterrence policy is, however, less straightforward.

- The Treaty on the Prohibition of Nuclear Weapons (hereinafter: TPNW) entered into force earlier this year. The signatories to that treaty consider "that any use of nuclear weapons would be contrary to the rules of international law applicable in armed conflict" and undertake "never under any circumstances to … threaten to use nuclear weapons".[20]

- There is consensus that, even for states which are not parties to the TPNW, any use or threat of use, of any nuclear weapon, in any circumstance *other* than self-defence, would

[18] In line with Schachter 1977.

[19] ICJ Statute, Art. 38(1)(d).

[20] 2017 Treaty on the Prohibition of Nuclear Weapons (TPNW), UNTC I-56487, Preamble and Article 1(d).

be unlawful.[21]

– There are good arguments that, even for states which are not parties to the TPNW, any use, or threat of use, of any nuclear weapon *even in self-defence* would be unlawful, but there is not consensus on this in the literature, or among states, and the wording of the *Nuclear Weapons* opinion left scope for disagreement on this point.[22]

– The UK is not a party to the TPNW. Current UK policy states that the "UK does not support and will not sign or ratify the Treaty" and claims that the "TPNW risks undermining existing non-proliferation and disarmament efforts, and will not enhance our security". Despite this, there are good arguments that UK nuclear deterrence policy currently constitutes an unlawful threat of force.[23] To date, however, there has been limited engagement with these arguments, and the relevant wording in the *Nuclear Weapons* opinion, while clear on a careful reading, is potentially confusing at first sight.[24]

– Even if, hypothetically, there might be some uses of a nuclear weapon which would be lawful, there are good arguments that the uses of UK weapons contemplated in UK nuclear deterrence policy would be unlawful.[25] These arguments are not currently accepted by the UK,[26] and there is limited scope to hold the UK accountable on this point.[27]

– If, separately from the above arguments, it could be shown that UK policy was unlawful under terrorism-specific international law, then this might be an argument that the UK would accept. The UK could, in theory, do this consistently with denying that the policy is otherwise unlawful: it is true that being otherwise unlawful is a characteristic of terrorism in an international law context; but some activities within the scope of terrorism-specific international law have few of the characteristics of terrorism in international law.[28]

– Even if the UK did not accept an argument that UK policy was unlawful as terrorism under international law, such an argument might persuade some of the authors, states, and other actors who are currently unpersuaded by the arguments that UK policy is otherwise unlawful. If so, this might increase the scope to hold the UK accountable. Pursuing this approach is consistent with a recent analysis which suggests that "no one approach can solve the problem of nuclear weapons" and encourages the pursuit of multiple parallel strategies.[29] The TPNW is one such strategy.[30] Exploring the relevance of terrorism law to nuclear weapons is another.

– In theory, it is more straightforward to consider the actual use of a nuclear weapon, than the threat of such use, both (a) to assess lawfulness, and (b) to prosecute perpetrators of unlawfulness before national or international courts. In practice, however, partly due to the

[21] See second para. of sect. 3.2 below.

[22] Drummond 2019, p. 200.

[23] Drummond 2019.

[24] Ibid. p. 209 and App.

[25] Ibid. pp. 219-232.

[26] Below, nn. 190-191 and related text.

[27] Drummond 2019, pp. 234-239.

[28] Below, Part 4.

[29] P. M. Lewis, *Nuclear weapons as a wicked problem in a complex world*, in N. Bård & V. Steen & O. Njølstad (Eds.), Nuclear Disarmament: A Critical Assessment, Routledge, London 2019, p.57.

[30] Drummond 2019, p. 204.

> significant risk of escalation arising from any use of any nuclear weapon,[31] the consequences of any actual such use are potentially catastrophic. For that reason, it makes sense to do the harder work of assessing the lawfulness of threats such as deterrence and working to achieve compliance with the relevant national and international law applying to such threats.

Thus, the question considered in this paper (does UK nuclear deterrence policy constitute terrorism under international law?) is of practical relevance in the current international context.

Concerns have been raised about what is referred to as 'nuclear terrorism',[32] but again there is not an agreed definition. Having first, in Part 2, considered the characteristics of terrorism in general, subsequent sections of the article will use the phrase 'nuclear terrorism' to refer to activity with these characteristics, which also involves nuclear weapons or materials.

2. Characteristics of Terrorism in International Law

It was suggested in 1997 that terrorism was "a term without any legal significance".[33] Developments in national and international law since then mean that such a view would now be hard to sustain.[34] This Part 2 looks at the activities which are described as terrorism:

- in the international law literature (Section 2.1);
- by the international courts (Section 2.2);
- in international humanitarian law (IHL) (Section 2.3); and
- among UN member states (Section 2.4.).

The limited aim here is to establish what agreement there is within, and between, these communities.[35]

2.1. Descriptions of Terrorism in the International Law Literature

In the international law literature, there is widespread agreement that violence which aims to

[31] Ibid. n. 232 and related text.

[32] A. Arbatov & V. Dvorkin & A. Pikaev, *Nuclear Terrorism: Political, Legal, Strategic, and Technological Aspects*, Russian Politics and Law, Vol. 46, No. 1, 2008, p. 50 (L. Galperin (Tr.), Mirovaia Ekonomika i Mezhdunarodnye Otnosheniia, Vol II, 2006, p. 3); C. C. Joyner, *Countering Nuclear Terrorism: A Conventional Response*, European Journal of International Law, Vol. 18, No. 2, 2007, pp. 227-229; M. K. Khan, *A Pakistani Perspective on WMD Terrorism*, Strategic Studies, Vol. 31, No. 3, 2011, p. 206; X. Liping, *Nuclear Terrorism and International Prevention Regimes*, China International Studies, Vol. 16, 2009, p. 24.

[33] Higgins 1997, p. 28; V.-J. Proulx, *A Postmortem for International Criminal Law? Terrorism, Law and Politics, and the Reaffirmation of State Sovereignty*, Harvard National Security Journal, Vol. 11, No. 1, 2020, p. 172.

[34] J. D. Fry, *The Swindle of Fragmented Criminalization: Continuing Piecemeal Responses to International Terrorism and Al Qaeda*, New England Law Review, Vol. 43, No. 3, 2009, pp. 400, 413-414; P. Hilpold, *The Evolving Right of Counter-terrorism: An Analysis of SC Resolution 2249 (2015) in View of some Basic Contributions in International Law Literature*, QIL Zoom-out, Vol. 24, 2016, pp. 30, 33-34; S. Margariti, *Defining International Terrorism to Protect Human Rights in the Context of Counter-terrorism*, Security and Human Rights, Vol. 29, 2018, p. 185; D. Moeckli, *Emergence of Terrorism as a Distinct Category of International Law*, Texas International Law Journal, Vol. 44, No. 2, 2008, p. 157.

[35] The existence of such agreement is suggested by Gillett & Schuster 2011, p. 1008; and Proulx 2020, p. 160.

create fear in order to coerce constitutes terrorism.[36] Some suggest that not all three are necessarily present in all terrorist acts.[37] Some suggest that terrorism also necessarily involves violence which does not discriminate between combatants and non-combatants,[38] or that it is necessarily targeted at civilians,[39] but there is less agreement on these suggestions.[40] There is also less agreement on

[36] T. Altwicker, *Explaining the Emergence of Transnational Counter-terrorism Legislation in International Law-making*, Finnish Yearbook of International Law, Vol. 24, 2014, p. 4; M. V. Andreev, *International Terrorism as a Key Threat to Security in the XXIst Century*, Bulletin of the Kazan Law Institute of MIA of Russia, Vol. 9, No. 1, 2018, pp. 84-85; M. C. Bassiouni, *Legal Control of International Terrorism: A Policy-oriented Assessment*, Harvard International Law Journal, Vol. 43, No. 1, 2002, p. 84; Begorre-Bret 2006, p. 1995; J. Blackbourn & F. F. Davis & N. C. Taylor, *Academic Consensus and Legislative Definitions of Terrorism: Applying Schmid and Jongman*, Statute Law Review, Vol. 34, No. 3, 2012, pp. 260-261; A. C. Brown, *Hard Cases Make Bad Laws: An Analysis of State-sponsored Terrorism and its Regulation under International Law*, Journal of Conflict and Security Law, Vol. 2, No. 2, 1997, p. 137; N. Gal-Or, *The Formation of a Customary International Crime: Global Terrorism Human (In)Security*, International Criminal Law Review, Vol. 15, No. 4, 2015, pp. 666-669; M. Hanson, *State Sponsorship: An Impediment to the Global Fight against Terrorism*, Groningen Journal of International Law, Vol. 7, No. 2, 2020, p. 133; A. A. Idowu, *Terrorism and Terrorist acts: Revisiting the USA - Nigeria Connection of 25 December, 2009*, KNUST Law Journal, Vol. 6, 2014, p. 49; Institute for Economics & Peace, *Global Terrorism Index 2020: Measuring the Impact of Terrorism*, https://www.economicsandpeace.org/reports/ (6 August 2021), p. 6; R. Kolb, *The Exercise of Criminal Jurisdiction over International Terrorists*, in A. Bianchi (Ed.), Enforcing International Law Norms against Terrorism, Hart Publishing, Oxford 2004, p. 227, at pp. 238-239 and 277; A. Kuznetcov & V. Kuznetcov, *The Legal Definition of Terrorism in the United States and Russia*, World Applied Sciences Journal, Vol. 28, No. 1, 2013, p. 133; Richards 2014, p. 230; O. Schachter, *The Extraterritorial Use of Force against Terrorist Bases*, Houston Journal of International Law, Vol. 11, 1989, p. 309; B. Van Schaack, *Finding the Tort of Terrorism in International Law*, Review of Litigation Vol. 28, No. 2, 2008, p. 429; R. Värk, *Terrorism, State Responsibility and the Use of Armed Force*, Estonian National Defence College Proceedings, Vol. 14, 2011, p. 81; T. Weigend, *The Universal Terrorist: The International Community Grappling with a Definition*, Journal of International Criminal Justice, Vol. 4, 2006, pp. 916-917; R. Young, *Defining Terrorism: The Evolution of Terrorism as a Legal Concept in International Law and its Influence on Definitions in Domestic Legislation*, Boston College International and Comparative Law Review, Vol. 29, 2006, p. 33; S. Zeidan, *Agreeing to Disagree: Cultural Relativism and the Difficulty of Defining Terrorism in a Post-9/11 World*, Hastings International and Comparative Law Review, Vol. 29, No. 2, 2006, p. 217.

[37] *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, STL-11-O1/I (16 February 2011), at [85]; A. K. Amet, *Terrorism and International Law: Cure the Underlying Problem, not just the Symptom*, Annual Survey of International & Comparative Law, Vol. 19, No. 1, 2013, pp. 30-31; D. Blöcher, *Terrorism as an International Crime: The Definitional Problem*, Eyes on the ICC, Vol. 8, No. 1, 2011, pp. 124-125; G. P. Fletcher, *The Indefinable Concept of Terrorism*, Journal of International Criminal Justice, Vol. 4, No. 5, 2006, p. 911; K. Hardy & G. Williams, *What is Terrorism? Assessing Domestic Legal Definitions*, UCLA Journal of International Law and Foreign Affairs, Vol. 16, No. 1, 2011, pp. 92-96; N. Norberg, *Terrorism and International Criminal Justice: Dim Prospects for a Future Together*, Santa Clara Journal of International Law, Vol. 8, 2010, pp. 19-20.

[38] Begorre-Bret 2006, p. 1996; L. M. Olson, *Prosecuting Suspected Terrorists: The War on Terror Demands Reminders about War, Terrorism, and International Law*, Emory International Law Review, Vol. 24, No. 2, 2011, p. 488.

[39] Andreev 2018, p. 84; Blackbourn & Davis & Taylor 2012, pp. 260-261; I. Braber, *The Thorny Nature of a Terrorism Definition in International Law*, IUP Journal of International Relations, Vol. 10, No. 1, 2016, p. 48 and 50; I. I. Chiha, *Redefining Terrorism under the Mubarak Regime: Towards a New Definition of Terrorism in Egypt*, Comparative and International Law Journal of Southern Africa, Vol. 46, No. 1, 2013, p. 91 and 113; F. de Londras, *Terrorism as an International Crime*, in W. A. Schabas & N. Bernaz (Eds.), Routledge Handbook of International Criminal Law, Routledge, London 2010, p. 170; M. Di Filippo, *The Definition(s) of Terrorism in International Law*, in B. Saul (Ed.), Research Handbook on International Law and Terrorism, Edward Elgar Publishing, Cheltenham, Northampton 2014, p. 16; Gal-Or 2015, p. 678; Greene 1992, p. 477; Jagtap 2013, p. 73; Poettcker 2019, pp. 317-319; K. Roach, *Defining Terrorism: The Need for a Restrained Definition*, in C. Forcese & N. LaViolette (Eds.), The Human Rights of Anti-terrorism, Irwin Law, Toronto 2008, p. 98 and 127; J. Satterley, *Terrorism in the Eye of the Beholder: The Imperative Quest for a Universally Agreed Definition of Terrorism*, Kent Student Law Review, Vol. 2, 2015, p. 8 and 16; Young 2006, p. 64; Zeidan 2006, p. 232.

[40] Blöcher 2011, p. 122; A. Conte, *Human Rights in the Prevention and Punishment of Terrorism*, Springer-Verlag, Berlin, Heidelberg 2010, pp. 26-27; Fletcher 2006, p. 904; T. M. Franck & B. B. Lockwood, *Preliminary Thoughts towards an International Convention on Terrorism*, American Journal of International Law, Vol. 68, No. 1, 1974, pp. 80-82; Gal-Or 2015, n. 59; Greene 1992, p. 487; R. Grozdanova, *'Terrorism' – Too Elusive a Term for an International Legal*

whether the coercion must be politically motivated,[41] or done by an organisation.[42]

The inclusion of threats as terrorist acts is also widely recognised in the law literature,[43] though there are some authors who challenge such inclusion.[44] Beyond the international law context, the fact that terrorism includes threats also emerges from the non-legal literature.[45]

There is widespread recognition in the law literature that states can commit terrorist acts,[46] despite

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Definition?, Netherlands International Law Review, Vol. 61, No. 3, 2014, p. 322; Held 2004, pp. 63-68; Higgins 1997, pp. 14-15 and 28; Hodgson & Tadros 2013, pp. 510-517; Kolb 2004, pp. 234-235; R. Lavalle, *A Politicized and Poorly Conceived Notion Crying out for Clarification: The Alleged Need for a Universally Agreed Definition of Terrorism*, Heidelberg Journal of International Law, Vol. 67, 2007, pp. 104-105, 110; M. Mancini, *Defining Acts of International Terrorism in Time of Armed Conflict: Italian Case Law in the Aftermath of September 11, 2001 Attacks*, Italian Yearbook of International Law, Vol. 19, 2009, pp. 118-119; M. O. Ochieng, *The Elusive Legal Definition of Terrorism at the United Nations: An Inhibition to the Criminal Justice Paradigm at the State Level*, Strathmore Law Journal, Vol. 3, 2017, p. 81; A. V. Orlova & J. W. Moore, *Umbrellas or Building Blocks: Defining International Terrorism and Transnational Organized Crime in International Law*, Houston Journal of International Law, Vol. 27, No. 2, 2005, p. 274; J. J. Paust, *Terrorism's Proscription and Core Elements of an Objective Definition*, Santa Clara Journal of International Law, Vol. 8, No. 1, 2010, at p. 59; Richards 2014, p. 221, and 226-227; S. Tiefenbrun, *A Semiotic Approach to a Legal Definition of Terrorism*, ILSA Journal of International & Comparative Law, Vol. 9, 2002, pp. 361-363 and 379-381; Young 2006, pp. 46, 54 and 94.

[41] M. Aksenova, *Conceptualizing Terrorism: International Offence or Domestic Governance Tool?*, Journal of Conflict and Security Law, Vol. 20, No. 2, 2015, pp. 283-284; M. J. Borgers, *Framework Decision on Combating Terrorism: Two Questions on the Definition of Terrorist Offences*, New Journal of European Criminal Law, Vol. 3, No. 1, 2012, sect. 3.2; E. C. Ezeani, *The 21st Century Terrorist: Hostis Humani Generis?*, Beijing Law Review, Vol. 3, No. 4, 2012, p. 160.

[42] Di Filippo 2014, p. 5, 17 and 19.

[43] Altwicker 2014, p. 4; Andreev 2018, p. 85; Begorre-Bret 2006, p. 1995; Borgers 2012, p. 70; Brown 1997, p. 137; Ezeani 2012, p. 159; Grozdanova 2014, pp. 311-312; Jagtap 2013, p. 66; Kuznetcov & Kuznetcov 2013, p. 133; Ochieng 2017, pp. 83-84; Orlova & Moore 2005, pp. 290-291, 310; Paust 2010, p. 65; Poettcker 2019, pp. 317-319; Schachter 1989, p. 309; Tiefenbrun 2002, p. 360, 362, 379 and 383; Värk 2011, p. 81; Weigend 2006, pp. 916-917.

[44] Chiha 2013, pp. 105-106, 109; Hodgson & Tadros 2013, pp. 509-510.

[45] Primoratz 2013, p. 70; D. Rodin, *Terrorism without Intention*, Ethics, Vol. 114, No. 4, 2004, p. 756; Schmid 2011, p. 80 and 86; A. Schwenkenbecher, *Terrorism, Supreme Emergency and Killing the Innocent*, Perspectives: Review of International Affairs, Vol. 17, No. 1, 2009, p. 106; T. Shanahan, *The Definition of Terrorism*, in R. Jackson (Ed.), Routledge Handbook of Critical Terrorism Studies, Routledge, London, New York 2016, p. 110; J. Teichman, *How to Define Terrorism*, Philosophy, Vol. 64, No. 250, 1989, p. 511; Vanaik 2010, p. 11.

[46] U. D. Acharya, *War on Terror or Terror Wars: The Problem in Defining Terrorism*, Denver Journal of International Law and Policy, Vol. 37, No. 4, 2009, p. 679; Amet 2013, p. 31; R. Arnold, *The Prosecution of Terrorism as a Crime against Humanity*, Heidelberg Journal of International Law, Vol. 64, 2004, pp. 996-997, 999; A. U. Bâli, *International Law and the Challenge of Terrorism*, Journal of Islamic Law and Culture, Vol. 9, No. 2, 2004, p. 13; Bassiouni 2002, p. 84; Baxi 2005, p. 23; Begorre-Bret 2006, p. 1990 and 2002; Braber 2016, n. 36; B Broomhall, *State Actors in an International Definition of Terrorism from a Human Rights Perspective*, Case Western Reserve Journal of International Law, Vol. 36, No. 2, 2004, pp. 432-433, 437 and 441; Brown 1997, pp. 140-141; L. Donohue, *Terrorism and the Counter-terrorist Discourse*, in V. V. Ramraj & M. Hor & K. Roach (Eds.), Global Anti-terrorism Law and Policy, Cambridge University Press, Cambridge, 2005, p. 16, 17 and 28; E. U. Ejeh & A. I. Bappah & Y. Dankofa, *Nature of Terrorism and Anti-terrorism Laws in Nigeria*, Nnamdi Azikiwe University Journal of International Law and Jurisprudence, Vol. 10, No. 2, 2019, pp. 190-191; Ezeani 2012, p. 168; Fletcher 2006, p. 905; Franck & Lockwood 1974, p. 90; J. Friedrichs, *Defining the International Public Enemy: The Political Struggle behind the Legal Debate on International Terrorism*, Leiden Journal of International Law, Vol. 19, No. 1, 2006, pp. 69-91; Greene 1992, p. 463 and 482; Grozdanova 2014, pp. 323-326 and 333-334; Hanson 2020, pp. 133-135; Higgins 1997, p. 27; Hodgson & Tadros 2013, p. 524; Jagtap 2013, p. 72; Kolb 2004, p. 235; P. Kovács, *The United Nations in the Fight against International Terrorism*, Miskolc Journal of International Law, Vol. 1, No. 1, 2004, n. 60 and 61; Margariti 2018, pp. 186-187; A. Marsavelski, *The Crime of Terrorism and the Right of Revolution in International Law*, Connecticut Journal of International Law, Vol. 28, No. 2, 2013, p. 266; P. A. Mazandaran, *An International Legal Response to an International Problem: Prosecuting International Terrorists*, International Criminal Law Review, Vol. 6, No. 4, 2006, pp. 511-512; S. Mazzochi, *The Age*

a few authors questioning this idea,[47] and also despite the reluctance of some states to explicitly acknowledge this possibility.[48] Again, the fact that states engage in terrorism also emerges from the non-legal literature.[49]

It is often suggested that a criminal act is a necessary element of terrorism,[50] but the better view appears to be that only an unlawful act is necessary.[51] The nature of the unlawfulness may depend on the legal nature of the person carrying out the act. For example, dealing with state crime or violence under national or international law differs, in many respects, from dealing with non-state crime or

of Impunity: Using the Duty to Extradite or Prosecute and Universal Jurisdiction to End Impunity for Acts of Terrorism Once and for All, Northern Illinois University Law Review, Vol. 32, No. 1, 2011, p. 89; Ochieng 2017, pp. 71-72; Orlova & Moore 2005, pp. 278-279 and 305-307; Paust 2010, p. 53; S. Peers, *EU Responses to Terrorism*, International and Comparative Law Quarterly, Vol. 52, No. 1, 2003, pp. 234-235; Poettcker 2019, pp. 317-318; Y. Ronen, *Incitement to Terrorist Acts and International Law*, Leiden Journal of International Law, Vol. 23, No. 3, 2010, p. 673; J. Santana, *In the Aftermath of Resolution 1373: Tackling the Protective Veil of Counter-terrorism*, Cardozo Journal of International and Comparative Law, Vol. 23, No. 3, 2015, p. 666, and 675; Satterley 2015, pp. 9-11; B. Saul, *Definition of 'Terrorism' in the UN Security Council: 1985–2004*, Chinese Journal of International Law, Vol. 4, No. 1, 2005, p. 147; M. Scalabrino, *Fighting against International Terrorism: The Latin American Response*, in A. Bianchi (Ed.), Enforcing International Law Norms against Terrorism, Hart Publishing, Oxford 2004, pp. 168-169 and 208; Tiefenbrun 2002, n. 113; J. Trahan, *Terrorism Conventions: Existing Gaps and Different Approaches*, New England Journal of International and Comparative Law, Vol. 8, No. 2, 2002, n. 32; Van Schaack 2008, pp. 439-440; Värk 2011, pp. 75-76 and 82; A. Ware, *Rule of Force or Rule of Law - Legal Responses to Nuclear Threats from Terrorism, Proliferation, and War*, Seattle Journal for Social Justice, Vol. 2, No. 1, 2003, p. 261; Weigend 2006, p. 918; Zeidan 2006, p. 227 and 230-232.

[47] de Londras 2010, p. 168; Lavalle 2007, n. 5; Young 2006, p. 101; other authors, such as Altwicker 2014, p. 4, appear to implicitly rule out state terrorism.

[48] A. R. Ahmad, *The ASEAN Convention on Counter-Terrorism 2007*, Asia-Pacific Journal on Human Rights and the Law, Vol. 14, 2013, p. 104; Donohue 2005, p. 20, citing Stohl; E. Dumitriu, *The EU's Definition of Terrorism: The Council Framework Decision on Combating Terrorism*, German Law Journal, Vol. 5, No. 5, 2004, pp. 600-601; Friedrichs 2006, pp. 71-83; Young 2006, p. 101.

[49] M. I. Balcon, *How Nuclear Deterrence during the Cold War Shaped the Definition of Terrorism*, thesis, De La Salle University, 2017; R. Blakeley, *Bringing the State back into Terrorism Studies*, European Political Science, Vol. 6, No. 3, 2007, pp. 228-235; R. English, *The Future Study of Terrorism*, European Journal of International Security, Vol. 1, No. 2, 2016, p. 136; Held 2004, pp. 62-63; D. Heradstveit & D. C. Pugh, *The Rhetoric of Hegemony: How the Extended Definition of Terrorism Redefines International Relations*, Norwegian Institute of International Affairs, Oslo, 2003, https://nupi.brage.unit.no/nupi-xmlui/handle/11250/2395224 (6 August 2021) p. 12; R. Jackson, *Review: 'Terror in our time' and 'State terrorism and neoliberalism'*, State Crime Journal, Vol. 3, No. 1, 2014, pp. 129-130; A. M. Jaggar, *Responding to the Evil of Terrorism*, Hypatia, Vol. 18, No. 1, 2003, p. 176; V. Medina, *Terrorism Always Unjustified and Rarely Excused: Author's Reply*, Reason Papers, Vol. 41, No. 1, 2019, p. 56; L. Nader, *Rethinking Salvation Mentality and Counterterrorism*, Transnational Law & Contemporary Problems, Vol. 21, 2012-2013, pp. 114-117; Primoratz 2013, pp. 70-71; E. Reitan, *Defining Terrorism for Public Policy Purposes: The Group-target Definition*, in T. Brooks (Ed.), Just War Theory, Brill, Leiden, Boston 2013, p. 205; Rodin 2004, p. 755 and 758-759; Schmid 2011, pp. 68-70 and 86-87; Shanahan 2016, pp. 108-109; J. Sluka, *Introduction: State Terror and Anthropology*, in J. Sluka (Ed.), Death Squad: The Anthropology of State Terror, University of Pennsylvania Press, Philadelphia, 2000; Teichman 1989, pp. 509-510.

[50] STL-11-01/I 2011, [85]; K. Ambos, *Judicial Creativity at the Special Tribunal for Lebanon: Is there a Crime of Terrorism under International Law?*, Leiden Journal of International Law, Vol. 24, No. 3, 2011, p. 673; Borgers 2012, p. 79; Gal-Or 2015, p. 679; Ochieng 2017, p. 78 and 81.

[51] Institute for Economics & Peace 2020, p. 6, citing the Global Terrorism Database; D. Baragwanath, *Responding to Terrorism: Definition and Other Actions*, Nigerian Yearbook of International Law, 2017, p. 45; Blöcher 2011, p. 120; Braber 2016, p. 45; Chiha 2013, p. 103, 105, 109, 114 and 118; Conte 2010, p. 35; Fletcher 2006, pp. 901-902; Gal-Or 2015, pp. 679-680; Grozdanova 2014, p. 333; Hanson 2020, p. 133; Higgins 1997, p. 28; C. C. Joyner 2007, p. 247; Mancini 2009, p. 117; Orlova & Moore 2005, p. 290 and 310; Paust 2010, n. 34; Saul 2011, pp. 689-690 and 697-698; Tiefenbrun 2002, pp. 379-380 and 382; Weigend 2006, pp. 916-917 and 922-923; Young 2006, p. 56, 91 and 96.

violence,[52] and the UN Charter provisions on the use of force only apply to states.[53] Generally an activity which constitutes terrorism will be unlawful by reference to some international or national law which is not specific to terrorism.

In summary, there is widespread consensus in the international law literature that terrorism refers to activities which:

(a) involve violence (or threat of violence), fear and coercion,

(b) are unlawful by reference to law which is not terrorism-specific, and

(c) can, in principle, include state activity.

2.2. Descriptions of Terrorism in International Law Courts

At first glance, the position might appear to be straightforward. In 2011, the Special Tribunal for Lebanon held that:

"a customary rule of international law regarding the international crime of terrorism, at least in time of peace, has indeed emerged. This customary rule requires the following three key elements: (i) the perpetration of a criminal act […] or threatening such an act; (ii) the intent to spread fear among the population or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; (iii) when the act involves a transnational element".[54]

This finding immediately met, however, with a range of criticism, some of it severe, from many authors on multiple grounds.[55] Although the responses of other authors partially address some of these criticisms,[56] it seems premature to accept the decision as a simple statement of customary law. In this context, for the purposes of this article, the decision will be treated as important, but not as a definitive statement of customary international law.

The nature of terrorism also featured in a 2012 Judgement rendered by the Special Court for Sierra Leone. This identified that the required elements of the crime of 'acts of terrorism' included "Acts or threats of violence directed against persons or their property […] with the primary purpose of spreading terror among protected persons", regardless of the existence of other purposes, and regardless of whether or not the acts or threats in fact produced terror.[57] The 2012 judgement

[52] J. Balint, *The 'Mau Mau' Legal Hearings and Recognizing the Crimes of the British Colonial State: A Limited Constitutive Moment*, Critical Analysis of Law, Vol. 3, 2016, pp. 261-285; Di Filippo 2014, p. 4; Dumitriu 2004, pp. 601-602; M. Hmoud, *Negotiating the Draft Comprehensive Convention on International Terrorism: Major Bones of Contention*, Journal of International Criminal Justice, Vol. 4, 2006, pp. 1039-1040; below, nn. 250-258 and related text.

[53] Jagtap 2013, pp. 61-62.

[54] STL-11-O1/I 2011, [85].

[55] Aksenova 2015, p. 297; Ambos 2011; Gillett & Schuster 2011; S. Margariti, *Defining International Terrorism, between State Sovereignty and Cosmopolitanism*, T.M.C. Asser Press, The Hague 2017, pp. 135-138; Proulx 2020, pp. 181-182; Saul 2011.

[56] Gal-Or 2015, p. 677 and 679; Marsavelski 2013, pp. 245-262; L. Moll, *Developments in the Bases of the International Obligation to Repress the Crime of Terrorism*, ISIL Year Book of International Humanitarian and Refugee Law, Vol. 10, 2010, pp. 7-13; M. J. Ventura, *Terrorism According to the STL's Interlocutory Decision on the Applicable Law: A Defining Moment or a Moment of Defining?*, Journal of International Criminal Justice, Vol. 9, No. 5, 2011, pp. 1027-1035.

[57] *Prosecutor v. Charles Ghankay Taylor* (Judgement) SCSL-03-01-T (18 May 2012) paras. 403-405.

identified this as a *war* crime of 'acts of terrorism' which "is firmly established in customary international law",[58] and distinguished it from the crime of terrorism in time of *peace*, which had featured in the Special Tribunal for Lebanon decision.[59]

The International Criminal Tribunal for the Former Yugoslavia (ICTY) dealt with the nature of the 'crime of terror,'[60] rather than 'terrorism'.[61] The ICTY is not separately discussed here, partly because terror and terrorism are not necessarily identical,[62] and partly because the Lebanon and Sierra Leone decisions cited above make extensive reference to relevant ICTY cases.

The 2011 Special Tribunal for Lebanon notion of terrorism included threats,[63] and even among those critical of the decision, at least some accept that threats are one form of terrorism.[64] The Special Court for Sierra Leone likewise included threats in its 2012 characterisation of terrorism.[65]

Thus, of the three characteristics of terrorism emerging from the literature, international courts have confirmed the first (violence or threat of violence, fear and coercion), and to a lesser extent the second (unlawfulness by reference to non-terrorism-specific law), but have had no cause to comment on the third (the inclusion, in principle, of state activity).

2.3. Descriptions of Terrorism in International Humanitarian Law

Several areas of international law are potentially affected by, and relevant to activities described as terrorism. Among others, these areas include international human rights law and international refugee law, where the links to terrorism are regularly mentioned in commentaries and UN resolutions.[66] Two areas of law, however, also refer to terrorism in their principal sources and these are considered in this section and the following one.

Several mentions of terrorism appear in the context of international humanitarian law (IHL). Measures of terrorism are prohibited under the 1949 Geneva Conventions,[67] but the term is not defined there. The 1958 International Committee of the Red Cross (ICRC) commentary likewise offers no definition, noting that the term terrorism has "so often been used lightly, and applied to […] trivial offences".[68] It does, however, suggest that terrorism requires unlawful conduct,[69] and that terrorism can refer to state acts.[70] Acts of terrorism are prohibited under the 1977 Additional Protocol II,[71] but again are undefined therein. The 1987 ICRC commentary suggests that "terrorism

[58] Ibid. para. 409.

[59] Ibid. paras. 408-410.

[60] *E.g., Prosecutor v. Dragomir Milošević* (Judgement) IT-98-29/1-T (12 December 2007) paras. 24-41.

[61] A. Kleczkowska, *Why there is a Need for an International Organ to Try the Crime of Terrorism - Past Experiences and Future Opportunities*, Hungarian Journal of Legal Studies, Vol. 60, No. 1, 2019, pp. 57-58.

[62] IT-98-29/1-T 2007, p. 146, Partly Dissenting Opinion of Judge Liu Daqun, paras. 27-28.

[63] STL-11-01/I 2011.

[64] Ambos 2011, p. 672 and 673; Margariti 2017, p. 159.

[65] Above, n. 57 and related text.

[66] Conte 2010, p. 369.

[67] 1949 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287, Art. 33.

[68] J. S Pictet (Ed.), *The Geneva Conventions of 12 August 1949, Commentary IV*, International Committee of the Red Cross, Geneva 1958, p. 53.

[69] Ibid. p. 31.

[70] Ibid. p. 341.

[71] 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 UNTS 609, Art. 4.

is understood to be the systematic attack on non-military objectives in order to force the military elements of the adverse Party to comply with the wishes of the attacker by means of the fear and anguish induced by such an attack".[72] It also notes that threats of violence are a type of terrorism.[73]

"Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited" by 1977 Additional Protocols I and II.[74] The ICRC commentary suggests that these provisions are intended only to prohibit such threats or acts which do not "offer substantial military advantage".[75]

The IHL understanding of terrorism, and terror,[76] thus confirm the first characteristic of terrorism noted in the wider literature:[77] violence, including threats, and coercion by spreading fear. To a lesser extent, the IHL understanding also confirms the second and third of these characteristics (unlawfulness by reference to non-terrorism-specific law, and the potential for state terrorism).

2.4. Descriptions of Terrorism among UN Member States

In recent decades UN member states have responded collectively in a range of other ways to terrorism,[78] including through international conventions and protocols relating to terrorism.[79]

The wording of a 1994 UN General Assembly declaration describes terrorism as "[c]riminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes".[80] Although the declaration was adopted by consensus without a vote, the debate at the time of its adoption makes clear that it does not amount to an agreed definition.[81] That said, a declaration can be taken to carry greater weight than a normal resolution,[82] and creates a "strong expectation" that "Members of the international community will

[72] Y. Sandoz & C. Swinarski & B. Zimmermann (Eds.), *Commentary on the Additional Protocols*, International Committee of the Red Cross, Geneva 1987, p. 526.

[73] Ibid. p. 1375.

[74] 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 3, Art. 51(2); Protocol II 1977, Art. 13.

[75] Sandoz & Swinarski & Zimmermann 1987, p. 618 and 1448.

[76] Above, nn. 60-62 and related text.

[77] Arnold 2004, p. 980.

[78] I. A. Attia, *Do the United Nations' Terrorism-related Conventions Prohibit and Suppress 'Terrorism' Acts Committed by 'Terrorists'?*, Bristol Law Review, Vol. 5, 2018, pp. 171-194; Conte 2010, pp. 19-27.

[79] Below, nn. 194-201 and related text.

[80] GA Res. 49/60, 9 December 1994, Art. 3.

[81] Saul 2011, pp. 697-698.

[82] J. Isanga, *Counter-terrorism and Human Rights: The Emergence of a Rule of Customary Int'l Law from U.N. resolutions*, Denver Journal of International Law and Policy, Vol. 37, No. 2, 2009, pp. 245-246 and sources cited therein; Moll 2010, pp. 2-3.

abide by it".[83] The 1994 declaration followed many previous resolutions on terrorism,[84] and has been recalled and reaffirmed in many subsequent resolutions, most recently in December 2020.[85]

The UN process aiming for a comprehensive convention against terrorism has been ongoing for over 20 years,[86] mainly due to states being unable to agree on a definition of terrorism. This lack of agreement is, however, almost entirely due to only two issues: whether or not the definition should include state actions, and whether or not the definition should explicitly recognise a right, of peoples under foreign occupation, to resistance.[87]

Agreement was reached on a convention to suppress financing of terrorism[88] which (implicitly)[89] describes terrorism as an "act intended to cause death or serious bodily injury [...] when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act".[90] High level recommendations[91] that this be adopted as a general definition of terrorism have not been accepted: the definition in the most recent draft of the UN comprehensive convention against international terrorism incorporatessome features of the financing convention definition, but differs from it in several respects.[92]

The 2004 UN Security Council (UNSC) Resolution 1566, often cited in this context,[93] was narrowly limited to acts "which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism".[94] The words immediately preceding that phrase are:

"criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act […]".[95]

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[83] Isanga 2009, p. 246, quoting Office of International Standards and Legal Affairs, *General Introduction to the Standard-Setting Instruments of UNESCO*, at Declarations, http://portal.unesco.org/en/ev.php-URL_ID=23772&URL_DO=DO_TOPIC&URL_SECTION=201.html (6 August 2021).

[84] Acharya 2009, pp. 664-665, Chiha 2013, pp. 95-97, and Moll 2010, pp. 3-4.

[85] GA Res. 75/145, 15 December 2020, Preamble and Art. 18.

[86] K. Iqbal & N. A. Shah, *Defining Terrorism in Pakistani Anti-terrorism Law*, Global Journal of Comparative Law, Vol. 7, No. 2, 2018, pp. 280-283 and 286; Hmoud 2006; GA Res. 75/145, Art. 5.

[87] A More Secure World: Our Shared Responsibility: Report of the Secretary-General's High-level Panel on Threats, Challenges and Change, UN Doc. A/59/565, 2 December 2004, paras. 157-161; Ezeani 2012, pp. 158-159; Jagtap 2013, pp. 71-73; Proulx 2020, pp. 159-160.

[88] 2000 International Convention for the Suppression of the Financing of Terrorism, 2178 UNTS 197, Art. 2.

[89] See below, nn. 197-199 and related text.

[90] Margariti 2017, pp. 147-153; Roach 2008, p. 126; L Turney-Harris, *The Development of a United Nations Counter Terrorism Policy: A Pragmatic Approach to the Problem of a Definition of Terrorism*, Masters thesis, University of Helsinki, 2014.

[91] A/59/565 2004, para. 164; A Global Strategy for Fighting Terrorism: Secretary-General's keynote address to the closing plenary of the International Summit on Democracy, Terrorism and Security, 10 March 2005, https://www.un.org/sg/en/content/sg/statement/2005-03-10/secretary-generals-keynote-address-closing-plenary-international (6 August 2021).

[92] Margariti 2017, pp. 153-156; see also below, nn. 99-101 and related text.

[93] Baragwanath 2018, p. 30; Chiha 2013, pp. 100-101; Hardy & Williams 2011, pp. 92-100.

[94] SC Res. 1566 (2004), 8 October 2004, Art. 3; Iqbal & Shah 2018, p. 279; Lavalle 2007, p. 100; Margariti 2017, pp. 133-134; Saul 2011, p. 686; Värk 2011, p. 80.

[95] SC Res. 1566 (2004), 8 October 2004, Art. 3.

If anything can be implied from these words, in terms of a generic description of terrorism:

- the frequent use of the word 'or' has the effect that the acts need not necessarily have any purpose of intimidation or provoking terror; and
- the word "including" suggests that civilian targets are not necessarily a feature of terrorism.

Subsequent Security Council resolutions give no guidance on the meaning of terrorism,[96] despite their increasing length and frequency.[97]

Several recent UN multilateral terrorism-related treaties include threats among the offences,[98] as does the most recent draft of the UN comprehensive convention against international terrorism.[99] There appears to be no ongoing disagreement on the inclusion of threats within the comprehensive convention definition,[100] although the relevant committee has not met since 2013.[101] Among the 11 regional legal responses to terrorism, six of them include threats,[102] one includes "threat […] withthe intent to […] act",[103] one does not include threats,[104] and the remaining three[105] limit terrorist acts to those specified in worldwide UN instruments.[106]

Wording in the 1994 declaration, echoed in other instruments, suggests that terrorism acts can be committed by states:[107] "all acts, methods and practices of terrorism […] wherever and by whomever committed".[108] Some Security Council resolutions explicitly acknowledge that states can commit acts of terrorism.[109] In April 2019 the US and Iran each officially designated the armed forces of the other as terrorist organisations.[110] All that said, the delay in finalising a comprehensive terrorism

[96] Ochieng 2017, pp. 71-72; Tiwari & Kashyap 2020, pp. 117-118.

[97] D. McKeever, *Revisiting Security Council Action on Terrorism: New threats; (a Lot of) New Law; Same Old Problems?*, Leiden Journal of International Law, Vol. 34, No. 2, 2021, pp. 441–470.

[98] See below, nn. 214, 218 and related text.

[99] Report of the Ad Hoc Committee established by General Assembly resolution 51/210 of 17 December 1996 Sixteenth session (8 to 12 April 2013) A/68/37, Ann. I, draft Art. 2(2).

[100] Ibid.

[101] https://legal.un.org/committees/terrorism/reports.shtml (6 August 2021).

[102] 1999 African Union Convention on the Prevention and Combating of Terrorism, 2219 UNTS 179, Art. 1(3)(b); 1998 Arab Convention for the Suppression of Terrorism, Art. 1(2); European Parliament and of the Council Directive (EU) 2017/541 of 15 March 2017 on combating terrorism, OJ L 88, 31.3.2017, Art. 3 , No. 1,(i); 1999 Treaty on Cooperation among the States Members of the Commonwealth of Independent States in Combating Terrorism, 2867 UNTS, Art. 1; 1999 Convention of the Organisation of the Islamic Conference on Combatting International Terrorism, Art. 1(2); 2009 Convention of the Shanghai Cooperation Organization against Terrorism, 2815 UNTS, Art. 2,1.(2).

[103] 1999 OAU (Organization of African Unity) Convention on the Prevention and Combating of Terrorism, 2219 UNTS 179, Art. 1,3.(b), and 2004 Protocol thereto.

[104] 1987 SAARC (South Asian Association for Regional Cooperation) Regional Convention on Suppression of Terrorism, Art. 1(e)-(f), and 2004 Additional Protocol thereto.

[105] 2007 ASEAN (Association of Southeast Asian Nations) Convention on Counter-Terrorism; 2005 Council of Europe Convention on the Prevention of Terrorism, 2488 UNTS, 2015 Additional Protocol thereto; 2002 Inter-American Convention Against Terrorism.

[106] See below, nn. 194-201 and related text.

[107] Baxi 2005, p. 20; Margariti 2017, p. 151; Norberg 2010, pp. 24-25; Paust 2010, p. 53 and 58; Turney-Harris 2014, pp. 25-26.

[108] GA Res. 49/60, Art. 1.

[109] SC Res. 687 (1991), 3 April 1991; SC Res. 748 (1992), 31 March 1992; SC Res. 1189 (1998), 13 August 1998; Baxi 2005, pp. 22-23; Hodgson & Tadros 2013, p. 522; Saul 2005, p. 147 and 149.

[110] J. Galbraith, *The State Department Designates Iran's Islamic Revolutionary Guards Corps as a Foreign Terrorist Organization*, American Journal of International Law, Vol. 113, No. 3, 2019, pp. 609-612.

convention partly reflects disagreement on whether or not the definition of terrorism should include state acts.[111] Several terrorism treaties explicitly exclude state military action from their scope.[112]

Of the three agreed characteristics of terrorism from the literature, UN member states agree on the first (violence or threat of violence, fear and coercion), and to a lesser extent the second (unlawfulness by reference to non-terrorism-specific law) but are in ongoing disagreement on the third (the inclusion, in principle, of state activity).

2.5. Characteristics of Terrorism: Conclusions

At this stage it appears clear that activities which:

(a) involve violence (or threat of violence), fear and coercion, and

(b) are unlawful by reference to international or national law which is not specific to terrorism,

(c) when carried out by a non-state actor,

are widely seen to constitute terrorism. There is also widespread agreement in the literature that state activities with the first two of these characteristics will constitute terrorism. Despite this, some UN member states argue, in some contexts, that activities do not constitute terrorism if they are undertaken by states.[113] These same states show, however, in other contexts, that they accept that some state activity constitutes terrorism.[114] This inconsistency among states, despite the otherwise widespread consensus, currently prevents a clear conclusion that state activity can constitute terrorism under international law.

3. UK Nuclear Deterrence has these Characteristics of Terrorism

Only some aspects of UK nuclear deterrence policy, as expressed in official UK Government statements, are relevant to, and quoted in, the analysis that follows. Other aspects of the policy and weapons are well analysed and documented elsewhere.[115]

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[111] Above, n. 87 and related text.

[112] Broomhall 2004, p. 431; Greene 1992, p. 468, 480-481, and 483; see below, nn. 222-228 and related text.

[113] Above, n. 87 and related text.

[114] Above, nn. 109, 110 and related text.

[115] Drummond 2013, pp. 111-115; Drummond 2019, sect. 2.2; R. Johnson & A. Zelter (Eds.), *Trident and International Law, Scotland's Obligations*, Luath Press, Edinburgh 2011; R. K. Murray, *Nuclear Weapons and the Law*, Medicine, Conflict and Survival, Vol. 15, 1999, pp. 134-135; N. Ritchie, *A Nuclear Weapons-free World? Britain, Trident and the Challenges Ahead*, Palgrave Macmillan, London 2012, pp. 10–13 and 19–20; UK White Paper 2006; UK Government, Policy Paper *2010 to 2015 Government Policy: UK Nuclear Deterrent*, updated 8 May 2015, http://www.gov.uk/government/publications/2010-to-2015-government-policy-uk-nuclear-deterrent/2010-to-2015-government-policy-uk-nuclear-deterrent (6 August 2021) (hereinafter: UK Policy Paper 2015); UK Prime Minister, *Global Britain in a competitive age: The integrated review of security, defence, development and foreign policy*, Command Paper CP 403 March 2021, pp. 76-78, (hereinafter: UK Command Paper 2021); UK Government Guidance March 2021; UK Government Guidance, *The UK's nuclear deterrent: what you need to know*, 21 April 2021, https://www.gov.uk/government/publications/uk-nuclear-deterrence-factsheet/uk-nuclear-deterrence-what-you-need-to-know (6 August 2021) (hereinafter: UK Guidance April 2021).

3.1. Threat of Violence, Fear, Coercion, and Unlawfulness

Deterrence involves one actor dissuading one or more other actors from taking some form of action, by stating that any such action will lead to an outcome which will be worse for those others than if they had not taken the action.[116] The literal meaning of the word deterrence is 'frightening from'.[117] UK nuclear deterrence policy thus intrinsically involves coercion through fear. This is made explicit in the UK Government statement that "retention of an independent centre of nuclear decision-making makes clear to any adversary that the costs of an attack on UK vital interests will outweigh any benefits".[118]

UK deterrence policy, in common with other typical nuclear deterrence policies, constitutes a threat of force in general terms.[119] This threat is unlawful, under Article 2(4) of the UN Charter, if the threatened force would be unlawful, were it actually to be used,[120] assuming that the circumstances referred to in the threat have arisen.[121] If Article 2(4) in isolation is taken to render any use of force unlawful, two possible exceptions to this general unlawfulness are generally recognised to arise from other provisions of the UN Charter. The use of force in self-defence under Article 51, or the use of force authorised by the Security Council under Article 42, can (although not necessarily will) be lawful. The scope of Article 2(4) and its interaction with other Charter provisions is, however, open to other readings.[122]

It follows that UK nuclear deterrence policy has the first of the widely agreed characteristics of terrorism noted in Part 2: it involves threat of violence, fear and coercion. In marked contrast, when the UNSC in 2009 expressed concern about nuclear terrorism,[123] it implicitly suggested that the deterrence policies of its permanent members did not constitute nuclear terrorism.

These differing views on whether or not nuclear deterrence policies necessarily constitute terrorism might reflect differing views on whether there could be any lawful use of nuclear weapons.[124] If unlawfulness is a necessary component of terrorism, then UK deterrence policy will amount to terrorism only to the extent that it is unlawful. There are several potential arguments for such unlawfulness.

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[116] M. E. E. McGrath, *Nuclear Weapons: The Crisis of Conscience*, Military Law Review, Vol. 107, 1985, p. 194; M. Quinlan, *Thinking about Nuclear Weapons: Principles, Problems, Prospects*, Oxford University Press, Oxford 2009, p. 20; N. Stürchler, *The Threat of Force in International Law*, Cambridge University Press, Cambridge 2007, p. 46.

[117] S. Wareham, *Nuclear Deterrence Theory – a Threat to Inflict Terror*, Flinders Law Journal, Vol. 15, 2013, p. 260.

[118] UK White Paper 2006, para. 3-4; equivalent statements appear in UK Command Paper 2021, p. 76, in UK Guidance March 2021, sect. 5, and in UK Guidance April 2021.

[119] Drummond 2019, sect. 3.2; F. Grimal, *Threats of Force: International Law and Strategy*, Routledge, London 2013, p. 61; Koskenniemi 1995, p. 348; McGrath 1985, p. 206; Murray 1999, p. 132; Quinlan 2009, p. 26; M. N. Schmitt, *The International Court of Justice and the Use of Nuclear Weapons*, Naval War College Review, Vol. 51, 1998, p. 99; Stürchler 2007, p. 89; Wareham 2013, p. 258.

[120] 1996 ICJ Rep. 226, paras. 47-48; Drummond 2019, p. 211; Stürchler 2007, p. 89.

[121] Drummond 2019, pp. 211-212.

[122] P. M. Butchard, *Back to San Francisco: Explaining the Inherent Contradictions of Article 2(4) of the UN Charter*, Journal of Conflict and Security Law, Vol 23, No. 2, 2018, pp. 229–267; Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries. Yearbook of the International Law Commission, 2001, vol. II(2) (hereinafter: ARSIWA 2001), at Art, 21, Commentary (1).

[123] SC Res. 1887 (2009), 24 September 2009, preamble; J. Black-Branch, *Nuclear Terrorism by States and Non-State Actors: Global Responses to Threats to Military and Human Security in International Law*, Journal of Conflict and Security Law, Vol. 22, No. 2, 2017, pp. 201-248, sect. 11.

[124] Drummond 2019, p. 200, surveys the relevant literature.

In the context of international armed conflict, as noted earlier, "threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited" by 1977 Additional Protocol I.[125] The ICRC commentary on this provision notes that it "calls to mind some of the proclamations made in the past threatening the annihilation of civilian populations".[126] This appears directly relevant to nuclear deterrence. Although there is widespread agreement that Protocol I applies to nuclear weapons only to the extent that it codifies pre-1977 law,[127] the UK is among those who recognise that these provisions were a "valuable reaffirmation" of a pre-existing rule of customary international law.[128] It might be possible to establish that the primary purpose of a nuclear deterrence policy is to spread terror among the civilian populations of potential attackers. Even if that could be established, however, there appears scope for a counter-argument that the policy is intended to "offer substantial military advantage" and therefore not subject to the prohibition.[129] (Whether or not nuclear deterrence does offer any such advantage remains a matter of controversy.[130])

It has been suggested, however, that at least two aspects of UK nuclear deterrence policy render it unlawful, by reference to non-terrorism-specific international law.[131] The phrase "at least" (in the previous sentence) recognises that, in relation to other aspects, further review of the law and the facts may reveal that some or all of these other aspects also render the policy unlawful.[132] The unlawfulness of each of these two aspects arises from the treatment of threats of force under international law. Before considering one of these aspects (failure to rule out first use), therefore, the following section considers more generally how international law applies to threats of force.[133]

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[125] Above, n. 74 and related text.

[126] Sandoz & Swinarski & Zimmermann 1987, p. 618.

[127] F. Kalshoven, *Arms, Armaments and International Law*, Recueil des Cours, Vol. 191, 1985, pp. 270–283; E. Koppe, *The Use of Nuclear Weapons and the Protection of the Environment during International Armed Conflict*, Hart Publishing, Oxford 2008, pp. 366–371 and 378–381; T. T. Richard, *Nuclear Weapons Targeting: The Evolution of Law and U.S. Policy*, Military Law Review Vol. 224, No. 4, 2016, pp. 937–946.

[128] J.-M. Henckaerts & L. Doswald-Beck, *Customary International Humanitarian Law, Vol. 1: Rules*, Cambridge University Press, Cambridge 2005, p. 8, citing UK Statement at the Diplomatic Conference leading to the adoption of the Additional Protocols.

[129] Above, n. 75 and related text.

[130] C. S. Gray, *Gaining Compliance: The Theory of Deterrence and its Modern Application*, Comparative Strategy, Vol. 29, 2010, pp. 278–283; D. T. Hagerty, *Nuclear Weapons and Deterrence Stability in South Asia*, Palgrave Macmillan, Cham, 2020; M. MccGwire, *Nuclear Deterrence*, International Affairs, Vol. 82, No. 4, 2006, pp. 771-784; J. Scouras, *Nuclear War as a Global Catastrophic Risk*, Journal of Benefit Cost Analysis, Vol. 10, No. 2, 2019, p. 292; M. Trachtenberg, *Strategists, Philosophers, and the Nuclear Question*, Ethics, Vol. 95, No. 3, 1985, pp. 731-739; UK Ministry of Defence, *Deterrence: The Defence Contribution*, Joint Doctrine Note 1/19 (7 February 2019), at 1.11, https://www.gov.uk/government/publications/deterrence-the-defence-contribution-jdn-119 (6 August 2021).

[131] Drummond 2019.

[132] This point is visually illustrated in a diagram in Drummond 2013, pp. 137–138.

[133] The second aspect of UK policy which, it has been suggested, renders it unlawful is the failure to explicitly state that nuclear weapons would never be used at 10 kilotons or more of explosive power, at a height of less than 200m above land. Such use would almost certainly lead to adverse effects in a state other than the target state and so be contrary to the law of neutrality: Drummond 2019, sect. 5.1. This aspect is not discussed further here. Equivalent conclusions on how neutrality law constrains nuclear threats have been drawn in relation to other states: R. Chang, *Nuclear Weapons and the Need for a No-first-use Agreement between the United States and South Korea for North Korea*, Southwestern Journal of International Law, Vol. 26, No. 1, 2020, pp. 185-196.

3.2. Threats of Force in International Law

There is not complete consistency among authors on how to identify or label the various categories of international law. This article will follow the *Nuclear Weapons* opinion[134] in identifying six categories: (a) the law relating to the threat or use of force, (b) humanitarian law, (c) neutrality law, (d) criminal law, (e) human rights law, and (f) environmental law. Again following the *Nuclear Weapons* opinion, this article will avoid the terms *ius/jus in bello* and *ius/jus ad bellum*,[135] as again the use of these terms is not entirely consistent among authors.

On the law on the threat or use of force, the *Nuclear Weapons* opinion stated, at paragraph 47:

"The notions of 'threat' and 'use' of force under Article 2, paragraph 4, of the Charter stand together in the sense that if the use of force itself in a given case is illegal—for whatever reason—the threat to use such force will likewise be illegal. In short, if it is to be lawful, the declared readiness of a State to use force must be a use of force that is in conformity with the Charter. For the rest, no State - whether or not it defended the policy of deterrence - suggested to the Court that it would be lawful to threaten to use force if the use of force contemplated would be illegal".[136]

On humanitarian law, the *Nuclear Weapons* opinion stated, at paragraph 78:

"If an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to that law". [137]

Applying the law to threats is not straightforward. The ICJ opinion wording suggests threat of a single use, but UK deterrence policy threatens multiple possible uses. The lawfulness of each such use must be considered separately.

It has been suggested that there is a further complication in assessing the lawfulness of threats of force. For a use of force, compliance with the six categories of law can to some extent be considered separately. As noted above, the use of force in self-defence can (although not necessarily will) be lawful. To be lawful, such use must also (separately) comply with the other five of the six categories of law noted above. A threat to use force in self-defence also can (although not necessarily will) be lawful.[138] All this is widely accepted. Less widely discussed is the relevance of the various categories of law to assessing the lawfulness of threats. Three views are considered here.

1. Only the law on the threat or use of force is relevant to assessing the lawfulness of threats. On this view, a threat is only unlawful if the threatened force would not, if actually used, comply with the law on the threat or use of force. This view takes the second sentence quoted above from paragraph 47 of the *Nuclear Weapons* opinion as describing the only way in which a threat could be unlawful, and takes the "Charter" to refer only to Article 2(4): [139] "if it is to be lawful, [it is sufficient that] the declared readiness of a State to use force must be a use of force that is in conformity with [Article 2(4) of] the Charter". It is not clear how this view understands the sentence quoted above from paragraph 78 of the *Nuclear Weapons* opinion.

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[134] 1996 ICJ Rep. 226, paras. 24, 26, 27, 37, 51 and 74.

[135] Ibid. para. 86 contains, in a quote from the UK submission, the only use of either phrase.

[136] Ibid. para. 47.

[137] Ibid. para. 78.

[138] Stürchler 2007, p. 273; Grimal 2013, pp. 97–98; Butchard 2018, p. 229.

[139] 1996 ICJ Rep. 226, para. 48.

2. All six categories of law noted above are relevant to assessing the lawfulness of a threat. On this view, for a threat to comply with the law relating to the threat or use of force, the threatened force must be such that, if it were used, it would comply with all six categories of law.[140] This view takes: the "for whatever reason" (in first sentence quoted above from paragraph 47 of the *Nuclear Weapons* opinion) to mean "by reference to any of the six categories of law"; and takes "illegal" in the third sentence to have the same meaning. This view emphasises that paragraph 47 is in the part of the *Nuclear Weapons* opinion focusing on the threat or use of force.[141] This view understands the sentence quoted above from paragraph 78 of the *Nuclear Weapons* opinion, to be a succinct expression of a more precise statement: "If an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to [the law relating to the threat or use of force, because the threatened use would generally be contrary to humanitarian] law".

3. Two or more of the six categories of law noted above are relevant to assessing the lawfulness of a threat. On this view, the first sentence quoted above from paragraph 47 is, despite the context, saying that (for two or more of the six separate categories of law) each category itself stipulates that a threat can only be lawful if the threat, if it were implemented, would comply with that category. The second sentence quoted above from paragraph 47 illustrates this in relation to the law on the threat or use of force. On this view, the sentence quoted above from paragraph 78 of the *Nuclear Weapons* opinion is a precise legal statement: "If an envisaged use of weapons would not meet the requirements of humanitarian law, a threat to engage in such use would also be contrary to *that* law" (emphasis added).[142]This readingof paragraph 78 finds some support in the literature,[143] although one unusually detailed analysis of this aspect of the opinion concluded that it "seems to be largely without legal support".[144]

The question of how to assess the lawfulness of threats, in relation to humanitarian law, is also raised by one of the main conclusions in the *Nuclear Weapons* opinion, at paragraph 105(2)E:

"the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law; However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake".[145]

The first part of paragraph 105(2)E appears to imply that threats are contrary to humanitarian law, if the threatened action would itself be contrary to humanitarian law—view (3) above. For those

[140] Drummond 2019, p. 208.

[141] 1996 ICJ Rep. 226, paras. 37, 38, 51.

[142] Ibid. para. 78.

[143] Henckaerts & Doswald-Beck 2005, p. 225: "a threat to commit an illegal act is generally considered to be illegal as well"; B. H. Weston, *Nuclear Weapons versus International Law: A Contextual Reassessment*, McGill Law Journal, Vol. 28, 1983, pp. 587-588; D. J. Arbess, *The International Law of Armed Conflict in Light of Contemporary Deterrence Strategies: Empty Promise or Meaningful Restraint?* McGill Law Journal, Vol. 30, 1984, p.121; S. Haines, *Is Britain's Continued Possession and Threatened Use of Nuclear Weapons Illegal?* in K. Booth & F. Barnaby (Eds), The Future of Britain's Nuclear Weapons: Experts Reframe the Debate, Oxford Research Group, Oxford 2006, p. 54.

[144] G. Nystuen, *Threats of Use of Nuclear Weapons and International Humanitarian Law*, in G. Nystuen & S. Casey-Maslen & A. G. Bersagel (Eds.), Nuclear Weapons under International Law, Cambridge University Press, Cambridge 2014, p. 148.

[145] 1996 ICJ Rep. 226, para. 105(2)E.

unconvinced by view (3), however, it can alternatively be seen as implying that, under the law relating to the threat or use of force, threats of force can only be lawful if the threatened force, if it were used, would comply with all relevant categories of law - view (2) above. Here the relevant category is humanitarian law. This alternative reading assumes that the ICJ chose a succinct form of words ("the threat or use of nuclear weapons would generally be contrary to … humanitarian law") to combine two more precise statements: (i) the *use* of nuclear weapons would generally be contrary to humanitarian law; and (ii) the *threat to use* nuclear weapons would generally be contrary to the law relating to the threat or use of force, because the threatened use would generally be contrary to humanitarian law. I am unaware of how those who are convinced by neither view (3) nor view (2) can make sense of the first part of paragraph 105(2)E. The statement: "the threat … of nuclear weapons would generally be contrary to the … rules of humanitarian law" seems inconsistent with view (1) above.

The relevance of humanitarian law to the lawfulness of threats also arises in one of the possible ways to understand if and how the second part of paragraph 105(2)E relates to the first part. Views differ on how to interpret the paragraph as a whole.[146] Here I consider two possible interpretations; both are consistent with the widely-held view that there are no exceptions to the application of humanitarian law.[147] Other possible interpretations which are inconsistent with that view are not considered here.

A. One possible interpretation is that the two parts of the paragraph do not affect each other. On this interpretation, the word "generally" in the first part implies that there might be specific circumstances in which the threat or use of nuclear weapons would not be contrary to humanitarian law but, on this interpretation, the ICJ makes no further comment on what those circumstances might be. This interpretation then considers that the second part of the sentence is (quite separately) saying that, in "extreme circumstances", it is not clear whether or not threat or use of nuclear weapons would comply with the law on the threat or use of force.

B. Another possible interpretation links the two parts of the paragraph: the general statement in the first part and "the qualification in the second part of the paragraph".[148] On this interpretation, the "extreme circumstance of self-defence" mentioned in the second part of the paragraph is a possible exception to the "general" statement in the first part.[149] On this basis, the clear implication is that both parts of the paragraph are dealing with humanitarian

[146] D. Akande, *Nuclear Weapons, Unclear Law? Deciphering the Nuclear Weapons Advisory Opinion of the International Court*, British Yearbook of International Law, Vol. 68, 1997, pp. 205-211.

[147] Y. Dinstein, *War, Aggression and Self-defence*, 6th edn., Cambridge University Press, Cambridge 2017, p. 183; Drummond 2019, pp. 214-215; C. Greenwood, *Jus ad bellum and Jus in Bello in the Nuclear Weapons Advisory Opinion*, in L. Boisson de Chazournes & P. Sands (Eds.), International Law, the International Court of Justice and Nuclear Weapons, Cambridge University Press, Cambridge 1999, p. 264; 1996 ICJ Rep. 226, dissenting opinion of Judge Higgins, para. 29; M. J. Matheson, *The Opinions of the International Court of Justice on the Threat or Use of Nuclear Weapons*, American Journal of International Law, Vol. 91, 1997, p. 430; K. Okimoto, *The Cumulative Requirements of Jus ad Bellum and Jus in Bello in the Context of Self-Defense*, Chinese Journal of International Law, Vol. 11, 2012, p. 46; Richard 2016, p. 949; M. Roscini, *On the 'Inherent' Character of the Right of States to Self-Defence*, Cambridge Journal of International and Comparative Law, Vol. 4, 2015, p. 653; Schmitt 1998, n. 55; G. Venturini, *Necessity in the Law of Armed Conflict and in International Criminal Law*, in I. Dekker & E. Hey (Eds.) 41 Netherlands Yearbook of International Law 2010, T.M.C. Asser Press, The Hague 2011, p. 74; J. H. H. Weiler & A. Deshman, *Far Be It from Thee to Slay the Righteous with the Wicked: An Historical and Historiographical Sketch of the Bellicose Debate Concerning the Distinction between Jus ad Bellum and Jus in Bello*, European Journal of International Law, Vol. 24, 2013, pp. 49–51.

[148] Greenwood 1999, p 262.

[149] Akande 1997, p. 205 and 211; Drummond 2019, pp. 213-215; Murray 1999, p. 132.

law.[150]

Interpretation (A) raises some difficult questions. How was the court willing to allow that there might be circumstances in which the threat or use of nuclear weapons would comply with humanitarian law? Why did it give no guidance on what these might be? Why did the court not comment on whether the threat or use of nuclear weapons would comply with the law on the threat or use of force in "non- extreme" circumstances? Why was it unable to "conclude definitively" on compliance with the law on the threat or use of force, if no such difficulty arose with humanitarian law? If there is no logical connection between the two parts of the paragraph, why are they linked by the word "however"? There are no obvious answers to these and other questions raised by interpretation (A).

In marked contrast, interpretation (B) raises only two significant questions, and there seem to be good answers to both of them.

- How can self-defence be relevant to humanitarian law, given the widely held view that self-defence does not preclude the wrongfulness of conduct with respect to humanitarian law (as is made clear, for example, in the Commentary on the Articles on Responsibility of States for Internationally Wrongful Acts)?[151] The answer is that the Court here is not stating that, as a general principle of international law, self-defence is relevant to humanitarian law. Instead, it is saying "that the rules of international humanitarian law themselves - particularly the rule of proportionality - allow the weighing of the importance of preserving a state against the very severe damage, injury and suffering that may result [from the use of a nuclear weapon] […] humanitarian law attempts to limit the infliction of damage and suffering to that which is genuinely required to accomplish legitimate military objectives".[152]

- How can there be repeated references to "threat" if both parts of this paragraph are dealing with humanitarian law and none of it is dealing with the law on the threat or use of force? There are two possible answers to this question, each of which takes one of the views described earlier on the relevance of humanitarian law to the lawfulness of threats. On view (3), threats are unlawful under humanitarian law if the threatened action would itself be unlawful under humanitarian law. On view (2), threats are unlawful under the law on the threat or use of force if the threated action would be unlawful under humanitarian law. Thus interpretation (B) of paragraph 105(2)E is consistent with either view (2) or view (3) on the relevance of humanitarian law to the lawfulness of threats.

Based on the above analysis, in my view, interpretation (B) is preferable to interpretation (A) and either of view (2) or view (3) is preferable to view (1). For the limited purposes of the following analysis, however, any combination of these interpretations and views can be adopted.

One point is crucial to the following analysis. Given the difficulty the court had in concluding on the "extreme circumstance", this article agrees with those authors who take this circumstance as the *only* possible exception to the general rule that the threat or use of nuclear weapons is unlawful.[153] This implies that, any threat to use nuclear weapons, where that use might *not* be in an "extreme circumstance of self-defence, in which the very survival of a State would be at stake", would be unlawful, because the threatened use would, if it were actual use, be unlawful.[154] This position is

[150] Matheson, p 430; Akande 1997, p. 208.

[151] ARSIWA 2001, Art, 21, Commentary (3).

[152] Matheson, p 430; the same point is made in Akande 1997, p. 208.

[153] Akande 1997, pp. 205, 211; Drummond 2019, pp. 213-215; Murray 1999, p. 132.

[154] Drummond 2019, pp. 213-216.

obviously consistent with interpretation (B). It is also consistent with interpretation (A), even if the range of possible exceptions to the general rule expressed in the first part of paragraph 105(2)E extends beyond the extreme circumstances mentioned in the second part. This is because any threat or use must comply with all six categories of international law to be lawful.[155] Under interpretation (A), any threat or use of nuclear weapons other than in an "extreme circumstance of self-defence", will not comply with the law on the use of force, and so be unlawful. In particular, if a deterrence policy merely says that nuclear weapons will only ever be used in self-defence, this does not necessarily render the deterrence threat lawful. Other aspects of the policy must be examined to see if they imply possible use other than in the extreme circumstances mentioned in the second part of paragraph 105(2)E.

3.3. One Aspect of UK Policy which Make it an Unlawful Threat of Force

One aspect of UK policy which renders it unlawful is the failure to rule out first use. In general, 'first use' might imply use in the absence of either a threat or an attack. The UK has, however, effectively ruled out such use by stating "We would only consider using nuclear weapons in self-defence (including the defence of our NATO allies)".[156] In this article, therefore, 'first use' will be taken to mean either (a) a nuclear response to a non-nuclear attack or (b) a nuclear response to the threat of a nuclear attack which has not yet begun. Conversely, in this article, 'no-first-use' will denote a policy which rules out both (a) and (b). There have been frequent security-based recommendations that no-first-use policies be adopted.[157]

Despite this, UK deterrence policy is deliberately ambiguous.[158] One aspect of this ambiguity includes an implication that factors other than armed attack on the UK might lead to a nuclear response, as seen in the following official statements:

"The UK's continued possession of a nuclear deterrent provides an assurance that we cannot be subjected in future to nuclear blackmail or a level of threat which would put at risk our vital interests or fundamentally constrain our foreign and security policy options.[159] […] we deliberately maintain some ambiguity about precisely when, how and at what scale we would contemplate use of our nuclear deterrent. We do not want to simplify the calculations of a potential aggressor by defining more precisely the circumstances in which we might consider the use of our nuclear capabilities (for example, we do not define what we consider to be our vital interests), hence, we will not rule in or out the first use of nuclear weapons.[160] […] Our nuclear deterrent is there to deter the most

[155] As illustrated, in relation to human rights law and humanitarian law in ARSIWA 2001, Art. 21, Commentary (3), and in relation to the law of neutrality in ARSIWA 2001, Art. 21, Commentary (5).

[156] UK White Paper 2006, para. 2-11; similar statements appear in UK Command Paper 2021, p. 76, and in UK Guidance April 2021.

[157] A.U. Bâli, *Legality and Legitimacy in the Global Order: The Changing Landscape of Nuclear Non-proliferation*, in R. Falk, M. Juergensmeyer & V. Popovski (Eds.), Legality and Legitimacy in Global Affairs, Oxford University Press, Oxford 2012, p. 332; M. Rifkind & B. of Ladyton & M. Campbell & A. Bailes & J. Greenstock & G of Craigiebank & H. of Nympsfield & R. of Ludlow, *The Trident Commission: An Independent, Cross-Party Inquiry to Examine UK Nuclear Weapons Policy; Concluding Report*, British American Security Information Council, London, Washington, 2014, p. 30, https://basicint.org/portfolio/trident-commission/ (6 August 2021); G. Schultz & J. Goodby (Eds.), *The War that must Never be Fought: Dilemmas of Nuclear Deterrence*, Hoover Institution Press, Stanford, 2015, p. 52, 205, 272, 351-352, 368 and 374-375; N. Tannenwald, *The Vanishing Nuclear Taboo? How Disarmament Fell Apart*, Foreign Affairs, Vol. 97, No. 6, 2018, p. 24; White 2020, p. 256 and 264.

[158] UK Command Paper 2021, p. 77.

[159] UK White Paper 2006, para. 3-10.

[160] UK Policy Paper 2015, App. 1, principle 3; a similar statement appears in UK White Paper 2006, para. 3-4.

extreme threats to our national security and way of life, which cannot be done by other means."[161]

The UK also appears to be willing to use nuclear weapons in response to the threat of a nuclear attack which has not yet begun,[162] and they clearly are willing to use other weapons in the "absence of specific evidence of where an attack will take place or of the precise nature of an attack".[163] Moreover, the specific nuclear weapons deployed by the UK logically increase the likelihood of first use by the UK,[164] and have been described in evidence to a UK Court as an "offensive first strike strategic nuclear weapons system".[165]

The force threatened by UK deterrence policy would not, at least to the extent that it involves 'first-use' of nuclear weapons, were it (hypothetically) to be actually used, comply with international law. This conclusion is based on the following premises:

- the ICJ *Nuclear Weapons* opinion implies that, other than in "an extreme circumstance of self-defence, in which the very survival of a state would be at stake", any nuclear weapon use will be unlawful (see section 3.2 above);[166]

- "the very survival of a State […] be[ing] at stake" refers to a factual situation, not a legal concept,[167] and cannot plausibly be understood to arise in the context of a non-nuclear attack;[168] and

- the circumstance of an imminent attack is not "extreme", relative to the circumstance of an attack which has begun.[169]

The basis of the latter part of the third of these premises is that the phrase "very survival of a State" might, in theory, refer to (i) the state's government surviving politically, (ii) the state retaining its independence, or (iii) the state's population and infrastructure surviving physically.[170] Most self-

[161] UK Guidance March 2021, preamble and sect. 9; similar statements appear in UK Command Paper 2021, p. 76, and in UK Guidance April 2021.

[162] UK HL Select Committee on International Relations, *Uncorrected oral evidence: Nuclear Non-Proliferation Treaty and nuclear disarmament*, 6 March 2019, (A. Duncan & S. Price & J. Franklin), http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/international-relations-committee/the-nuclear-nonproliferation-treaty-and-nuclear-disarmament/oral/97600.html (6 August 2021) at Q155.

[163] J. Wright, *The Modern Law of Self-Defence*, UK Attorney General's Speech at International Institute for Strategic Studies (11 January 2017), p. 17; https://www.gov.uk/government/news/legal-basis-for-striking-terror-targets-set-out (6 August 2021).

[164] Boyle 1988, p. 558 and 560; D. S. Rudesill, *MIRVs Matter: Banning Hydra-headed Missiles in a New START II Treaty*, Stanford Journal of International Law, Vol. 54, No. 1, 2018, pp. 84-86, 92 and 101.

[165] Evidence given by Professor Francis Boyle in Report of Proceedings, Sheriff Court, Greenock, *HM Advocate v. Angela Christina Zelter, Bodil Ulla Roder and Ellen Moxley*, Friday, 1st October 1999, http://tridentploughsharesarchive.org/greenock-1999-evidence-given-by-professor-francis-boyle-2/ (6 August 2021).

[166] Above, nn. 150-159 and related text.

[167] Drummond 2019, pp. 219-220; M. G. Kohen, *The Notion of 'State Survival' in International Law*, in L. Boisson de Chazournes & P. Sands (Eds.), International Law, the International Court of Justice and Nuclear Weapons, Cambridge University Press, Cambridge 1999, p. 294, and 312-313; J. A. Green, *Self-Preservation*, in F. Lachenmann & R. Wolfrum (Eds.), The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law Thematic Series, Vol. 2, Oxford University Press, Oxford 2017, p. 1139, paras. 11 and 16; Venturini 2011, sects. 3.2.2 and 3.5.

[168] Drummond 2019, pp. 220-221; D. H. Joyner, *International Law and the Proliferation of Weapons of Mass Destruction*, Oxford University Press, Oxford 2009, p. 84.

[169] Drummond 2019, p. 222.

[170] Matheson 1997, p. 430; B. H. Weston, *Nuclear Weapons and the World Court: Ambiguity's Consensus*, Transnatio-

defence situations would put at risk one of the first two senses of 'survival', so it appears to be the third sense that is intended here: the physical survival of the population and infrastructure.[171] No non-nuclear attack would risk the "very survival" of a state in this sense.

As noted in section 3.2 above, assessing the lawfulness of a threat of force is complex because it may require assessment of the lawfulness of the (hypothetical) use of the threatened force. Here the relevant point is that the UK's failure to rule out first use renders unlawful the threat intrinsic to its nuclear deterrence policy.[172] This is because (a) the lawfulness of such a threat, under international law, depends on the (hypothetical) use of the threatened force also complying with international law; (b) a nuclear response to a non-nuclear attack would be unlawful (because the "very survival of a State" is not at stake); and (c) a nuclear response to the threat of a nuclear attack would be unlawful (because the threat of a nuclear attack is not an "extreme circumstance").

UK nuclear deterrence policy, and the application of international law thereto, was analysed in detail in a 2019 article,[173] which also concluded that the policy was unlawful. That 2019 conclusion was based on a uniquely detailed analysis of the relevant paragraphs of the *Nuclear Weapons* opinion,[174] and a reasonably representative body of literature, although subject to the same language constraint as mentioned earlier.[175] I am unaware of any subsequent official consideration of that analysis. In particular, the UK Government was asked, in the UK parliament, what assessment it had made of the implications for its policies of the conclusions of the 2019 article.[176] The Government's one line response merely asserted that UK nuclear deterrence policy is "fully compliant and compatible with our international legal obligations".[177]

It has been suggested that "interpretation is pervasively determinative of what happens to legal rules when they are out in the world" as distinct from "the notion that there is a stable and agreed meaning to a rule, and we need merely to observe whether it is obeyed".[178] Here, however, no alternative interpretations have subsequently been offered, by the UK Government or others, of the law examined in the 2019 article. The following analysis will, therefore, accept the argument in this Part 3, that UK nuclear deterrence policy is currently unlawful. This does not imply that a nuclear deterrence policy ever could be lawful; it merely acknowledges that further work may be needed to rule out that possibility.[179]

On this basis, current UK deterrence policy has the second characteristic of terrorism noted in Part 2 above—unlawfulness. Despite this, as noted at the end of Part 2, a clear conclusion that this state activity constitutes (what a "broadly representative" group of international lawyers would consider to be) terrorism is not currently possible (because a "broadly representative" group would include lawyers acting for states who are currently inconsistent on this point). Even if consistency on this

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nal Law & Contemporary Problems, Vol. 7, 1997, p. 386; Schmitt 1998, p. 107.

[171] Drummond 2013, p. 123; this view appears to underlie the analysis in Joyner 2009, p. 84; Weston 1997, p. 387, appears to take a different view.

[172] Drummond 2019, p. 223; see also White 2020, p. 264.

[173] Drummond 2019.

[174] Ibid. part 3; 1996 ICJ Rep. 226, paras. 47-48.

[175] Above, n. 12, and related text.

[176] UK HC, Written Question 3709 by Martyn Day, and Response by Mark Lancaster, 22 & 28 October 2019, https://questions-statements.parliament.uk/written-questions/detail/2019-10-22/3709 (6 August 2021).

[177] Ibid.

[178] R. Howse & R. Teitel, *Beyond Compliance: Why International Law Really Matters*, Global Policy, Vol. 1, No. 2, 2010, p. 127.

[179] Above, n. 132, and related text.

point were to emerge in future, establishing that UK nuclear deterrence policy is nuclear terrorism is quite distinct from assessing whether or not that particular policy is constrained by existing international law specific to terrorism. Part 4 moves on to that assessment.

4. Legal Efforts to Constrain General and Nuclear Terrorism

4.1. International Constraints

The UN lists 19 international conventions and protocols relating to terrorism.[180] (The list of 19 does not include all worldwide treaties potentially relevant to terrorism.[181] Nor does it include the 11 regional treaties and conventions on terrorism.[182]) None of the 19 in the UN list expressly uses the words 'terrorism' or 'terrorist' other than (at most) in the title or preamble.[183] It follows that none of them define terrorism.[184] At most they define specific offences,[185] and then only partially andinconsistently.[186] Thus, not all activity with the core characteristics of activities described as terrorism in an international law context, is currently covered by international law instruments specific to terrorism. Mathematically: {the set of activities covered by terrorism-specific international law instruments} partially intersects {the set of all activities with the core characteristics of activities described as terrorism in international law literature}. Note that the sets partially intersect, rather than the first being a subset of the second. This is because some activities covered by terrorism-specific international law instruments do not have the core characteristics of terrorism.[187]

[180] List, with links to the texts, at http://www.un.org/counterterrorism/international-legal-instruments (6 August 2021).

[181] Z. W. Galicki, *International Treaties and Terrorism*, Romanian Journal of International Law, Vol. 1, 2003, final sect.; Trahan 2002, n. 32.

[182] Listed in nn. 102-105, above.

[183] Fry 2009, pp. 392-393; C. C. Joyner 2007, p. 245; Värk 2011, p. 75.

[184] Arbatov & Dvorkin & Pikaev 2008, p. 74; Fry 2009, p. 393.

[185] Franck & Lockwood 1974, pp. 89-90; Friedrichs 2006; B. Golder and G. Williams, *What is 'Terrorism'? Problems of Legal Definition*, University of New South Wales Law Journal, Vol. 27, No. 2, 2004, p. 273; Orlova & Moore 2005, pp. 308-309.

[186] Acharya 2009, pp. 662-663; Fry 2009, pp. 381-394 and 401-403; Kovács 2004, pp. 10-12; Mazandaran 2006, pp. 516-517; Trahan 2002, pp. 220-230 and 242; Van Schaack 2008, pp. 414-417.

[187] Below, note 217 and related text.

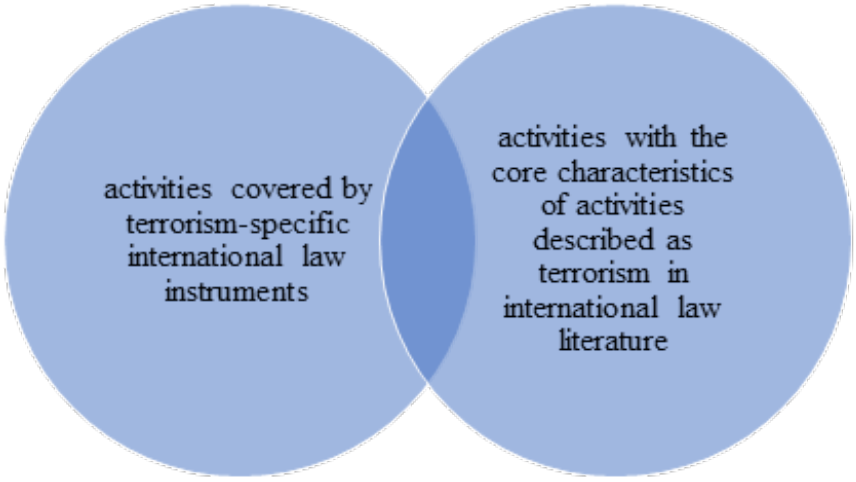

Figure 1. Terrorist activities and international law

Of the 19 instruments, three focus specifically on nuclear terrorism:[188] the 1979 Convention on the Physical Protection of Nuclear Material (CPPNM)[189]; its 2005 Amendment[190] (CPPNM/A denotes the amended convention); and the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism (ICSANT).[191] Several of the other 16 cover nuclear terrorism within their particular scope.[192]

The 1979 CPPNM required protection only for nuclear material used for peaceful purposes, and not for military nuclear material.[193] This remains true of CPPNM/A,[194] which therefore covers less than a fifth of all nuclear materials in the world.[195] UNSC Resolution 1540[196] requires controls to be

[188] These three are reviewed, in the context of the wider, non-terrorism-specific, nuclear security legal framework, in A. Gioia, *International Atomic Energy Agency, Nuclear Security and the Fight against International Terrorism*, Italian Yearbook of International Law, Vol. 18, 2008, pp. 139-157.

[189] 1979 Convention on the Physical Protection of Nuclear Material (CPPNM), 1456 UNTS 125.

[190] 2005 Amendment to the Convention on the Physical Protection of Nuclear Material ('CPPNM/A' denotes the amended Convention), INFCIRC/274/Rev.1/Mod.1; M. Asada, *Security Council Resolution 1540 to Combat WMD Terrorism: Effectiveness and Legitimacy in International Legislation*, Journal of Conflict and Security Law, Vol. 13, No. 3, 2008, p. 310; Black-Branch 2017, pp. 232-233.

[191] 2005 International Convention for the Suppression of Acts of Nuclear Terrorism (ICSANT), 2445 UNTS 89; C. C. Joyner 2007; N. Ronzitti, *WMD Terrorism*, Japanese Yearbook of International Law, Vol. 52, 2009, pp. 184-185.

[192] 1997 International Convention for the Suppression of Terrorist Bombings (ICSTB), 2149 UNTS 256, Art. 1(3); 2005 Protocol to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (PCSUASMN), LEG/CONF.15/21, Art. 4(5); 2010 Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation (CSUARICA) DCAS2010, Art. 1(1)(g),(h),(i); Ronzitti 2009, p. 176 and 183-184.

[193] CPPNM 1979, Art. 2.

[194] CPPNM/A 2005, Preamble, Art. 2(5).

[195] J. D. Herbach, *Preventing Nuclear Terrorism: International Law and Nuclear Security Governance*, PhD thesis, University of Amsterdam, 2019, p. 201.

[196] SC Res. 1540 (2004), 28 April 2004; on wider aspects of the resolution see: Black-Branch 2017, sect. 10; L. M. Hinojosa-Martínez, *The Legislative Role of the Security Council in its Fight against Terrorism: Legal, Political and Practical Limits*, International and Comparative Law Quarterly, Vol. 57, No. 2, 2008, pp. 333-359; D. H. Joyner, *Non-proliferation Law and the United Nations system: Resolution 1540 and the Limits of the Power of the Security Council*, Leiden Journal of International Law, Vol. 20, No. 2, 2007, pp. 489-518; C. H. Powell, *The United Nations Security Council, Terrorism and the Rule of Law*, in V. V. Ramraj & M. Hor & K. Roach (Eds.), Global Anti-terrorism Law and Policy, 2nd edn., Cambridge University Press, Cambridge 2012, p. 19; S. Shirazyan, *Building a Universal Counter-proliferation Regime: The Institutional Limits of United Nations Security Council Resolution 1540*, Journal of National Security Law & Policy, Vol. 10, No. 1, 2019, pp. 125-170.

established over weapons-related materials and increases non-proliferation obligations,[197] butdoes not otherwise constrain the military policies or activities of nuclear-armed states. ICSANT[198] requires states to physically protect all radioactive material regardless of whether that material is used for peaceful or non-peaceful purposes.[199]

The main offence specified by ICSANT requires only one or other of violence (or threat of violence) or coercion (or threat of coercion),[200] not necessarily in combination,[201] and not necessarily any element of creating fear.[202] The ICSANT offences thus include many actions which few, if any, would describe as terrorism.[203] CPPNM/A offences include using (or threatening to use) non-military nuclear material to cause death.[204] ICSANT and CPPNM/A provide for indirect suppression of the specified offences through national prosecution and punishment of offenders.[205] They also provide for international cooperation between states in terms of imposing duties to extradite or prosecute.[206]

Despite some disagreement during negotiations,[207] the final text of ICSANT explicitly excludes,[208] from its scope,

– the "activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law",[209] and

– "the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law".[210]

Identical text appears in CPPNM/A.[211] ICSANT also "does not address, nor can it be interpreted as addressing, in any way, the issue of the legality of the use or threat of use of nuclear weapons

[197] SC Res. 1540 (2004), footnote to preamble, Art. 3.

[198] ICSANT 2005.

[199] Ibid. Art. 7; Gioia 2008, p. 151; Herbach 2019, p. 201.

[200] ICSANT 2005, Art. 2: (1)(b), 2(a); threats are not offences under ICSTB 1997, Art. 2, but are under PCSUASMN 2005, Art. 4(5), and CSUARICA 2010, Art. 1(3)(b).

[201] Conte 2010, p. 31.

[202] Gioia 2008, p. 152; Grozdanova 2014, p. 311.

[203] Arbatov & Dvorkin & Pikaev 2008, p. 72; Conte 2010, p. 31, citing UN Special Rapporteur on the promotion and protection of human rights while countering terrorism; Lavalle 2007, n. 66; R. Smith, *Terrorism, Protest and the Law (in a Maritime Context)*, Yearbook of New Zealand Jurisprudence, Vol. 11-12, 2008-2009, pp. 61-73; Weigend 2006, n. 33.

[204] CPPNM/A 2005, Art. 7(1)(a), (g).

[205] C. C. Joyner 2007, p. 246; Margariti 2018, p. 179.

[206] ICSANT 2005, Art. 10; D. P. Fidler, *International Convention for the Suppression of Acts of Nuclear Terrorism Enters into Force*, ASIL Insights, Vol. 11, No. 18, 2007; C. C. Joyner 2007, pp. 239-242; Kolb 2004, pp. 246-255, 257-258 and 261-265; Mazzochi 2011, pp. 94-95; Ochieng 2017, pp. 85-87; Paust 2010, pp. 62-64; P. Willan, *The Convention on the Suppression of Acts of Nuclear Terrorism: An Old Solution to a New Problem*, Georgetown Journal of International Law, Vol. 39, No. 3, 2008, pp. 536-540 and 542-543.

[207] C. C. Joyner 2007, pp. 231-232; R. Perera, *International Convention for the Suppression of Acts of Nuclear Terrorism: Introductory Note*, 2008, United Nations Audiovisual Library of International Law, https://legal.un.org/avl/ha/icsant/icsant.html (6 August 2021).

[208] ICSANT 2005, Art. 4(2).

[209] Ibid.

[210] Ibid; the concerns outlined by Hmoud 2006, pp. 1040-42, and Margariti 2018, p. 196, over the phrase 'inasmuch as' in another context, are equally relevant here.

[211] CPPNM/A 2005, Art. 2(4)(b); identical text also appears in: ICSTB 1997, Art. 19; PCSUASMN 2005, Art. 3; and CSUARICA 2010, Art. 6.

by States".[212] Thus, CPPNM/A and ICSANT only aim to constrain acts and threats by non-state actors[213] who are not "armed forces" in a non-international armed conflict.[214]

A threat by a state to use military nuclear material violently to cause death, such as in UK nuclear deterrence, is thus specifically excluded from the scope of both CPPNM/A and ICSANT (because CPPNM/A only applies to non-military nuclear material, and state military action is excluded from the scope of ICSANT). UK nuclear deterrence policy is therefore an activity which (a) has the characteristics of activities which are described as terrorism in this context but (b) is not currently covered by terrorism-specific international law instruments.

4.2. UK National Law Constraints

Under the UK Terrorism Act 2000, terrorism-related offences include using "money or other property for the purposes of terrorism".[215] The Act's definition of 'terrorism'[216] has been described as "vague, broad and widely criticized by experts, courts and academics".[217] The main definition requires a design to influence a government or intimidate a public, but a threat or use "which involves the use of firearms or explosives is terrorism whether or not" any such design exists.[218] Thus 'terrorism' is so widely defined that it includes any "use or threat of action" where

- "the action involves serious violence against a person",[219]
- the "use or threat is made for the purpose of advancing a political [...] or ideological cause",[220] and
- the "use or threat […] involves the use of firearms or explosives".[221]This means that most, perhaps all, military action is an offence.[222] Ongoing UK action hasbeenrecognised to

[212] ICSANT 2005, Art. 4(4); C. C. Joyner 2007, p. 235.

[213] Arbatov & Dvorkin & Pikaev 2008, p. 74; Margariti 2018, p. 183.

[214] A. Coco, *The Mark of Cain: The Crime of Terrorism in times of Armed Conflict as Interpreted by the Court of Appeal of England and Wales in R v. Mohammed Gul*, Journal of International Criminal Justice, Vol. 11, No. 2, 2013, pp. 433-434.

[215] UK Terrorism Act 2000, sect. 16.

[216] Ibid. sect. 1, as amended by Terrorism Act 2006 and Counter-Terrorism Act 2008.

[217] A. Greene, *Defining Terrorism: One Size Fits All?*, International and Comparative Law Quarterly, Vol. 66, No. 2, 2017, pp. p. 41 and 423; similar criticism is noted by: K. Bell, *When Terror and Journalism Collide: A Critique of the UK's Overreach of Power in the Name of National Security*, Indonesian Journal of International & Comparative Law, Vol. 1, No. 4, 2014, pp. 924-926; H. Fenwick & G. Phillipson, *UK Counter-terror Law post-9/11: Initial Acceptance of Extraordinary Measures and the Partial Return to Human Rights Norms*, in V. V. Ramraj & M. Hor & K. Roach (Eds.), Global Anti-terrorism Law and Policy, 2nd edn., Cambridge University Press, Cambridge 2012, p. 484; Golder & Williams 2004, p. 290; Hardy & Williams 2011, pp. 115-120; Heradstveit & Pugh 2003, p. 11; Margariti 2018, p. 188; and Roach 2008, pp. 113-116; the UK is by no means unique in this respect: see, *e.g.*: S. B. Adarkwah, *Counter-terrorism Framework and Individual Liberties in Ghana*, African Journal of International and Comparative Law, Vol. 28, No. 1, 2020, p. 62; Idowu 2014, pp. 55-57; and S. Naz & M. E. Bari, *The Enactment of the Prevention of Terrorism Act, 2015, in Pursuance of the Constitution of Malaysia*, Suffolk Transnational Law Review, Vol. 41, No. 1, 2018, pp. 25-27.

[218] UK Terrorism Act 2000, sect. 1, subsects. (1)(b) and (3); J. Blackbourn, *The Evolving Definition of Terrorism in UK Law*, Behavioral Sciences of Terrorism and Political Aggression, Vol. 3, No. 2, 2011, pp. 141-143.

[219] UK Terrorism Act 2000, sect. 1, subsects. (1)(a), (2)(a).

[220] Ibid. subsect. (1)(c).

[221] Ibid. subsect. (3).

[222] Hodgson & Tadros 2013, p. 510, and 522.

> fall within the UK's own definition of terrorism.[223] Offences under the Act also include UK deterrence policy: the threat to use nuclear weapons ("firearms or explosives") for a "political or ideological cause" is clear in the published policy's references to "threat which would put at risk our vital interests or fundamentally constrain our foreign and security policy options",[224] and "threats to our national security and way of life".[225]

The UK went on to render yet more of its own actions, and actions which receive official approval, unlawful under UK terrorism law. On 14 September 2005 the UNSC adopted the UK-sponsored Resolution 1624, which calls upon states to prohibit and prevent incitement to commit terrorist acts.[226] The previous day, the UK had initiated the process leading to the UK Terrorism Act 2006.[227] The 2006 Act creates an offence of encouraging "acts of terrorism" (as defined by the Terrorism Act 2000), such as publishing a statement of "any form of praise" of acts of terrorism, from which "any section of the public" could infer, that what is being praised is "a type of conduct" that "should be emulated by them".[228]

This legislation has been widely criticised.[229] On the basis that most UK military action constitutes terrorism under the Terrorism Act 2000,[230] the 2006 Act makes offences of most military recruitment campaigns, as well as of events in the UK to remember those who participated in previous military action. Offences under the 2006 Act also include publishing official statements of UK nuclear deterrence policy:[231] a "form of praise" of nuclear deterrence, from which the "section of the public" contemplating joining the UK armed forces, could infer that it is a "type of conduct" (serving in the UK armed forces)[232] that "should be emulated by them".

5. Effective Impunity for UK Nuclear Deterrence

The term "impunity" read literally would only ever apply to non-state actors such as individuals, since there are no mechanisms to "punish" states under international law. States may, however, have responsibility for unlawful acts, and such responsibility may have consequences such as liability to make reparations.[233] Unlawful acts by states may also lead to UN Security Council countermeasures and sanctions.[234] In the context of unlawful state activity, the word impunity is used in this article in a non-literal sense to cover both penal consequences for individual officials of the state, and non-penal consequences for the state itself.

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[223] Greene 2017, pp. 428-431.

[224] Above, n. 164 and related text.

[225] Above, n. 166 and related text.

[226] SC Res. 1624 (2005), 14 September 2005, Art. 1(a), (b); Ronen 2010; C. Walker, *The War of Words with Terrorism: An Assessment of Three Approaches to Pursue and Prevent*, Journal of Conflict and Security Law, Vol. 22, No. 3, 2017, pp. 526-527.

[227] Moeckli 2008, pp. 175-176.

[228] UK Terrorism Act 2006, sects. 1(1)-(3), 20(1)-(3) and (7); Walker 2017, pp. 531-532; Blackbourn 2011, p. 144 and 146.

[229] Bell 2014, pp. 899-900 and 905-908; Fenwick & Phillipson 2012, p. 509; Margariti 2018, p. 188.

[230] Above, n. 236 and related text.

[231] *E.g.,* text related to nn. 164-166, above.

[232] Which constitutes terrorism under the 2000 Act: above, nn. 236-239 and related text.

[233] ARSIWA 2001.

[234] D. Kritsiotis, *International Law and the Relativities of Enforcement*, in J. Crawford & M. Koskenniemi (Eds.), The Cambridge Companion to International Law, Cambridge University Press, Cambridge 2012, pp. 248–258.

The existing UN instruments directed at terrorism either expressly exclude (potentially terrorist) actions of states from their scope,[235] or are generally interpreted in that way. In theory, this does not imply impunity for state terrorism, but in practice it can do,[236] often because the non-terrorism-specific law, under which acts of state terrorism are unlawful, is insufficiently enforced.[237] The resultant effective impunity has been defined as "the impossibility, *de jure* or *de facto*, of bringing the perpetrators of violations to account".[238]

It has been suggested that trials in national courts are appropriate for acts of terrorism.[239] As outlined in Section 4.2 above, UK nuclear deterrence policy is clearly an offence under the UK's own terrorism legislation. There is, however, little hope of successfully prosecuting UK officials in a UK court.[240] Nor is there much hope of prosecuting the UK Government in a non-UK court. In general, no state is entitled unilaterally to prosecute an act of terrorism which has been committed by another state.[241] Indeed, the jurisdiction of a state to prosecute any act of terrorism occurring in another state is limited.[242] The question of whether or not officials of one state could be prosecuted by another state, for official acts of terrorism, is not straightforward,[243] particularly after they cease to be officials.[244]

The International Criminal Court (ICC) would be a possible forum for such a trial, if the act of terrorism was also a crime as defined in the Rome Statute, for example a crime against humanity,[245] a war crime or genocide. Although a proposal to explicitly include terrorism among the crimes within the jurisdiction of the ICC was rejected,[246] there is nothing in the wording of the Rome Statute to prevent a crime against humanity (or a war crime or genocide) from being tried at the ICC merely because it also constitutes an act of terrorism.[247] This is, however, difficult for nuclear deterrence. The ICC definitions of crime against humanity, war crimes and genocide include neither the threat, nor the planning, of an unimplemented crime. That said, there are possible routes, at least in theory, for terrorism in the form a threat to be tried as an international crime.

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[235] Above, n. 112 and 221-228 and related text.

[236] Bâli 2012, p. 334; Broomhall 2004, p. 426, 431, 436, 437 and 441; Brown 1997, pp. 145-146; Margariti 2017, pp. 167-168; Santana 2015, p. 675; Weigend 2006, p. 923.

[237] Franck & Lockwood 1974, p. 74.

[238] N. Kyneswood, *Limits of Law in Ending Impunity for State Crime: Time to Re-Frame the International Criminal Court's Mandate?*, State Crime Journal, Vol. 8, No. 2, 2019, p. 220, quoting the UN Commission on Human Rights.

[239] Aksenova 2015, p. 280 and 298-299; Mazzochi 2011, pp. 101-102; Olson 2011, p. 492, 493 and 496.

[240] Drummond 2019, sect. 6.2; M. Morris, *Terrorism: The Politics of Prosecution*, Chicago Journal of International Law, Vol. 5, No. 2, 2005, p. 407.

[241] Dumitriu 2004, p. 601; Hmoud 2006, p. 1040; O. Fitzgerald, *The Globalized Rule of Law and National Security: An Ongoing Quest for Coherence*, University of New Brunswick Law Journal, Vol. 65, 2014, p. 82, notes potential changes in this area.

[242] C. C. Joyner 2007, pp. 237-239; Kolb 2004, pp. 271-278; M. Kovac, *International Criminalization of Terrorism*, Croatian Annual of Criminal Law and Practice, Vol. 14, No. 1, 2007, pp. 279-281; S. Sibbel, *Universal Jurisdiction and the Terrorism Acts*, Cambridge Student Law Review, Vol. 3, 2007, pp. 13-21.

[243] Hmoud 2006, p. 1040; Morris 2005, pp. 410-411 and 415-418; Proulx 2020, p. 190.

[244] R. Wedgwood, *International Criminal Law and Augusto Pinochet*, Virginia Journal of International Law, Vol. 40, No. 3, 2000, pp. 829-848.

[245] Mazandaran 2006, pp. 529-534; Proulx 2020, pp. 177-181.

[246] Aksenova 2015, p. 279, 281-282, and 296; I. Iqbal, *International Law of Nuclear Weapons Nonproliferation: Application to Non-State Actors*, Pace International Law Review, Vol. 31, No. 1, 2018, pp. 45-46; Kolb 2004, pp. 279-281; Margariti 2017, pp. 10-15; Mazandaran 2006, pp. 527-529; Van Schaack 2008, pp. 421-426.

[247] Arnold 2004, pp. 994-999; de Londras 2010, pp. 170-171; Kolb 2004, pp. 259, 278; Mazandaran 2006, p. 527; Mazzochi 2011, pp. 92-93; Zeidan 2006, p. 224; see, however, Kleczkowska 2019, pp. 48-53, which argues against this idea.

– One possibility is implicit in the existing ICC jurisdiction, if terrorism in the form of a threat is itself seen as a crime against humanity.[248] A broad reading of the reference to "inhumane acts of a similar character intentionally causing great suffering, or serious injury to … mental … health" might include the threat of violence. Although such acts will only be crimes against humanity when they are "part of a widespread or systematic attack directed against any civilian population", such an attack is defined as "conduct involving the multiple commission of acts referred to in paragraph 1 [which include "inhumane acts"] against any civilian population, pursuant to or in furtherance of a State or organizational policy".[249] A nuclear deterrence policy, which caused "great suffering, or serious injury to … mental … health" of the civilian population of the state(s) which the policy aimed to deter, could therefore be a crime against humanity within the jurisdiction of the ICC.

– A second possibility depends on the prohibition of terrorism, or at least nuclear terrorism, having achieved the status of a peremptory norm.[250] A peremptory norm is "accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".[251] All individuals and states are bound these worldwide norms, regardless of individual nationality or state consent.[252] Among the various consequences of such norms, one consequence is universal jurisdiction over violators of peremptory norms.[253] Specifically, it is well established that breaches of peremptory norms give rise to universal civil jurisdiction (even without a specific provision) and, unless otherwise provided, universal criminal jurisdiction.[254] This means that any State can bring the case to their own national court,[255] (potentially overriding the immunity normally granted to other States and their officials),[256] or to the International Court of Justice if the offending state has consented to ICJ jurisdiction (potentially overriding any reservations to that consent).[257]

On the first point, however, "the ICC offers little hope of ending state impunity" due to the fact that only individuals (not states) can be prosecuted at the ICC.[258] On the second point, even if the prohibition of nuclear terrorism became a peremptory norm, it is unlikely that the relevant understanding of terrorism would include state actions (given the ongoing inconsistencies among states on this point). A further difficulty is that, despite the well-established status of the prohibition of the *use* of force as a peremptory norm, it is "extremely difficult" to conclude that the prohibition of the *threat* of force is also a peremptory norm.[259]

This overall effective impunity for UK nuclear deterrence policy, even were it to constitute terrorism

[248] Arnold 2004, pp. 998-999; de Londras 2010, pp. 170-171.

[249] 1998 Rome Statute of the International Criminal Court, 2187 UNTS 38544, Arts. 7(1)(k) and (2)(a).

[250] Iqbal 2018, pp. 48-51; T. Weatherall, *The Status of the Prohibition of Terrorism in International Law: Recent Developments*, Georgetown Journal of International Law, Vol. 46, No. 2, 2015, pp. 611-616.

[251] 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331, Art. 53.

[252] A. Orakhelashvili, *Peremptory Norms in International Law*, Oxford University Press, Oxford 2008, pp. 8, 264.

[253] Iqbal 2018, p. 50; Weatherall 2015, pp. 621-622.

[254] Orakhelashvili 2008, p. 308.

[255] Ibid. p. 309.

[256] Ibid. pp. 343-357.

[257] Ibid. pp. 499-508.

[258] Kyneswood 2019, p. 221.

[259] J. A. Green, *Questioning the Peremptory Status of the Prohibition of the Use of Force*, Michigan Journal of International Law, Vol. 32, No. 2, 2011, p. 227.

under international law, is concerning but not surprising. It is consistent with the UK's long history of impunity for atrocities. Many atrocities have been committed by states,[260] including the UK,[261] which in aggregate have left millions dead.[262] Many of these fall within common definitions of terrorism,[263] and few have led to any punishment for powerful states.[264] The bombings of cities in Germany and Japan in the 1940s are clear examples.[265] UK action to maintain such impunity is ongoing. This was seen in the UK's obstruction and obfuscation in the context of the 2013 case about UK atrocities in Kenya,[266] and in the UK's attempts to avoid members of its armed forces, in action abroad, being prosecuted for violation of human rights,[267] or commission of war crimes.[268]

6. Prospects for Change

The analysis in this article reflects a more general concern raised by other authors. The emergence of recent international and national law specific to terrorism, often through Security Council action, has been driven by powerful states in order to establish a worldwide approach that reflects their particular priorities.[269] For example, the particular activities covered by, and the timing of

[260] Bassiouni 2002, p. 102; Blakeley 2007, pp. 231-233; B. S. Chimni, *The Past, Present and Future of International Law: A Critical Third World Approach*, Melbourne Journal of International Law, Vol. 8, No. 2, 2007, p. 501; R. Falk, *Reviving Global Justice, Addressing Legitimate Grievances*, Middle East Report, Vol. 229, 2003, p. 16; Held 2004, pp. 60-61, citing Honderich; K. Kovarovic, *When the Nation Springs a [Wiki]leak: The 'National Security' Attack on Free Speech*, Touro International Law Review, Vol. 14, No. 2, 2011, pp. 321-322; A. Nuzzo, *Reasons for Conflict: Political Implications of a Definition of Terrorism*, Metaphilosophy, Vol. 35, No. 3, 2004, pp. 340-342; O. C. Okafor, *Newness, Imperialism, and International Legal Reform in our Time: A TWAIL Perspective*, Osgoode Hall Law Journal, Vol. 43, No. 1&2, 2005, pp. pp. 173 and 190; Primoratz 2013, p. 78.

[261] Donohue 2005, p. 16; M. Neocleous, *Air Power as Police Power*, Environment and Planning D: Society and Space, Vol. 31, No. 4, 2013, pp. 578-593.

[262] Blakeley 2007, p. 228; Mazzochi 2011, p. 76; R. J. Miller, *The Doctrine of Discovery: The International Law of Colonialism*, UCLA Indigenous Peoples' Journal of Law, Culture, and Resistance, Vol. 5, 2019, pp. 36-37; N. Wittmann, *Reparations—Legally Justified and Sine qua non for Global Justice, Peace and Security*, Global Justice: Theory Practice Rhetoric, Vol. 9, No. 2, 2016, pp. 200, 209.

[263] S. A. Alshdaifat, *International Law and the Use of Force Against Terrorism*, Cambridge Scholars Publishing, Newcastle, 2017, pp. 3-5; Blakeley 2007, p. 231; Card 2007, pp. 10-11 and 22-23; C. Carr, *'Terrorism': Why the Definition must be Broad*, World Policy Journal, Vol. 24, No. 1, 2007, 48-49; English 2016, p. 136; Held 2004, p. 67, citing Means; Hodgson & Tadros 2013, p. 524; Jackson 2014, pp. 129-130; Jaggar 2003, p. 177; Medina 2019, p. 56; C. Miéville, *Multilateralism as Terror: International Law, Haiti, and Imperialism*, Finnish Yearbook of International Law, Vol. 19, 2008, pp. 79-81; S. Perera, *Introduction: Living through Terror: (Post)Conflict, (Post)Trauma and the South*, Social Identities: Journal for the Study of Race, Nation and Culture, Vol. 15, No. 1, 2009, pp. 3-4 and 8; Sluka 2000, pp. 8-10 and 30; Ware 2003, p. 261.

[264] Acharya 2009, p. 671; K. Borrelli, *Between Show-trials and Utopia: A Study of the Tu Quoque Defence*, Leiden Journal of International Law, Vol. 32, No. 2, 2019, pp. 317-318, 320 and 324-331; Paust 2010, p. 60; L. Varadarajan, *The Trials of Imperialism: Radhabinod Pal's Dissent at the Tokyo Tribunal*, European Journal of International Relations, Vol. 21, No. 4, 2015, pp. 806-810.

[265] Begorre-Bret 2006, p. 2002; Card 2007, pp. 9-10; Falk 2003, p. 16; Fletcher 2006, p. 905; Franck & Lockwood 1974, p. 73; Held 2004, p. 65; Hodgson & Tadros 2013, p. 512; Jaggar 2003, p. 181; Primoratz 2013, p. 72, and 74-77; Reitan 2013, p. 205; Rodin 2004, p. 770; Schelling 1982, p. 67; Schwenkenbecher 2009, pp. 109-116, 119; Vanaik 2010, p. 10.

[266] Balint 2016.

[267] Margariti 2018, pp. 196-197.

[268] Kyneswood 2019, p. 230; E. van Sliedregt, *One Rule for Them - Selectivity in International Criminal Law*, Leiden Journal of International Law, Vol. 34, No. 2, 2021, pp. 287-288.

[269] Acharya 2009, p. 653 and 678-679; A. Anghie, *Imperialism, Sovereignty and the Making of International Law*, Cambridge University Press, Cambridge 2005, pp. 306-307; Brown 1997, pp. 167-168; Chimni 2007, p. 509; R. Cry-

the introduction of measures, has often directly related to the effects of the relevant activities on residents of the US and Europe.[270] Here, as in other areas of international law, this imbalance is exacerbated when authors accept, consciously or otherwise, the priorities and perspectives of the powerful states.[271] For those wishing to challenge this dominance of the powerful states, five strategies are worth considering. The first three of these strategies are specific to nuclear deterrence.

1. Including state action, and state military action, in existing or future international terrorism conventions, might allow them to cover some (or all) aspects of nuclear deterrence. For example, defining terrorism in a way that did not exclude state military activity would be a useful first step. This possibility, however, seems unlikely given the failure to reach agreement, after almost fifty years of UN-sponsored debate on this specific issue.[272]

2. The UNSC could "manage nuclear deterrence" though a Resolution which explicitly restricts the use of nuclear weapons to "a response to an armed attack [...] involving nuclear weapons".[273] The calls for a multilateral no-first-use agreement have also been ongoing for over fifty years,[274] with little progress to date.[275] There are, however, two reasons for hope:(i) the growing support for no-first-use policies;[276] and (ii) the pressure on the nuclear-armed states to make some substantial change to their policies ahead of the next Non-Proliferation

er, *Book Review: Myra Williamson, Terrorism, War and International Law: The Legality of the Use of Force against Afghanistan in 2001*, Journal of Conflict and Security Law, Vol. 14, No. 2, 2009, p. 384; Ejeh & Bappah & Dankofa 2019, p. 189; Grozdanova 2014, pp. 324-326; B.-V. Ikejiaku, *International Law is Western Made Global Law: The Perception of Third-world Category*, African Journal of Legal Studies, Vol. 6, Nos. 2-3, 2013, p. 341 and 353-354; Koskenniemi 1995, p. 348; Moeckli 2008, pp. 178-180 and 182; C. C. Murphy, *Terrorism and Transnational Law: Rules of Law under Conditions of Globalisation*, in P. Zumbansen (Ed.), Oxford Handbook of Transnational Law, Oxford University Press, Oxford 2021, sect. IV.A; Norberg 2010, p. 49; Satterley 2015, pp. 15-16; P. C. R. Terry, *The Return of Gunboat Diplomacy: How the West has Undermined the Ban on the Use of Force*, Harvard National Security Journal, Vol. 10, 2019, p. 110.

[270] Acharya 2009, p. 657 and 659-660; Anghie 2005, pp. 306-307; Asada 2008, pp. 320-324; Brown 1997, p. 167; Greene 1992, p. 484; Okafor 2005, p. 173 and 181-187.

[271] M. al Attar, *Review of J Linarelli, M E Salomon and Sornarajah: The Misery of International Law: Confrontations with Injustice in the Global Economy*, Leiden Journal of International Law, Vol. 32, No. 4, 2019, pp. 875-876; O. A. Badaru, *The Right to Food and the Political Economy of Third World States*, Transnational Human Rights Review, Vol. 1, 2014, pp. 113-115 and 121-122; H. Charlesworth, *International Law: A Discipline of Crisis*, Modern Law Review, Vol. 65, No. 3, 2002, pp. 377-392; M. Chiam & A. Hood, *Nuclear Humanitarianism*, Journal of Conflict and Security Law, Vol. 24, No. 3, 2019, pp. 490-492; Chimni 2007, pp. 507-508 and 512-513; Miéville 2008, pp. 73-79; A. Orford, *International Law and the Populist Moment: A Comment on Martti Koskenniemi's Enchanted by the Tools? International Law and Enlightenment*, Proceedings of the ASIL Annual Meeting, Vol. 113, 2019, pp. 24-25; J. Reynolds, *Disrupting Civility: Amateur Intellectuals, International Lawyers and TWAIL as Praxis*, Third World Quarterly, Vol. 37, No. 11, 2016, p. 2100; Satterley 2015, pp. 9-11 and 13-15; C. Schwöbel-Patel, *Populism, International Law and the End of Keep Calm and Carry on Lawyering*, in J. E. Nijman & W. G. Werner (Eds.), 49 Netherlands Yearbook of International Law 2018, T.M.C. Asser Press, The Hague 2019, p. 97; the same point is also made in the context of international relations: Blakeley 2007, pp. 229-231.

[272] Above, nn. 87, 111 and 221 and related text.

[273] White 2020, p. 265.

[274] Z. Pan, *A Study of China's No-First-Use Policy on Nuclear Weapons*, Journal for Peace and Nuclear Disarmament, Vol. 1, No. 1, 2018, pp. 125-126; N. Ritchie, *Waiting for Kant: Devaluing and Delegitimizing Nuclear Weapons*, International Affairs, Vol. 90, 2014, pp. 610–612.

[275] Global Zero, *Commission on Nuclear Risk Reduction: De-alerting and Stabilizing the World's Nuclear Force Postures*, Global Zero 2015, https://www.globalzero.org/reaching-zero/reports/ (6 August 2021) pp. 38-39.

[276] Above, n. 162 and related text.

Treaty[277] (hereinafter: NPT) Review Conference,[278] now planned for early 2022,[279] to balance their negative response[280] to the development of the Treaty on the Prohibition of Nuclear Weapons.[281]

3. Giving at least equal attention to wider national and international law, not specific to terrorism, which also applies to terrorism,[282] may highlight ways of countering state terrorism.[283] In the context of UK nuclear deterrence, in addition to the law outlined in Section 3 above, other areas to explore include the UK's apparent ongoing breach of its obligations under NPT Article VI[284] in acting to maintain its nuclear deterrence policy indefinitely.[285] That said, the UK Government's current disrespect for the rule of law is demonstrated by (a) its action in 2017 and 2018 to prevent its nuclear deterrence policy being challenged in UK and international courts,[286] and (b) its repeated failure to answer parliamentary questions on how international law applies to its nuclear deterrence policy.[287]

4. A more general strategy is to give increased attention to the application of international law in areas which are of significant concern to the less powerful states.[288] For example powerful

[277] 1968 Treaty for the Non-Proliferation of Nuclear Weapons (NPT), 729 UNTS 161.

[278] White 2020, pp. 264-265.

[279] https://www.un.org/en/conferences/npt2020 (6 August 2021).

[280] UK Guidance April 2021: "the UK [...] will not support, sign or ratify the TPNW".

[281] TPNW 2017.

[282] Amet 2013, p. 18; E. C. Ezeani, *Responding to Homegrown Terrorism: The Case of Boko Haram*, Annual Survey of International & Comparative Law, Vol. 22, No. 1, 2017, p. 23; Moeckli 2008, pp. 178-181; Roach 2008, pp. 99-100.

[283] Amet 2013, p. 33; Bâli 2004, pp. 12-14 and 18-20; Jaggar 2003, p. 178; Tiefenbrun 2002, pp. 378-379.

[284] NPT 1968, Art. VI.

[285] UK Guidance April 2021: "The UK's independent nuclear deterrent […] will remain […] for as long as the global security situation makes it necessary"; Drummond 2019, pp. 227-228 and 236-237; S. Kadelbach, *Possible Means to Overcome Tendencies of the Nuclear Weapons Ban Treaty to Erode the NPT*, in J. L. Black-Branch & D. Fleck (Eds.), Nuclear Non-proliferation in International Law - Volume V, T.M.C. Asser Press, The Hague 2020, pp. 309-310; for an alternative perspective, see P. M. Kiernan, *'Disarmament' under the NPT: Article VI in the 21st Century*, Michigan State International Law Review, Vol. 20, No. 2, 2013, pp. 381-400.

[286] Drummond 2019, sect. 6.2.

[287] UK HC, *Written Question 222573 by Martyn Day, and Response by Gavin Williamson*, 18 & 26 February 2019, https://www.parliament.uk/business/publications/written-questions-answers-statements/written-question/Commons/2019-02-18/222573/ (6 August 2021); UK HC *Written Questions 3709, 3710 & 3711 by Martyn Day, and Responses by Mark Lancaster*, 22 & 28 October 2019, https://questions-statements.parliament.uk/written-questions/detail/2019-10-22/3709 (6 August 2021), https://questions-statements.parliament.uk/written-questions/detail/2019-10-22/3710 (6 August 2021), & https://questions-statements.parliament.uk/written-questions/de-tail/2019-10-22/3711 (6 August 2021).

[288] Badaru 2014; Charlesworth 2002, p. 389 and 391-392; Chimni 2007, p. 503 and 515; M. A. Drumbl, *Poverty, Wealth, and Obligation in International Environmental Law*, Tulane Law Review, Vol. 76, No. 4, 2002, p. 847 and 918; H. Elver, *Human Rights Based Approach to Sustainable Agricultural Policies and Food Security*, in H. Ginzky & E. Dooley & I. L. Heuser & E. Kasimbazi & T. Markus & T. Qin (Eds.), International Yearbook of Soil Law and Policy 2018, Springer, Cham 2019, pp. 358-370; C. G. Gonzalez, *International Economic Law and the Right to Food*, in N. C. S. Lambek & P. Claeys & A. Wong & L. Brilmayer (Eds.), Rethinking Food Systems, Springer, Dordrecht, 2014, pp. 188-193; R. L. Johnstone, *Unlikely Bedfellows: Feminist Theory and the War on Terror*, Chicago-Kent Journal of International and Comparative Law, Vol. 9, No. 1, 2009, p. 45; B. Leebaw, *Justice, Charity, or Alibi? Humanitarianism, Human Rights, and 'Humanity Law'*, Humanity, Vol. 5, No. 2, 2014, pp. 261-276; K. Mickelson, *Rhetoric and Rage: Third World Voices in International Legal Discourse*, Wisconsin International Law Journal, Vol. 16, No. 2, 1998, pp. 383-384 and 393-394; M. Mutua, *Human Rights in Africa: The Limited Promise of Liberalism*, African Studies Review, Vol. 51, No. 1, 2008, pp. 17-39; Okafor 2005, p. 173 and 181-187; Orford 2019, pp. 23-26; M. E. Salomon, *From NIEO to Now and the Unfinishable Story of Economic Justice*, International and Comparative Law Quarterly, Vol. 62, No. 1, 2013, p. 49; see also below, notes 307-311 and related text.

states contribute to systematic injustice,[289] including through their undue influence over the development of international law,[290] which undermines the "ultimate goal of law […] to maintain justice by facilitating human dignity and worth".[291]

5. Another general strategy is to use the word 'terrorism' more consistently in an international law context.[292] Such use should acknowledge, at least in principle, that 'terrorism' can potentially refer to some actions of powerful states, such as:

   – some of their recent military action;[293] and

   – some of their ongoing,[294] centuries-long,[295] often violent,[296] structural oppression of other countries.[297]

7. Conclusions

Subject to considering only English-language literature, there is a wide consensus in the international law literature, on some core characteristics of activities described as terrorism. Such activities (a) involve violence (or threat of violence), fear and coercion, (b) are unlawful by reference to some non-terrorism-specific international or national law, and (c) can, in principle, include state activity. The first two of these characteristics are broadly consistent with descriptions of terrorism by international courts, in international humanitarian law, and among UN member states. Inconsistency among states, however, currently prevents a clear conclusion that state activity can constitute terrorism under international law.

At least some aspects of UK nuclear deterrence policy, such as the failure to rule out first use, render it unlawful under non-terrorism-specific international law. UK nuclear deterrence policy

[289] E. Ashford, *The Infliction of Subsistence Deprivations as a Perfect Crime*, Proceedings of the Aristotelian Society, Vol. 118, No. 1, 2018, pp. 83-106; Badaru 2014, pp. 123-133; G. Brock, *Global Health and Responsibility*, in P. T. Lenard & C. Straehle (Eds.), Health Inequalities and Global Justice, Edinburgh University Press, Edinburgh, 2012, pp. 117-118; T. Hayward, *On the Nature of our Debt to the Global Poor*, Journal of Social Philosophy, Vol. 39, No. 1, 2008, pp. 12-18; J. Hickel, *The Imperative of Redistribution in an Age of Ecological Overshoot: Human Rights and Global Inequality*, Humanity, Vol. 10, No. 3, 2019, pp. 420-421; Salomon 2013, pp. 52-54.

[290] R. S. Abella, *International Law and Prospects for Justice*, Emory International Law Review, Vol. 34, 2020, p. 941 and 945; Gonzalez 2014, pp. 169-184; O. C. Okafor, *Poverty, Agency and Resistance in the Future of International Law: An African Perspective*, Third World Quarterly, Vol. 27, No. 5, 2006, pp. 802-805; M. E. Salomon, *Poverty, Privilege and International Law: The Millennium Development Goals and the Guise of Humanitarianism*, German Yearbook of International Law, Vol. 51, 2008, pp. 43-44, 51-52, 64 and 72-73.

[291] Acharya 2009, p. 653; Charlesworth 2002, p. 391; Chimni 2007, p. 500.

[292] I. Mgbeoji, *The Bearded Bandit, the Outlaw Cop, and the Naked Emperor: Towards a North-South (De)Construction of the Texts and Contexts of International Law's (Dis)Engagement with Terrorism*, Osgoode Hall Law Journal, Vol. 43, No. 1&2, 2005, p. 108; Blakeley 2007, makes the same suggestion in the context of international relations.

[293] R. Blakeley, *Drones, state terrorism and international law*, Critical Studies on Terrorism, Vol. 11, No. 2, 2018, pp. 321-341; Carr 2007, p. 50.

[294] al Attar 2019, p. 878, and 880; Ashford 2018, pp. 91 and 99; Badaru 2014, pp. 124-132; Baxi 2005, p. 12; Blakeley 2007, pp. 229-231; Ikejiaku 2013, pp. 346-347; M. Koskenniemi, *'The Lady doth Protest Too Much': Kosovo, and the Turn to Ethics in International Law*, Modern Law Review, Vol. 65, No. 2, 2002, p. 172.

[295] Anghie 2005, p. 295; Drumbl 2002, pp. 912-913; Hickel 2019, pp. 419-421; S. Marks, *Human Rights and the Bottom Billion*, European Human Rights Law Review, Vol. 1, 2009, pp. 43-49; Orford 2019, p. 26.

[296] al Attar 2019, p. 876; Anghie 2005, p. 308; Charlesworth 2002, p. 391; Ikejiaku 2013, p. 345.

[297] Baxi 2005, pp. 11-12 and 24-25; Blakeley 2018.

also involves threat of violence, fear and coercion. The suggestion that UK nuclear deterrence policy is terrorism under international law, although "credible" is not yet "authoritative",[298] due to the current legal disagreement on whether or not state activity can constitute terrorism.

Not all activity with the characteristics of terrorism, as currently specified by terrorism-specific international law instruments, is covered by those instruments. In particular, UK nuclear deterrence policy, which would fall within international legal constraints on nuclear terrorism, does not do so, because of their scope restrictions and exceptions. Thus although UK nuclear deterrence policy might be terrorism, that fact alone would not currently render the policy unlawful under international law (nor would that fact prevent the policy being otherwise unlawful).

UK nuclear deterrence policy is an offence under UK terrorism law, but there is little hope of successfully prosecuting UK Government officials in national or international courts.

This overall effective impunity for UK nuclear deterrence policy highlights how powerful states often drive the development of international law on terrorism by reference to their own priorities. Strategies for change include: applying wider, non-terrorism-specific, international law to achieve a UK no-first-use policy; giving more attention to applying international law to worldwide systematic injustices; and aiming for a more consistent use of the word 'terrorism' in an international law context.

[298] Above, n. 10 and related text.

The right to a fair trial at international criminal courts and tribunals – Are the standards of international criminal proceedings fair enough?[1]

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Since the establishment of the first ad hoc criminal tribunals and from the creation of the International Criminal Court, there has always been a discussion whether these international courts and tribunals are obliged to set the highest standards of fairness in their procedural practices, or whether it is sufficient if their proceedings and practice is just 'fair enough'. In essence, the human rights framework cannot be neglected when assessing the fairness of international criminal proceedings. As the fair trial provisions of the human rights framework inspired the international criminal courts and tribunals' own standards, as well as the recent trends show that international criminal courts and tribunals draw on international human rights jurisprudence in their own interpretation of those standards, the aim of this article is to explore whether the standards of fairness of the international criminal proceedings are set high enough to ensure compliance with the international human rights framework. The article focuses on providing a brief overview and a short comparative analysis of the standards of fairness at the selected international criminal courts and tribunals. It primarily explores the interplay between the international human rights framework and the statutory framework of the international criminal courts and tribunals, by examining the existing international human rights legal framework, and exploring the understanding and interpretation of standards of fairness, with an emphasis on the equality of arms principle as given by the jurisprudence of the international criminal courts and tribunals.

Keywords: Right to a fair trial; International criminal proceedings; Standards of fairness

1. Introduction

The idea of creating an international criminal court to punish the most serious crimes of international concern dates back to the period after the First World War.[2] The attainment of that goal and the road from the Nuremberg and Tokyo Tribunals, through the establishment of the first *ad hoc* criminal tribunals, namely the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), the adoption of the Rome Statute and the establishment of the International Criminal Court (ICC) to the establishment of hybrid criminal courts and tribunals, such as the Extraordinary Chambers of the Courts of Cambodia (ECCC) has

[1] This article was supported by project VEGA No. 1/0579/20 "Armed conflicts and cyber threats – challenges to International Law in the 21st century".

[2] A. Cassese & P. Gaeta & L. Baig & M. Fan & C. Gosnell & A. Whiting (eds.), *Cassese's International Criminal Law,* 3rd edn., Oxford University Press, Oxford 2013, p. 253.

been slow and troublesome. Trials for genocide, war crimes and crimes against humanity can take place in multiple jurisdictions and at both the international and national levels. The legal framework of the systems of international criminal courts and tribunals, including their Statutes and Rules of Procedure have played a key role in consolidating the substantive and procedural law for trying international crimes, and standardizing some of the structures and roles for international justice mechanisms and their actors.

The primary idea behind the efforts of the international community to create international criminal courts and tribunals was to ensure that serious violations of human rights and humanitarian law that shock the international community do not remain unpunished.[3] The period specific for the development of these institutions empowered to prosecute and punish serious violations of international humanitarian law and human rights law, aimed to show not only to the victims of these crimes, but also to the entire international community, including the perpetrators of these crimes that justice will be done and the international community is ready to fight impunity, to guarantee lasting respect for and the enforcement of international justice.[4]

It is difficult to categorize international criminal proceedings as fitting squarely into any of the models of system of justice,[5] as fragmentation and divergency can be observed not only among the international criminal courts and tribunals, but also within the different chambers of the same criminal court or tribunal. However, while the scope and the way the international criminal proceedings are conducted depends largely on the structure of the international mechanism and the system it follows, with differences between the proceedings, it should always be ensured that the goal to punish the perpetrators of the most serious international crimes is realized through just means. Thus, regardless of the mechanism, justice can only be done if the appearance of victor's justice is avoided.[6] Already when establishing the ICTY, the Secretary General of the United Nations stated that it was 'axiomatic' that criminal courts established by the international community should espouse the highest standards of human rights protection in their procedures.[7] Ensuring a fair trial is essential for all parties involved, and is an inevitable pre-requisite for effective and efficient international criminal justice systems based on the principle of rule of law.

The aim of this article is to explore whether the standards of fairness of the proceedings are set high enough to ensure compliance with the international human right standards. It focuses on examining the interplay between the international human rights framework and the statutory framework of the international criminal courts and tribunals. The article firstly explores and introduces the international human rights legal framework, setting out the elements of the right to a fair trial. The second chapter of this article explores the understanding and interpretation of standards of fairness, with an emphasis on the equality of arms principle as given by the jurisprudence of the international criminal courts and tribunals. The third chapter offers a brief comparison of the fair trial rights of the defendants as ensured by the Statutes and Rules of Procedure of the selected international and internationalized criminal courts and tribunals, namely the ICTY, the ICTR, the ICC and the ECCC. In addition, it also examines and discusses the selected challenges that the international criminal courts and tribunals face that may have an impact on the fairness of the proceedings. Furthermore, the fourth chapter of this article aims to discuss the common challenges that international criminal

[3] J. P. W. Temminck Tuinstra, *Defence counsel in international criminal law*, Amsterdam Center for International Law, University of Amsterdam, (PhD thesis), January 2009, p. 1.

[4] 1998 Rome Statute of the International Criminal Court, 2187 UNTS 90, Preamble.

[5] Y. McDermott, *Fairness in International Criminal Trials*, Oxford University Press, Oxford 2016, p. 10.

[6] Temminck Tuinstra 2009, p. 1.

[7] Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993), UN Doc. S/25704, 3 May 1993, para. 106.

proceedings face, in general, regardless of the selected court.

2. The international human rights framework

International human rights instruments have had a pervasive effect and impact not only on national criminal proceedings, but also on the way international criminal proceedings are conducted at the various different international criminal courts and tribunals. In essence, taking into account that international criminal law is centered around individual criminal responsibility, it is agreed that the credibility of international justice depends largely on the respect of the rights of the accused and the human rights standards related to fair trial. Whether it is the standards of conducting an arrest, or the information that must be provided to an accused upon arrest, the entitlement to remain silent and not to self-incriminate oneself, as well as the rights of access to legal counsel, legislation and court practice of the international criminal courts and tribunals have been significantly impacted by judicial interpretation of generally worded human rights standards.

Despite the fact that the international human rights legal instruments are not themselves binding before the international criminal courts and tribunals, the fair trial standards enshrined in the statutes of the international criminal courts and tribunals largely reflect on the provisions contained therein.[8] Indeed, it is now well-established that the statutes of the international criminal courts and tribunals not only refer to but also mirror the rights established in many of the major international human rights instruments. Therefore, it is important to consider the international human rights standards as not only relevant, but also essential to international criminal proceedings. Indeed, the right to a fair trial is one of the most essential components of human rights[9] and forms fundamental part of international criminal procedure. It is established within the fundamental documents of the international criminal courts and tribunals, such as their statutes and rules of procedure.

The right to a fair trial as such is enshrined in numerous key international and regional human rights documents. The development of individual rights protection in criminal proceedings, both at the international and regional level, goes back to the drafting and ratification of these founding documents setting out the contemporary law of human rights. At the international level, the right to a fair trial was first articulated in Articles 10 and 11 of the Universal Declaration of Human Rights (UDHR).[10] The scope of the right to a fair trial was expanded by the International Covenant on Civil and Political Rights (ICCPR), which in its Article 14(1) articulates the entitlement to a fair and public trial.[11] Further minimum guarantees and aspects of the fair trial are set out in Article 14(3) of the ICCPR.

Article 14(3) of the International Covenant on Civil and Political Rights reads as follows:

> "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
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> (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
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> (b) To have adequate time and facilities for the preparation of his defence and to communi-

[8] McDermott 2016, p. 17.

[9] A. Clooney & P. Webb, *The Right to a Fair Trial in International Law, Oxford University Press*, Oxford 2021.

[10] GA Res. 217A (III), Universal Declaration of Human Rights, 10 December 1948.

[11] 1966 International Covenant on Civil and Political Rights, 999 UNTS 171.

cate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt."[12]

These are all elements of fair trial rights,[13] which endorse the universal principle that criminal proceedings must be fair and legitimate. In relation to the fairness of the proceedings, it is thus important, when examining and assessing whether a trial adheres to the standards of fairness, to take into account the application and enforcement of the above-mentioned minimum guarantees of fair trial. Furthermore, with regards to the legitimacy of the proceedings, the fact that the defendant receives a fair trial is inherent to the legitimacy of international criminal courts and tribunals.[14] Although ensuring a fair trial, in itself, might not legitimize an international criminal court, an unfair trial certainly undermines its legitimacy.[15]At the regional level, including for instance the European level, fair trial rights have been first laid down by the Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR), with Articles 5 and 6 being the fundamental provisions guaranteeing the basic defence rights, largely reflecting the statutory provisions of the ICCPR.

3. Understanding fairness and the equality of arms principle

Given the unique nature and context of the international criminal courts and tribunals, a mere access to the court's doors is not sufficient to guarantee a fair trial in international criminal proceedings. Fairness is essential to enhance the process of legitimacy of international criminal courts and tribunals.[16] Fairness is a broad concept, applicable also in international criminal law, invoking and comprising of principles including equality, impartiality and consistency.[17] The requirement of the principle of fairness of the proceedings possesses a fundamental and practical value in internation-

[12] 1966 International Covenant on Civil and Political Rights, 999 UNTS 171, Article 14(3).

[13] *Salduz v. Turkey* (App. No. 36391/02) ECtHR [GC], (2008) paras. 51 and 55; *Dvorski v. Croatia* (App. No. 25703/11) ECtHR [GC] (2015) para. 76; *Ibrahim and Others v. the United Kingdom* (App. Nos. 50541/08, 50571/08, 50573/08 and 40351/09) ECtHR [GC] (2016) para. 255; *Simeonovi v. Bulgaria* (App. No. 21980/04) ECtHR [GC] (2017) para. 112.

[14] J. Nicholson, '*Too High', 'Too Low', or 'Just Fair Enough'? Finding Legitimacy Through the Accsued's Right to a Fair Trial,* Journal of International Criminal Justice, Vol. 17, No. 2, July 2019, p. 2.

[15] A. Kiyani, *The Antinomies of Legitimacy: On the (Im)possibility of a Legitimate International Criminal Cour*t, African Journal of Legal Studies, Vol. 8, No. 1, June 2015, p 27.

[16] Nicholson 2019, p. 3.

[17] McDermott 2016, p. 31.

al criminal proceedings whose modalities,[18] given the context in which they operate, are flexible, subject to the fact that this overarching principle and its independent significance has been upheld by the practice of the international criminal courts and tribunals.[19]

According to the Appeals Chamber of the ICTY in the case of *Tadić*, fairness is "central to the rule of law: it upholds the due process of law."[20] Both the statutes of the *ad hoc* criminal tribunals[21] as well as the Rome Statute[22] declare a general obligation to ensure that the trial is fair and expeditious, conducted with full respect for the rights of the accused and with due regard for the protection of the rights of victims and witnesses. Thus, pursuant to the jurisprudence of the international criminal courts and tribunals, fairness is seen to be pertained not only to the accused, but is an attribute of proceedings that may be demanded by any participant in the proceedings, including the prosecution and victims.[23] While the ICTY has been more elaborative on the extension of the fair trial rights to prosecution, as seen for example in the case of *Haradinaj*[24] or *Milutinović,*[25] the ICC has remained more restrained.

Therefore, the questions of procedural fairness indispensably involve the principle of equality of arms. According to the judgment of the ICTR in the case of *Prosecutor v. Kayishema and Ruzindana*, the Appeals Chamber recognized equality of arms as an important component of a fair trial. [26] While the international human rights framework explicitly enshrines the principle of equality of arms within the right to equality before courts and tribunals, as stipulated, for instance, in Article 14(1) of the ICCPR, the statutory frameworks of the international criminal courts and tribunals do not contain an explicit provision ensuring the equality of arms principle.

Nonetheless, the equality of arms principle has been repeatedly referred to in the jurisprudence of these courts and tribunals. In the case of *Proseuctor v. Tadić* tried before the ICTY, the Appeals Chamber defined equality of arms as requiring equality of the prosecution and defence before the Trial Chamber; in particular, requiring, every practicable facility the Court is capable of granting under the Rules of Procedure and the Statute of the Court when faced with a request by a party for assistance in presenting its case.[27] Quite the contrary, the ICC in the case of *Lubanga* considered that "it will be impossible to create a situation of absolute equality of arms", adding later that a

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[18] Cassese & Gaeta & Baig & Fan & Gosnell & Whiting 2013, p. 356.

19 ICTY, *Prosecutor v. Tadić*, Decision on the Prosecution's Motion Requesting Protective Measures for Witness R, Case No. IT-94-1-T, 31 July 1996, para. 4; ICTY, *Prosecutor v. Jelisić*, Judgment, Case No. IT-95-10-A, Appeals Chamber, 5 July 2001, para. 27.

[20] ICTY, *Prosecutor v. Tadić*, Judgment, Case No. IT-94-1-A, Appeals Chamber, 15 July 1999, para. 43.

[21] SC Res. 827, 25 May 1993, Statute of the International Criminal tribunal for the Former Yugoslavia Annex ("ICTY Statute"), Article 20(1); SC Res., 955, 8 November 1994, Statute of the International Criminal Tribunal for Rwanda Annex ("ICTR Statute"), Article 19(1).

[22] 1998 Rome Statute of the International Criminal Court, 2187 UNTS 3 ("Rome Statute"), Article 64(2) and Article 64(8).

[23] See for example, ICTY, *Prosecutor v. Prlić and others*, Decision on Prosecution Appeal Concerning the Trial Chamber's Ruling Reducting the Time for the Prosecution Case, Case No. IT-04-74, Appeals Chamber, 6 February 2007, para. 14; ICC, *Prosecutor v. Lubanga*, Order relating to the request of the Office of the Public Counsel for the Victims of 16 September 2016, Opinion of Judge Herrera Carbuccia, Case No. ICC-01/04-01/06-3252, 21 October 2016, para. 6.

[24] ICTY, *Prosecutor v. Haradinaj et al*, Judgment, Case No. IT-04-94-A, Appeals Chamber, 19 July 2010, para. 49.

[25] ICTY, *Prosecutor v. Milutović et al*, Decision on Prosecution's Request for Certification of Rule 73*bis* Issues for Appeal, Case No. IT-05-87-T, 30 August 2006, para. 10.

[26] ICTR, *Prosecutor v. Kayishema and Ruzindana*, Judgment, Case No. ICTR-95-1-A, Appeals Chamber, 1 June 2001, para. 67.

[27] ICTY, *Prosecutor v. Tadić,* Judgment, Case No. IT-94-1-A, Appeals Chamber, 15 July 1999*,* para. 44.

"fact sensitive evaluation will be required whenever unfairness is alleged."[28]

Given the complex nature of international criminal proceedings, including complicated legal as well as factual issues, their breadth, and often, asymmetrical relationships of the parties with the States where investigations must mainly take place,[29] establishing the principle of equality of arms between the prosecution and the defence is indeed challenging. Therefore, throughout all stages of the proceedings, the defendant should have right to be assisted by competent legal counsel,[30] as one of the most regularly recalled minimum guarantee of a fair trial. Moreover, the complexity of the case also requires that the defendant be assisted not only with a single legal counsel, but also an adequately funded defence team. In principle, the choice of defence counsel in proceedings rests mainly with the defendant, subject to certain restrictions.[31] Ensuring the right to effective legal assistance is therefore one of the most important prerequisites which guarantees and enhances the fairness of the proceedings.[32]

4. Ensuring fairness of the proceedings at the international criminal courts and tribunals

If we look back in time and examine the structure and systems of the Nuremberg and Tokyo Tribunals, one can find only a very few references to the rights of the accused.[33] Indeed, despite the fact that the right of access to a legal counsel was enshrined in the founding documents of the tribunals, only a handful of other procedural rights were explicitly enumerated and guaranteed.[34] In fact, the needs and the rights of the accused have been largely marginalized. It was only with the establishment of the ICTY and the ICTR that ensuring the standards of fairness of the proceedings and guaranteeing the accused his/her fair trial rights was gaining more priority.[35] According to the words of Theodor Meron, the former President of the ICTY, "apart from the European Court of Human Rights and the American Court of Human Rights, […] there has not been any tribunal which devoted so much attention to elaborating and giving proper foundation to due process and fairness."[36]

As will be discussed in this chapter, the statutory frameworks of the selected international criminal courts and tribunals articulate and largely resemble the international human rights framework,

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[28] ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06-1091, Decision on Defence's Request to Obtain Simultaneous French transcripts, 14 December 2007, paras. 18–19.

[29] Cassese & Gaeta & Baig & Fan & Gosnell & Whiting 2013, p. 353.

[30] ICTR, *Prosecutor. Akayesu*, Judgment, Case No. ICTR-96-4-A, Appeals Chamber, 1 June 2001, para. 76; ICTY, *Blagojevic and Jokić*, Judgment, Case No. IT-02-60-A, Appeals Chamber Judgment, 9 May 2007, para. 23.

[31] ICTY, *Prosecutor v. Prlić and others*, Decision on Appeal by Bruno Stojic against Trial Chamber's Decision on Request for Appointment of Counsel, Case No. IT-04-74, Appeals Chamber, 27 November 2004, para. 19; ICTY, *Prosecutor v. Karadžić*, Decision on Request for Review of Registrar Decision and for Summary Dismissal, Case No. IT-95-5, Trial Chamber, 7 May 2012, para. 12.

[32] *Artico v. Italy* (App. no. 6694/74) ECtHR (1980) para. 33; *Goddi v. Italy* (App. No. 8966/80) ECtHR (1984) para. 27.

[33] K. S. Gallant, *Politics, Theory and Institutions: Three Reasons Why International Criminal Defence is Hard and What Might be Done About One of Them*, Criminal Law Forum, Vol. 14, No. 3, September 2003, pp. 317-334.

[34] United Nations, *Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis*, 8 August 1945, Chapter IV, Article 16

[35] X-J. Keita, *Evolution or Revolution: The Defence Offices in International Criminal Law,* A Compendium on the Legacy of the ICTR and the Development of International Law, Arusha, November 2014, p. 2.

[36] ICTY Global Legacy: Conference Proceedings, The Hague, 15-16 November 2011, ICTY Outreach Programme The Hague, 2012, https://www.icty.org/x/file/Outreach/conferences_pub/global_legacy_publication_en.pdf (19 November 2021).

including provisions ensuring the standards of fairness. However, as will be shown, the selected challenges and criticism that the international criminal courts and tribunals have been facing still questions whether they meet the standards of fairness as set out by the international human rights framework also in practice.

4.1. Fair trial rights at the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda

Following the adoption of the United Nations ("UN") Security Council Resolution 827 on 25 May 1993[37] and, the adoption of the UN Security Council Resolution 955 on 8 November 1994,[38] the International Criminal Tribunal for former Yugoslavia and the International Criminal Tribunal for Rwanda were established. The increasing emphasis on ensuring the fair trial rights of the defendant was also depicted in the inclusion of statutory provisions of both *ad hoc* criminal tribunals. Thus, it can be stated that the goal of establishing the *ad hoc* criminal tribunals was to bring perpetrators of the most serious violations of international humanitarian law and human rights law to justice, while conducting fair trial and ensuring the standards of fairness. In this regard, both *ad hoc* criminal tribunals have reiterated in their decisions that they aspire to set the 'highest standards of justice'[39] and serve as a 'model of fairness'[40] for other jurisdictions to follow. As remarked by the former UN High Commissioner for Human Rights, Navi Pillay, "the tribunals helped pave the way for the ideal of an additional layer of justice operating in the global sphere to be invoked in substitution or complementarity for the efforts or the failures of states in one of their core sovereign functions - the dispensation of criminal justice."[41]

4.1.1. Statutory provisions ensuring fair trial rights at the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda

The relevant human rights framework, including the provisions concerning fair trial as enshrined in Article 14 of the ICCPR are reflect and substantially largely resembling in Article 21 of the ICTY Statute and Article 20 of the ICTR Statute. In other words, while Article 14 of the ICCPR provides the minimum fair trial standards to be followed in the criminal proceedings, the statutes of the *ad hoc* criminal tribunals are in general, substantially similar to these provisions. The statutory provisions ensuring the fair trial rights are identical in the statutes of both the ICTY and ICTR.

While Article 21(1) of the ICTY Statute and 20(1) of the ICTR Statute explicitly articulate the equality of arms principle, Article 21(2) and (3) of the ICTY Statute and Articles 20 (2) and (3) of the ICTR Statute ensure that the accused receives a fair and public hearing as well as the principle of presumption of innocence. Further minimum guarantees of fair trial rights, are listed in Article 21(4) of the ICTY Statute and Article 20(4) of the ICTR Statute, including the right to be informed of the charges promptly and in detail and in a language the accused understands; the adequate time

[37] SC Res. 827, 25 May 1993, Annex.

[38] SC Res. 955, 8 November 1994, Annex.

[39] ICTY, *Prosecutor v. Blaškić*, Decision on the objection of the Republic of Croatia to the Issuance of Subpoenae Duces Tecum, Case No. IT-95-14-T, Trial Chamber, 18 July 1997, para. 61.

[40] ICTR, *Prosecutor v. Ntagerura et al.,* Separate Opinion of Judge Pavel Dolenc, Judgment, Case No. ICTR-99-46-T, Trial Chamber, 25 February 2004, para. 5.

[41] ICTY Global Legacy: Conference Proceedings, The Hague, 15-16 November 2011, ICTY Outreach Programme The Hague, 2012, https://www.icty.org/x/file/Outreach/conferences_pub/global_legacy_publication_en.pdf (19 November 2021).

and facilities in order to prepare a defence; the access to legal assistance of own choice and the ability to communicate freely with the counsel; trial without undue delay; the examination of witnesses; free assistance of an interpreter or the right to remain silent.

According to the ICTY, the human rights standards, must be interpreted within the context of the unique object and purpose of the International Criminal Tribunal, also particularly recognizing the mandate to protect victims and witnesses.[42] While as stated above, both of the statutes are substantially similar to the human rights standards set out by the ICCPR, in some cases, the practice of the *ad hoc* criminal tribunals have expanded the scope of protection, for example, by acknowledging that in the case when the accused exercises his/her right to remain silent in accordance with Article 21(4) of the ICTY Statute and Article 20(4) of the ICTR Statute, there should be no negative repercussions and such decision should not negatively affect the accused.

4.1.2. The selected challenges impacting the standards of fairness of the proceedings at the International Criminal Tribunal for former Yugoslavia and the International Criminal Tribunal for Rwanda

Regardless of the fact that, as mentioned above, the interests and the rights of the accused have gained increasing priority when establishing the ICTY and the ICTR, not a lot of deliberations were given to the organization of the Defence. Considering the concise wording of the statutory provisions outlining the fair trial rights of the accused, the lack of organization support for the Defence hinders the equality of arms principle. Moreover, putting Defence outside of the official organs of the tribunals, not only disproportionately restricted the time and resources provided for the investigations carried out by the Defence,[43] but also questioned the fairness of the proceedings. Hence, the equality of arms principle was not fully depicted in the structures of the *ad hoc* criminal tribunals due to the fact that the Defence Counsel remained largely as outsider, not listed among the recognized organs of the tribunals which included the Chambers, Prosecution and Registry.[44]

Indeed, Defence counsels and the defence teams in general possess an important mandate to ensure the fairness of the proceedings, and undoubtedly play an essential role for ensuring the fair trial rights of the defendant. Therefore, integrating the Defence counsels within the structures of the courts and ensuring their institutional presence is essential. As was criticized by some, the adopted procedural reforms resulting in lacking of institutional support for the defence were inconsistent with the standards of fairness of the proceedings and the equality of arms principle.[45]

In relation to the complexity of the proceedings compromising the protection of defendants fair trial rights and the overall fairness of the proceedings is also the length and efficiency of the proceedings. Given the amount of evidentiary materials to be examined and assessed during the proceedings, the judges of the ICTY and the ICTR, in an attempt to expedite the proceedings and ensure the accused's right to fair trial, introduced various procedural reforms. Such reforms, among

[42] ICTY, *Prosecutor v. Tadić*, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, Case No. IT-94-1-T, Trial Chamber, 10 August 1995, para. 70.

[43] J. I. Turner, *Defense Perspectives on Fairness and Efficiency at the International Criminal Court*, in K. J. Heller & F. Mégret & S. M. H. Nouwen & J. D. Ohlin & D. Robinson (eds.), Oxford Handbook on International Criminal Law, Oxford University Press, Oxford 2017[2020], p. 2

[44] Keita 2014, p. 2.

[45] Turner 2017 [2020], p. 2; G-J. A. Knoops, *The Dichotomy Between Judicial Economy and Equality of Arms Within International and Internationalized Criminal Trials: A Defense Perspective*, Fordham International Law Journal, Vol. 28, No. 6, 2004, p. 1580; ICTY, *Prosecutor v. Milošević*, Dissenting Opinion of Judge David Hunt, Case No. IT-02-54-AR73.4, Appeals Chamber, 21 October 2003.

others, included reducing the amount of oral evidence, in favor of permitting written statements,[46] or restricting the parties' time allocated for witness examinations and cross-examinations.[47] Some critics even argued that the tension between the judicial activism at the ad hoc criminal tribunals aimed at speeding up the proceedings collided with the fairness and truth-determination.[48]

4.2. Fair trial rights at the International Criminal Court

The drafting of the Rome Statute was a significant opportunity to examine the set of fair trial rights of the defendant in international criminal proceedings again. On 17 July 1998, the Rome Statute was adopted, establishing a permanent court called the International Criminal Court, with a mandate not limited in its temporal or geographic scope.[49] The improvement in the consideration given to the fair trial rights of the accused, from the establishment of the *ad hoc* criminal tribunals, is even more visible when it comes to the Rome Statute. When comparing the statutory provisions of the *ad hoc* criminal tribunals with those of the Rome Statute, the relevant provisions of the Rome Statute ensuring the fair trial rights of the defendant are more comprehensive and detailed.

4.2.1. Statutory provisions ensuring fair trial rights at the International Criminal Court

Articles 66 and 67 of the Rome Statute greatly resemble Article 14 of the ICCPR, however, contain more detailed provisions. The minimum fair trial guarantees as listed in Article 67(1) of the Rome Statute, substantially mirroring Article 14 of the ICCPR, include the ensurance of the right to be informed of the charges promptly and in detail and in a language the defendant understands; adequate time and facilities in order to prepare a defence; the right to access legal assistance of own choice, the ability to communicate freely with that counsel and entitlement to legal aid; a trial without undue delay; to access free interpreter, to examine witnesses and not to self-incriminate oneself. In addition, the presumption of innocence in ensured under Article 66 of the Rome Statute.

In comparison with the statutes of the *ad hoc* criminal tribunals, the Rome Statute in Article 67(1)(e) provides a more detailed right of the accused to examine or have examined the witnesses against him or her, and enables the accused to raise defences and to present other evidence admissible under the Rome Statute. In addition, Article 67(2) of the Rome Statute contains a provision outlining the disclosure of evidence by the Prosecutor, obliging the Prosecutor to also disclose evidence that tends to show the innocence of the accused.

Additionally, there even exist multiple examples where the ICC has developed and applied higher standards of fairness, going beyond the requirements established by the international human rights framework and the subsequent jurisprudence of the human rights courts and bodies.[50] One such example could be the right of the accused to have the assistance of interpretation and translation as enshrined in Article 67(1)(f). According to Article 50, the working languages of the Court are English and French. However, it is often the case that the accused claims that he or she does not fully

[46] M. Langer, *The Rise of Managerial Judging in International Criminal Law*, American Journal of Comparative Law Vol. 53, No. 4, Fall 2005, p. 900.

[47] Turner 2017 [2020], p. 2; Langer 2005, pp. 899-900.

[48] Ibid. 908.

[49] 1998 Rome Statute of the International Criminal Court, 2187 UNTS 90.

[50] Y. McDermott, *International Criminal Procedure and the False Promise of an Ideal Model of Fairness*, in John D. Jackson & S. J. Summer (eds.), Obstacles to Fairness in Criminal Proceedings: Individual Rights and Institutional Forms, Hart Publishing, Oxford 2018, p. 196.

understand and speak either of the working language of the Court. According to the wording of Article 67(1)(f) of the Rome Statute, the accused shall be guaranteed in full equality "to have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks." As was further held by the Appeals Chamber in the case of *Katanga*, the Court must pay attention and give credence to such claims of the accused alleging that he or she does not fully understand and speak the working language of the Court as "it is the accused who can most aptly determine his or her own understanding and it should be assumed that he or she will only ask for a language he or she fully understands and speaks."[51]

When interpreting the necessity of the provision of interpretation and translation rights, the Appeals Chamber employed a rather high standard of fairness to the accused, holding that language request should be granted except it is absolutely clear on the record that the person fully understands and speaks one of the working languages of the Court. Hence, if there are doubts if the person fully understands and speaks the language of the Court, the language being requested should be accommodated.[52] In addition, according to the findings of the Appeals Chamber, an accused fully understands and speaks a language "when he or she is completely fluent in the language in ordinary, non- technical conversation; it is not required that he or she has an understanding as if he or she were trained as a lawyer or judicial officer".[53]

The minimum guarantee of the accused to have the assistance of interpretation and translation in cases where he or she does not fully understand and speak the language and the subsequent interpretation and understanding of this right as developed by the case law of the ICC illustrated above, appears to apply a higher standard than the one required under the international human rights framework as set out by the ICCPR or the ECHR. According to Article 14(3)(f) of ICCPR and Article 6(3) of ECHR, the person charged with a criminal offence has the right to have access to the assistance of interpretation if he or she "cannot understand or speak the language used in court."

Besides the above-mentioned extensions of minimum fair trial guarantees as enshrined in Article 66 and 67 of the Rome Statute, the Statute goes even further in applying the human-rights based approach towards the proceedings in more general. In particular, the human rights framework and the practice of international human rights bodies with regard to the standards of fairness of the proceedings and the individual fair trial rights of the defendant has gained a rising influence on the scope and the interpretation. The Rome Statute itself emphasizes in Article 21(3) concerning the sources of law applied by the ICC that the application and interpretation of law must be consistent with internationally recognized human rights. Hence, the human rights framework is firmly rooted in the statutory provisions of the Rome Statute as well as the practice of the Court. As seen in the jurisprudence of the ICC, the Court has been constantly including references to the international human rights standards[54], including the increasing references to the interpretation of fair trial rights given by the European Court of Human Rights ("ECtHR").

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[51] ICC, *Prosecutor v. Katanga*, Situation in the Democratic Republic of the Congo, Judgment on the appeal of Mr. Germain Katanga against the decision of the Pre-Trial Chamber I entitled 'Decision on the defence request concerning languages', Case No. ICC 01/04/01/07, Appeals Chamber, 27 May 2008, para. 59.

[52] ICC, *Prosecutor v. Katanga*, Situation in the Democratic Republic of the Congo, Judgment on the appeal of Mr. Germain Katanga against the decision of the Pre-Trial Chamber I entitled 'Decision on the defence request concerning languages', Case No. ICC 01/04/01/07, Appeals Chamber, 27 May 2008, para. 61.

[53] Ibid. para. 61.

[54] See for example, ICC, *Situation in the Democratic Republic of Congo in case of the Prosecutor v Thomas Lubanga Dyilo*, Decision establishing general principles governing applications to restrict disclosure pursuant to Rule 81(2) and (4) of the Rules of Procedure and Evidence, Case No. ICC-01/04-01/06-108-Corr, 20 May 2006, para. 37.

For instance, in one of the latest judgments of the ICC in the case of *Ongwen*, the Trial Chamber has tackled complex legal issues, which required the support through references to the sources of other human rights courts and bodies. It made several references to the jurisprudence of the human rights courts, bodies, in particular it referred to the case law of the ECtHR, the Inter-American Court of Human Rights as well as the African Commission of Human Rights in its findings on what in fact constitutes torture and it further elaborated upon the elements of the crime of torture as a crime against humanity or war crime.[55]

4.2.2. Challenges impacting the fairness of the proceedings at the International Criminal Court

Despite the positive examples of employing high standards of fairness at the ICC, a number of challenges remain and there are multiple practical aspects where the ICC falls short of securing the highest standards of fairness. An online survey conducted in 2016 with a small sample of the ICC Defence counsels, including members of the Defence teams, outlining a preliminary examination of their views on the fairness and efficiency of the procedures before the ICC showed that concerns among the Defence counsels about procedural unfairness remain.[56] However, on the contrary to the criticism that the afore-mentioned *ad hoc* criminal tribunals faced regarding the reforms the judicial activity and approaches to expediting proceedings for the price of undermining and compromising the fairness of the proceedings, the surveyed defence attorneys did not associate their concerns about the fairness of the proceedings with the judges‘ preoccupation with expediting the proceedings, ensuring their efficiency.[57]

The defence attorneys‘ concerns about the fairness of the proceedings were largely connected with their views that judges undermine the accused’s right[58] as well as with their complains about the Registry’s failure to provide the defence with sufficient resources and support to enable adequate investigation and trial preparation.[59] Similarly to the *ad hoc* criminal tribunals, the ICC is also committed to ensuring the principle of equality of arms throughout the entire proceedings. Pursuant to the jurisprudence of the ICC, the equality of arms principle is to be understood and interpreted as the procedural equality[60] between defence and prosecution, not equality of resources.[61]

The discrepancies between the positions of defence and prosecution in the proceedings before the ICC are largely reflected in the manner the investigations are conducted, as well as the perception of the role of defence by the State Parties. For instance, pursuant to Article 57(3)(b) of the Rome Statute, the Defence must request the Pre—Trial Chamber for judicial assistance to seek and attain cooperation with the domestic authorities of the States, to assist the defence in the preparation of their case. This, however, creates unnecessary hurdles for the defence, particularly, if they must turn to and request the Pre-Trial Chamber of the Court to issue an order to gain the necessary information.

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[55] ICC, *Prosecutor v. Ongwen*, Judgment, Case No. ICC-02/04-01/15, Trial Chamber, 4 February 2021, para. 2071.

[56] Turner 2017 [2020], p. 4.

[57] Ibid. 4.

[58] Ibid. 4.

[59] Turner 2017 [2020], p. 9.

[60] International Bar Association (IBA), ‘Fairness at the International Criminal Court‘ An International Bar Association’s Human Rights Institute Report’, August 2011.

[61] See for example C. C. Jalloh & A. DiBella, *Equality of Arms in International Criminal Law: Continuing Challenges*, in W. A. Schabas & Y. McDermott, & N. Hayes (eds.), The Ashgate Research Companion to International Criminal Law: Critical Perspectives, Routledge, London and New York 2018.

4.3. Fair trial rights at the Extraordinary Chambers of the Courts of Cambodia

Following the negotiations and agreement with the UN, the Cambodian Parliament ultimately adopted in 2001 (and amended in 2004 in light of an agreement of 2003 with the UN) a law establishing the Extraordinary Chambers in the Courts of Cambodia (ECCC) for prosecuting crimes committed during the period of Democratic Kampuchea (1975-1979).[62] The ECCC is a so-called hybrid criminal court, with staff and members partly from Cambodia and partly from international arena.

4.3.1. The statutory provisions ensuring fair trial rights at the Extraordinary Chambers of the Courts of Cambodia

In the case of the legal representation before the ECCC and the fair trial rights of the defendant, such rights must be upheld during all stages of the proceedings and must also be in conformity with the international human rights law standards. As mentioned above, being a hybrid tribunals, the functioning and the structure of the ECCC is governed by several main documents. The main laws governing the functioning and structure of the ECCC include the Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea ("Agreement"),[63] the ECCC Law,[64] Internal Rules of the ECCC,[65] and the 1993 Constitution of Cambodia.

Article 13 of the Agreement sets out the rights of the accused, by referring to the rights of the accused as enshrined in Article 14 and 15 of the 1966 International Covenant on Civil and Political Rights, including the right to a fair and public hearing or the right to engage a counsel of the accused's choice, to have adequate time and facilities to prepare their defence and to access to legal aid. In particular, according to Article 13 (2), the UN and the Royal Government of Cambodia agree that the provision on the right to defence counsel in the ECCC Law mean that the accused has the right to engage counsel of his or her own choosing as guaranteed by the ICCPR. Article 24 (new) of the ECCC Law stipulates the right of access to a counsel of own choosing, or legal assistance assigned and the right to interpretation during the investigation for suspected persons. Further minimum fair trial guarantees are listed in Article 35 of the ECCC Law including, for example, the right to information about the charges against the accused, the right to be presumed innocent, the right to have adequate time and facilities to prepare one's defence, the right to communicate with counsel of own choosing, the right to be defended by counsel of choice or to access legal aid. Similar fair trial guarantees are stipulated also in Rules 21 and 22 of the Internal Rules, including the right to be defended by a lawyer of one's own choice and the equality of arms principle.

[62] Cassese & Gaeta & Baig & Fan & Gosnell & Whiting 2013, p. 264.

[63] 2003 Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, 2329 UNTS 117.

[64] Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, as promulgated on 27 October 2004 (NS/RKM/1004/006), https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf (7 July 2021).

[65] Internal Rules of the Extraordinary Chambers in the Courts of Cambodia, Rev. 9, as revised on 16 January 2015.

4.3.2. Challenges impacting the fairness of the proceedings at the Extraordinary Chambers of the Courts of Cambodia

Indeed, the scope and the way that pre-trial proceedings, including the way investigation are conducted, can have an impact on the equality of arms principle also in the pre-trial phase of the proceedings. A good example to illustrate this is the investigation and the pre-trial phase conducted before the ECCC.

The ECCC, being a hybrid tribunal based on Cambodian law, puts an emphasis on the importance of the pre-trial proceedings and investigations. However, the responsibility to conduct the in-depth pre-trial investigations is vested in the hands of the Co-Investigating Judges, and parties, including the defence, play a very limited role.[66] This, in turn, however, reduces the role that defence counsels can play in the pre-trial proceedings and may impact the fair trial rights. In particular, Rule 55 of the Internal Rules of the ECCC,[67] Article 5 of the Agreement between the UN and the Royal Government of Cambodia,[68] and Article 23 new of the ECCC Law confers the powers to conduct a judicial investigation to the Co-Investigating Judges (one Cambodian and one international) and the Co-Prosecutors, a Charged persons (including his legal counsel) or a Civil Party may request the Co-Investigating Judges to undertake such investigative actions as they consider useful for the conduct of the investigation. However, such request might be rejected by the Co-Investigating Judges. Co-Prosecutors may only conduct preliminary investigations to determine whether evidence indicates that crimes within the jurisdiction of the ECCC have been committed and to identify Suspects and potential witnesses as set out by Rule 50 of the Internal Rules.

5. Common challenges to the fairness of the proceedings

Although the ECtHR[69] as well as the international criminal courts and tribunals themselves[70] have repeatedly reiterated that the right to fair trial applies to all stages of the proceedings, including the pre-trial investigation stage, the manner in which the investigations are carried out as well as the realization of fair trial rights vary across the jurisdictions. Thus, differences can be found not only within the structure and organization of the selected international and internationalized courts and tribunals, but also in the rights of the defendant applicable at different stages of the proceedings.

While the major differences between domestic and international criminal proceedings primarily lie in the complexity, breadth, number of evidence and witnesses and length of the trial itself, an important element specific to international criminal proceedings is also an arrest and detention of

[66] G. Sluiter & M. Tiernan, *The Rights to an Effective Defence during ECCC Investigations*, Journal of International Criminal Justice, Vol. 18, No. 3, July 2020.

[67] Internal Rules of the Extraordinary Chambers in the Courts of Cambodia, Rev. 9, as revised on 16 January 2015; Article 23 (new) ECCC Law.

[68] 2003 Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, 2329 UNTS 117.

[69] See for example, *Salduz v. Turkey* (App. No. 36391/02) ECtHR [GC] (2008); *Dvorski v. Croatia* (App. No. 25703/11) ECtHR [GC] (2015) para. 76.

[70] See for example, ICC, *Situation in the Democratic Republic of Congo*, Decision on the Prosecution's Application for Leave to Appeal the Chamber's Decision of 17 January 2006 on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, Case No. ICC-01/04, Pre-Trial Chamber I, 31 March 2006, paras. 34-35; ECCC, Decision on Ieng Thirith's Appeal Against the Co-Investigating Judges' Order Rejecting the Request for Stay of Proceedings on the Basis of Abuse of Process, Ieng Thirith et al., Case No. 002/19-09-2007-ECCC/OCIJ, D264/2/6, Pre-Trial Chamber, 10 August 2010, para. 13.

the defendant throughout the pre-trial phase of the proceedings, as well as during trial and appeal. While the remand of the defendant in pre-trial detention is an exceptional measure of last resort, used under strict and specific circumstances laid out by the criminal procedure codes of the individual States, international criminal proceedings are characteristic for keeping the defendants in detention throughout the entire proceedings, including the pre-trial phase.

It is argued that the need to keep the defendant in detention during the pre-trial phase is warranted by the necessary reliance that international criminal courts and tribunals have on the cooperation of the states forcefully to ensure that the defendants will appear again in the session of the courts, once summoned to resume their participation in trial or appellate proceedings.[71] This, however, can impact the level of assuring the presumption of innocence of the defendant, an important principle and pre-requisite of the fair trial rights acknowledged by the international community and enshrined in numerous key international human rights instruments. This, in turn, impacts a number of fundamental rights of the defendant, such as the right to remain silent and not to incriminate oneself.

6. Conclusion

Although the prosecution and punishment of international crimes by international criminal courts and tribunals had undoubtedly contributed to the lasting respect and enforcement of international justice, it is not flawless. Prosecuting serious international crimes through international criminal proceedings is a complex procedure, involving extensive amounts of evidence, a large number of victims and witnesses, complex nature and elements of crimes. In fact, there are many elements of international criminal proceedings that represent a myriad of essential advantages that the international criminal trials have contributed with to putting an end to impunity. However, as was illustrated in this article, certain areas of concern remain, also with regard to guaranteeing the fairness of the proceedings.

As shown above, international criminal courts and tribunals play a key role in setting the highest standards of fairness. The application and interpretation of human rights standards in international criminal proceedings by the international criminal courts and tribunals, however, lacks a supervisory treaty body or an oversight mechanism. Hence, on the one hand, the international criminal courts may ensure higher standards of protection than those enshrined by the international human rights framework, but on the other, due to their complex nature, they may depart from the jurisprudence of the human rights courts and bodies. Undoubtedly, there exist multiple examples of good practice where international criminal courts and tribunals have developed and applied the highest standards of fairness in relation to the conduct of proceedings in general, and the rights of the accused, in particular. One such example was illustrated above regarding the high standard for ensuring the rights of the accused to have translation and interpretation assistance. Nonetheless, it was also suggested by this article that there still remain multiple factors hindering the application of the highest standards of fairness in practice.

Fairness is a broad concept and given the uniqueness of the institutions, the international criminal courts and tribunals operate under constant challenges to their legitimacy and functioning. Nevertheless, international criminal courts and tribunals should indeed act as a guiding example for domestic courts and justice systems in relation to how criminal proceedings should be conducted in compliance with the standards of fairness and the international human rights framework. Setting the highest standards of fairness encourages state cooperation, which enhances the Court's effectiveness. Simply taking into consideration the character of international criminal proceedings in

[71] Cassese & Gaeta & Baig & Fan & Gosnell & Whiting 2013, p. 270.

terms of their mixed nature with foundations in human rights law and impact on domestic proceedings, the international criminal courts and tribunals should further aim at developing human rights standards, despite not being human rights courts. However, the focus should be on ensuring the standards of fairness in practice and identifying and improving those aspects of practice where the proceedings fell short of their potential of being a role model of fair trial practice, rather than the statutory provisions outlining the fair trial rights which are largely built on the international human rights framework.

Therefore, there always needs to be the right balance between, on the one hand, an exclusive concern for the rights of the accused, and on the other hand, the accuracy of outcome of the proceedings. As a common practice, given the far-reaching consequence of the decisions of the international criminal courts and tribunals, it is indispensable to take a human-rights based approach to international criminal proceedings.

Considering the difficult environment in which the international criminal tribunals and courts operate and the evolving challenges they constantly face, constant re-evaluation of the compliance with fundamental human rights standards as well as the sustainability of the proceedings is also needed. To protect the integrity of the proceedings, the international criminal courts and tribunals should safeguard the fundamental rights of the accused to adequate and effective legal assistance, the independence of the defence and the principle of equality of arms.

The Protection of Fundamental Rights in the Jurisprudence of the CJEU and the Charter – Twelve Years On

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While national governments remain ambivalent about the EU's role in relation to human rights matters within the EU, the CJEU has taken a broad view of what falls within the scope of EU law for the purposes of Article 51 (field of application) of the Charter of Fundamental Rights of the EU. Mainly, in the event of conflict, it has asserted the primacy of EU law and of the Charter over national constitutional law. The Article therefore studies the development of human rights protection and the role of the Charter, Member State law, and international organizations in the matter of fundamental rights and freedoms. The paper considers the future of the CJEU's protection policy and provides a conclusion of the analysed issues at hand.

Keywords: fundamental rights, Charter, criminal proceedings, field of application, primacy, CJEU, ECtHR

1. Introduction

The aim of this Article is to summarise and analyse the status of human rights and their protection in the field of EU law, while examining the engagement by the Court of Justice of the European Union (CJEU), mostly over the period since the Charter of Fundamental Rights (Charter) was made formally binding by the Lisbon Treaty in 2009. The case law available shows that the Court has engaged in several issues concerning human rights, the paper therefore explains the CJEU's protection policy towards these matters, while clarifying the definition and system of human rights and giving a short history of the fundamental rights protection before the Charter.

As stated in the abstract above, even though national governments remain ambivalent about the EU's role in relation to human rights matters within the EU, the CJEU has taken a broad view of what falls within the scope of EU law for the purposes of Article 51[1] (field of application) of the Charter. Mainly, in the event of conflict, it has declared the primacy of EU law and of the Charter over national constitutional law. However, it has not yet clarified whether the Charter can impose obligations on private parties or not. The most important case law is selected in order to understand

[1] Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, (hereinafter: Charter) Article 51. 1. "The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties. 2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties."

the CJEU's logic through landmark decisions. The relationship between Luxembourg and the European Court of Human Rights (ECtHR)[2], and the EU's accession to the European Convention of Human Rights is also discussed in the given context. The Article considers the extent to which the European Court of Justice has provided adequate protection for human rights within the European Union legal order, and also how national courts (explicitly the Spanish and German constitutional tribunals) reacted to this matter.

The Lisbon Treaty, by adopting the Charter did not aim at promoting the harmonisation of the systems of protection of fundamental rights of Member States, but it rather aimed at eliminating the possibility that Member States in implementing Union law would apply different standards of protection of fundamental rights. As part of the body of EU constitutional rules and principles, the Charter is binding upon the EU institutions when adopting new measures as well as on the Member States when implementing them. EU law is shaping up to be a complete legal order based on a solid construction of fundamentals or principles, and even if it is founded on the principle of conferral from the Member States, it has developed as a "supranational legal order." The Article consequently also explores whether this legal order, the primacy, unity and effectiveness of EU law should mean placing these above national constitutions and also considers the future of the CJEU's protection policy.

2. The development of protection - the road to the Charter of Fundamental Rights

Human rights are rights inherent to all human beings, regardless of race, sex, nationality, ethnicity, language, religion or any other status. Everyone is entitled to these rights, without discrimination, because they are all interrelated, interdependent and indivisible. Deciding which norms should be counted as human rights is a matter of considerable difficulty, even more so that there is a continuing pressure to expand lists of human rights to include new areas.[3] Many political movements would like to see their main concerns categorized as matters of human rights, since this would publicize, promote, and legitimize their concerns at an international level.[4] Universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law. Furthermore international human rights law lays down obligations of governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups.

After the Second World War has ended, when the promise of an integrated Europe emerged, the rebuilding of Europe, devastated both economically and physically by the War, was the primary concern. The immediate focus was on economic integration and the creation of a common market that would result in a higher standard of living for all.[5] So, when the Treaty of Paris[6], and the treaty

[2] The European Court of Human Rights (based in Strasbourg) is an international court set up in 1959. It rules on individual or State applications alleging violations of the civil and political rights set out in the European Convention on Human Rights.

[3] See J. Nickel, *Human Rights,* in E. N. Zalta (ed.), The Stanford Encyclopedia of Philosophy (Spring 2017 Edition) https://plato.stanford.edu/archives/spr2017/entries/rights-human/ (1 December 2021).

[4] O. P. Dhiman, *Understanding human rights, an overview.* Kalpaz Publication, Delhi 2011, p. 56. See also: M. W. Cranston, *What are Human Rights?* The Bodley Head, London1973.

[5] E. F. Defeis, *Human Rights and the European Court of Justice: An appraisal.* Fordham International Law Journal Vol. 31, No 5, 2007, pp. 1104-1106.

[6] The Treaty establishing the European Coal and Steel Community by „The Six" (Belgium, Luxembourg, France, Italy, Netherlands, West Germany) signed on April 18, 1951. See 1951 Treaty between the Federal Republic of Germany, the

of Rome (EEC Treaty)[7] were adopted, the protection of human rights was given very little attention. Fortunately, other forums like the United Nations declared as one of its purpose the encouragement and promotion of human rights and fundamental freedoms protection.

The principle of universality of human rights is the cornerstone of international human rights law. One of the first resolutions adopted by the General Assembly of the UN was the Universal Declaration of Human Rights in 1948.[8] This declaration is a milestone document, drafted by representatives with different legal and cultural backgrounds from all regions of the world, to show a common standard of achievements for all peoples and all nations. In addition the European Convention for the Protection of Human Rights and Fundamental Freedoms was signed in 1950 and was subsequently ratified – among others – by each of the original members of the EEC.[9]

Although the EEC Treaty contained a Social Chapter which gave limited mention to human rights and the protection of workers' rights, neither it, nor the Treaty of Paris could have been considered a bill of rights. The EEC Treaty protected freedom of movement and gender equality with respect to equal pay for male and female workers,[10] but beyond the mention of these principles, the EEC Treaty offered little protection in other areas of human rights, further it did not contain any specific provisions to enforce these rights.[11] At the time, human rights were to be protected by individual Member States through their national constitutions and laws.[12] In addition, since each Member State was also party to the European Convention of Human Rights[13], the guarantees of the Strasbourg process were available to its citizens.

The status of human rights within the EU legal order has changed dramatically since its foundation in the early 1950s. An explicit reference to fundamental rights at Treaty level appeared only with the entry into force of the Maastricht Treaty.[14] According to Article F of the Treaty on European Union, the EU was obliged to "respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States as general principles of Community law. "[15]

Kingdom of Belgium, the French Republic, the Italian Republic, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands instituting the European Coal and Steel Community, 261 UNTS 140.

[7] The Treaty establishing the European Economic Community signed by the upper mentioned „Six" on March 25, 1957. See 1957 Treaty establishing the European Economic Community, 294-298 UNTS 3-2-2-3. (hereinafter: EEC Treaty)

[8] GA Res. 217 (III), 10 December 1948.

[9] Defeis 2007, p. 1105.

[10] EEC Treaty Article 48: providing that freedom of movement for workers shall be secured within the Community. EEC Treaty Article 119: providing that each Member State shall ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.

[11] Defeis 2007, p. 1106.

[12] See J. H. H. Weiler, *Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Rights Within the Legal Order of the European Communities,* Washington Law Review Vol. 61, No. 3, 1986, p. 1103.

[13] Formally the Convention for the Protection of Human Rights and Fundamental Freedoms is an international treaty signed on 4 Nov. 1950 to protect human rights and fundamental freedoms in Europe. It was drafted by the then newly formed Council of Europe. The Convention also established the European Court of Human Rights. See 1950 Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 221.

[14] The Maastricht Treaty (signed on 7 February 1992) created the 3 pillars structure of the European Union and led to the creation of the single European currency, the euro. The Maastricht Treaty and all pre-existing treaties has subsequently been further amended by the treaties of Amsterdam (1997), Nice (2001) and Lisbon (2009).

[15] 1992 Treaty on European Union, 1755-1759 UNTS, Article F

Since the entry into force of the Amsterdam Treaty[16] and more likely of the Lisbon Treaty[17], protecting fundamental rights is a founding element of the European Union and an essential component of the development of the supranational European Area of Freedom, Security and Justice.[18]

3. Scope and structure of the Charter

The Charter was originally drawn up in 1999-2000, and was solemnly proclaimed by the Commission, Parliament and Council and also politically approved by the Member States at a European Council summit in December 2000, but its legal status was left undetermined at the time.[19] The original idea near the millennium was to ratify the so-called Constitutional Treaty, which would have replaced all the existing EU Treaties with a single text, and would have given legal force to the Charter. The Treaty establishing a Constitution for Europe however remained an unratified international treaty and the Treaty of Lisbon formulated as amendments to the existing Treaties.

Formally, then, the Charter is recognized as primary law, and it has even been suggested that it could gain constitutional status, on the reasoning the Charter enshrines the Union's fundamental principles and some general legal principles - such as ne bis in idem.[20] Following the failure of the Constitutional Treaty, the legal status of the Charter was not resolved until the adoption of the Lisbon Treaty. Instead of incorporating the Charter into the Treaties -the strategy used for the Constitutional Treaty- it was decided that the Treaty of Lisbon should simply refer to the Charter as a source that would be external to the Treaty itself but internal to the EU system. Therefore - currently - under Article 6 of the Treaty on European Union (TEU), the Charter "shall have the same legal value as the Treaties." In reality the Charter's force as a primary source is reduced from within, notwithstanding that the EU Charter of Fundamental Rights may formally have equal rank with the EU Treaty and may in the abstract be subject to the same structural principles as the latter: the principles of conferral, primacy, and direct effect. Written into the Charter itself are a series of provisions limiting its own effects, with extra caution taken where interference may arise with the Member States' legal systems.[21] This, after all, seems to be in keeping with the function originally entrusted to the Charter by its drafting convention as a tool designed not to bring new rights into being but to firm up existing ones.

The rights of every individual in the EU were established at different times, in different ways and

[16] 1997 Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, 2700 UNTS.

[17] The Treaty of Lisbon (initially known as the Reform Treaty) is an international agreement, which amends the two treaties which form the constitutional basis of the European Union. The Treaty of Lisbon was signed by the EU Member States on 13 December 2007, and entered into force on 1 December 2009. It amends the Maastricht Treaty (1993) (Treaty on European Union (2007), and the Treaty of Rome (1957), (Treaty on the Functioning of the European Union (2007). It also amends the attached treaty protocols as well as the Treaty establishing the European Atomic Energy Community (EURATOM). See 2007 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 2702 UNTS.

[18] F. Ferraro, J. Carmona, *Fundamental Rights in the European Union – The role of the Charter after the Lisbon Treaty*, European Parliamentary Research Service, March 2015, (PE 554.168) http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/554168/EPRS_IDA(2015)554168_EN.pdf (1 December 2021).

[19] P. Craig & G. de Búrca, *EU Law – Text, Cases and Materials*, Oxford University Press, Oxford 2015, p. 394.

[20] See T. Tridimas, *General Principles of EU law,* 2nd edn., Oxford European Union Law Library, Oxford 2006 and also M. Wimmer, *The Dinghy's Rudder: General Principles of European Union Law through the Lens of Proportionality,* European Public Law Vol. 20, No. 2, 2014 pp. 331-353.

[21] L. S. Rossi, *"Same Legal Value as the Treaties"? Rank, Primacy, and Direct Effects of the EU Charter of Fundamental Rights,* German Law Journal Vol. 18, No. 04, p. 795.

in different forms. For this reason, the EU decided to include them all in a single document, which has been updated in the light of changes in society, social progress and scientific and technological developments. The Charter brings together all the personal, civic, political, economic and social rights enjoyed by people within the EU in a single text.

Consequently, the Charter plays a special part in the European Union's Acquis Communautaire, as the Charter and the general principles of EU law now rank alongside Treaty provisions as primary norms of EU law, and there is a growing EU case law dealing with human rights issues. The Charter is binding upon the EU institutions when enacting new measures, as well as for the Member States whenever they act within the scope of EU law.[22] The field of application of the Charter is limited in a significant way: the Charter only applies when EU law is at stake. When national courts and authorities in the EU Member States are confronted with problems of purely national law, they are not obliged to apply the Charter, but should instead rely on the national constitutional bill of rights as well as the international human rights instruments which are binding on the Member State in question.[23]

The Charter is worded taking into account all previous CJEU case law, but it enjoys a higher degree of legitimacy, thanks to its ratification by all the Member States on behalf of their citizens. An important aspect of the EU Charter, indicated explicitly in its preamble, is that it places the individual at the heart of EU activities (people's Europe). The Charter draws on the European Convention on Human Rights (ECHR), the European Social Charter and other human-rights conventions, as well as the constitutional traditions common to the EU Member States. It also recognises new kinds of rights protecting individuals from new forms of abuses by public or private entities (like the right to the protection of personal data and to good administration).[24] Overall, the Charter could best be described as a creative distillation of the rights contained in the various European and international agreements and national constitutions on which the CJEU had for some years already drawn.[25]

Via the Lisbon Treaty, the so-called 'principle of conferral' has been further codified by the TEU, notably in Article 5, according to which under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein, and the competences not conferred upon the Union in the Treaties remain with the Member States. It is, then, the scope of EU law which determines EU jurisdiction on fundamental rights and not the reverse.[26] The same applies to the content of EU fundamental rights. In fact, according to Article 52(2) of the Charter: "Rights recognised by [the] Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties." In the light of this specification, in several areas where the same subject matter is regulated both by an Article of the Treaty and by an Article of the Charter (see the

[22] See Case C-617/10 *Åkerberg* Fransson, [EU:C:2013:105]. European Union law does not govern the relations between the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and the legal systems of the Member States, nor does it determine the conclusions to be drawn by a national court in the event of conflict between the rights guaranteed by that convention and a rule of national law. European Union law precludes a judicial practice which makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the Charter of Fundamental Rights of the European Union conditional upon that infringement being clear from the text of the Charter or the case-law relating to it, since it withholds from the national court the power to assess fully, with, as the case may be, the cooperation of the Court of Justice of the European Union, whether that provision is compatible with the Charter.

[23] A. Rosas, *When is the EU Charter of Fundamental Rights applicable at national level?* Jurisprudence, Vol. 19, No. 4, 2012, pp. 1269-1288.

[24] Ferraro & Carmona 2015, p. 5.

[25] Craig & de Búrca 2015, p. 396.

[26] Ferraro & Carmona 2015, p. 11.

case of data protection covered by Articles 16 TFEU and 8 of the Charter, or the case of access to documents covered by Article 15 TFEU and Article 42 of the Charter), the legislature has to take both as a reference; indeed very often they complement each other.[27]

The Charter is the reference not only for the CJEU but also for EU institutions, in particular the Commission, when launching new proposals which give 'specific expression to fundamental rights.'[28] This is the case with EU policies dealing with anti-discrimination, asylum, data protection, transparency, good administration, and procedural rights in civil and criminal proceedings. Nevertheless, fundamental rights (and the Charter) come into play in EU legislation in any other domain of EU competence, such as transport, competition, customs and border control. As these policies can also have an impact on the rights of citizens and other individuals, such as human dignity, privacy, the right to be heard and freedom of movement, EU and Member State law should take the Charter into account when regulating these spheres.[29]

4. The European Court of Justice's role in the protection of human rights

Traditionally, the term 'fundamental rights' is used in a constitutional setting whereas the term 'human rights' is used mainly in international law. The two terms refer to similar substance as can be seen when comparing the content in the Charter of the European Union with that of the European Convention on Human Rights and the European Social Charter. Initially the term human rights appeared rarely in the case law of the CJEU. The term was mainly used when referring to the international treaties, rather, the CJEU referred to the 'fundamental rights' as general principles of EU law that must be protected by the Court.[30] These general principles of EU law are interpreted by the Court more broadly than the rights contained in international human rights conventions and include not only those rights but also rights recognised in the constitutional law of Member States. The term 'fundamental rights' is used in the European Union to express the concept of 'human rights' within a specific EU internal context.

It is important to note that there needs to be a balance between three systems of protection of fundamental rights in the EU. The Court of Justice of the European Union, the European Court of Human Rights and the national courts. According to the Treaties, the CJEU has three main sources of inspiration as regards the protection of fundamental rights within the Union legal order: the Charter, the Convention and the constitutional traditions common to the Member States. Article 6 of the TEU[31]

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[27] Ferraro & Carmona 2015, pp. 11-12.

[28] See Case 555/47 Seda Kücükdeveci v Swedex GmbH & Co. KG. [EU:C:2010:21] para. 21. The Court underlined for the first time the new legal status of the Charter, stating that the Charter of Fundamental Rights of the European Union is to have the same legal value as the Treaties. See also: E. Muir, *The Fundamental rights implications of EU legislation: some constitutional challenges,* Common Market Law Review, Vol. 51, No. 1, 2014, pp 223-226.

[29] Ferraro & Carmona 2015, p. 4.

[30] Defeis 2007, p. 1111.

[31] "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adopted at Strasbourg, on 12 December 2007, which shall have the same legal value as Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human rights ad Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamen-

gives the CJEU all the elements to be considered in interpreting the provisions of the Charter. It provides that the interpretation of the Charter requires the Court to take into consideration several parameters; such as the constitutional traditions common to the member States and the national laws and practices as specified in the Charter, the Convention for the Protection of Human Rights and Fundamental Freedoms, the case-law of the Court of Strasbourg as well as the Explanations relating to the Charter.[32]

The case law of the CJEU and the General Court dealing with human rights matters continues to grow exponentially, and covers a wide spectrum of different human rights issues. Since the adoption of the Charter, the CJEU has shown itself willing to strike down EU laws for violation of its provisions. Throughout its history, the CJEU has decided on many cases which deal with fundamental rights such as non-discrimination, freedom of religion, association, and expression. Facing today's problems and with the widening and the deepening of the Union, it is safe to say that the Court will be faced with new controversies involving human rights. Issues such as the legality of anti-terrorist measures, standards to be applied to expanded equality provisions, and restrictions on the movement of persons and goods are certain to come before the Court.[33]

5. Some landmark decisions

Back in 1969, the CJEU already referred to fundamental rights as being part of the general principles of Community law and underlined that they are protected by the Court.[34] The CJEU's willingness to protect fundamental rights appeared in the context of the doctrine of supremacy of Community law as proclaimed in *Van Gend en Loos*[35] and *Costa v Enel.*[36] However, national constitutional courts showed reluctance - especially in Germany[37] - to recognise this supremacy without proper guarantees for fundamental rights at the Community level.[38] While in the first *Solange* decision the German Constitutional Court (BVerfG) expressed the view that Community law did not ensure a standard of fundamental rights corresponding to that of German Basic Law, only some years later in the second *Solange* judgement finally conceded that the protection of fundamental rights ensured by the CJEU could be presumed to be equivalent to the protection by the German Constitutional Court. However, the BVerfG also indicated that this presumption could not be considered absolute.

In the *Stauder* case the CJEU for the first time affirmed a category of 'general principles of EU law', which included protection for fundamental human rights. Highly relevant furthermore is the

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tal Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law." See Consolidated version of the Treaty on European Union, OJ C 326, 26.10.2012. Article 6.

[32] A. Arnull, *The European Court of Justice after Lisbon,* in M. Trybus & L. Rubini (Eds.), The Treaty of Lisbon and the Future of European law and Policy, Edward Elgar Publishing, Cheltenham, Northampton 2012, pp. 49-50.

[33] Craig & de Búrca 2015, p. 427.

[34] Case 29/69 Erich Stauder v City of Ulm [EU:C:1969:57]

[35] Case 26/62 Van Gen den Loos [EU:C:1963:1]

[36] Case 6/64, Costa v. Enel [EU:C:1964:66]

[37] See Case 11-70 Internationale Handelsgesellschaft, [EU:C:1970:114.] and also the Solange saga (Solange I: Federal Constitutional Court of Germany, judgment no. 37, 271 of 29 May 1974, Solange II: Federal Constitutional Court of Germany, judgment no. 73, 339 of 22 October 1986), where the German Constitutional Court expressed the view that the Community law did not in all circumstances ensure a standard of fundamental rights corresponding to that of German Basic Law, however later decided that it would no longer examine the compatibility of Community legislation with German fundamental rights as long as the European Court continues to protect fundamental rights adequately.

[38] Ferraro & Carmona 2015, p. 4.

Internationale Handelsgesellschaft case, in which the German Federal Constitutional Court was asked to set aside an EU measure concerning forfeiture of an export-licence deposit which allegedly violated German constitutional rights and principles such as economic liberty and proportionality.[39] The CJEU upheld the EU measure, ruling that the restriction on the freedom to trade was not disproportionate to the general interest advanced by the deposit system. In 1974 in the *Nold* decision[40] the Court declared that general principles of law would take precedence, in event of conflict, over specific Community measures, it ruled that the rights to property and to trade or profession were far from absolute, and that limitations in this case were justified by the EU's overall objectives.[41] The Court also added that, apart from national constitutional traditions, Community fundamental rights can be based on international agreements to which the Member States are contracting parties, explicitly pointing to the ECHR the following year in the *Rutilli* case.[42]

One of the most analysed CJEU judgments dealing with the scope of application of EU law in the fundamental rights context is *Åkerberg Fransson*,[43] where the Court, referring to its established case law on the scope of fundamental rights in the EU and to the explanations relating to Article 51 of the Charter considered that the fundamental rights guaranteed by the Charter must be complied with where national legislation falls within the scope of European Union law. The Court also stated in - further discussed - *Melloni*[44] judgement that only in a situation where an action of a Member State is not entirely determined by EU law, do national courts and authorities remain free to apply national standards of protection of fundamental rights. However, even in these cases, the level of protection provided by the Charter as interpreted by the Court, and the primacy, unity and effectiveness of EU law must not thereby be compromised.[45]

Indeed, in the *Åkerberg Fransson* case, the Court interpreted the *ne bis in idem* principle laid down in Article 50 of the Charter[46]. The Court observed that the principle of preventing a person from being punished twice for the same offence does not preclude a Member State from imposing, for the same acts, a combination of tax penalties and criminal penalties, as long as the tax penalty is not criminal in nature. It then defined the three criteria to be followed by the national judge to assess if a sanction is criminal in nature, for example, the legal classification of the offence under national law, the very nature of the offence, and the nature and degree of severity of the penalty that the personconcerned is liable to incur.[47] According to the Court: 'since the fundamental rights

[39] Craig & de Búrca 2015, p. 383.

[40] Case 4/73 Nold v Commission, [EU:C:1974:51]

[41] Craig & de Búrca 2015, p. 401.

[42] Case 36/75 Roland Rutili v Ministre de l'intérieur [EU:C:1975:137]

[43] See B. de Witte & A. Ott, E. Vos (Eds.), *Between Flexibility and Disintegration: The Trajectory of Differentiation in EU Law,* Edward Elgar Publishing, Cheltenham, Northampton 2017. p. 186.

[44] Case C-399/11 Stefano Melloni v Ministerio Fiscal, [EU:C:2013:107] A preliminary ruling by the Spanish Constitutional Court was based on a situation where two different regimes of judgment *in absentia* competed at national and European level. The CJEU's answer was in favour of the application of the principle of EU law, as described by the Framework Decision on the European Arrest Warrant, because: "allowing a Member State to avail itself of Article 53 of the Charter of Fundamental Rights to make the surrender of a person conditional on a requirement not provided for in the EU framework decision on the European Arrest warrant would, by casting doubt on the uniformity of the standard of protection of fundamental rights as defined in that decision, undermine the principles of mutual trust and recognition which that decision purports to uphold and would therefore compromise its efficacy." Ibid. para. 63.

[45] C-399/11 Melloni [EU:C:2013:107] para. 60. See also**:** A. Von Bogdandy & M. Kottmann & C. Antpöhlee & J. Dickschen & S. Hentrei & M. Smrkolj, *Reverse Solange – Protecting the essence of fundamental rights against EU Member States*, Common Market Law Review*,* Vol. 49, No. 2, 2012, pp. 489–519.

[46] Charter Article 50 "No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law."

[47] Ferraro & Carmona 2015, p. 12.

guaranteed by the Charter must be complied with where national legislation falls within the scope of European Union law, situations cannot exist which are covered in that way by European Union law without those fundamental rights being applicable. The applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.'[48]

6. Fundamental rights in criminal proceedings

When dealing with fundamental rights issues, which concern international (European Convention on Human Rights and its protocols), EU (Charter of Fundamental Rights, Framework Decision) and national law (including the State's constitutions), we often have to face the complexity and difficulty of applying different binding texts sometimes simultaneously, using different standards, structures and terminology, while the aim is to find a solution that harmonizes the fields of application.[49] In the event of conflict, the principle of supremacy of EU law states that Member States should not apply conflicting national rules. National courts accept that obligation to a large extent, although when it comes to their constitutions they - understandingly - tend to stand their grounds.

The CJEU therefore developed various techniques to deal with such constitutional matters.[50] The controversial issue may be brought outside the scope of EU law (see *e.g. Grogan*[51]), EU law may be recognised to protect the same constitutional right to the same far-reaching extent (*e.g*. case *Omega Spielhallen*[52]), or the principle of respect for national identity, as currently laid down by Article 4(2) of the Treaty on the European Union[53], may be used to allow national norms to remain applicable even when they undermine effectiveness of an EU norm.[54]

In the landmark *Melloni* judgement, the Grand Chamber of the CJEU decided not to use any of these techniques, instead the EU Framework Decision was held to prevail over the Spanish Constitution. It is also important to mention, that *Melloni* seems to hold its relevance as time passes by, since there has been many follow-up cases in the CJEU's practice, concerning similar matters—but

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[48] C-617/10 Åkerberg Fransson, [EU:C:2013:105] para. 21.

[49] See J. Polakiewitz, *Fundamental Rights in Europe: a Matter for Two Courts*, Oxford Brookes University, Strasbourg, 2014, Concluding remarks: present challenges and future directions, https://www.coe.int/en/web/dlapil/speeches-of-the-director/-/asset_publisher/ja71RsfCQTP7/content/-fundamental-rights-in-europe-a-matter-for-two-courts-?inheritRedirect=false#_ftn1 (1 December 2021).

[50] E. Cloots, *National Identity in EU Law*, Oxford University Press, Oxford 2015, pp. 263-265.

[51] Case C-159/90 The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others. [EU:C:1991:378]. The issue was an Irish constitutional prohibition on the distribution of information on abortions carried out abroad. It appears from the Court's reasoning (para. 24.) that the Irish prohibition fell outside the scope of the freedom to provide services, not because it gave effect to a national constitutional right, but because it did not, in fact, hinder the UK abortion clinics in the provision of their services.

[52] Case C-36/02 Omega Spielhallen [EU:C:2004:614] involved the marketing in Germany of a violent laser-game, which had been lawfully produced and sold in the United Kingdom. The marketing of the game was forbidden by the German authorities on the basis that the game 'constituted an affront to human dignity' as protected by the German constitution (paras. 11-12.).

[53] 'The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.'

[54] D. Lecykiewicz, *Melloni and the future of constitutional conflict in the EU*, U.K. Constitutional Law Association Blog, 22 May 2013 https://ukconstitutionallaw.org/2013/05/22/dorota-leczykiewicz-melloni-and-the-future-of-constitutional-conflict-in-the-eu/ (1 December 2021).

in different approach and reasoning—like *Taricco I-II*[55]*, Jeremy F*[56] or *Aranyosi/Căldăraru,*[57] which cases will be explained below.

Apart from the previously mentioned general case law leading up to the *Melloni* judgement, particularly when thinking about criminal proceedings, and the issuing of a European Arrest Warrant (EAW), the national judiciaries also have to think about the problem of double jeopardy, with which the CJEU also dealt with in the *Mantello*[58] case. According to the CJEU's judgement, whether a person has been 'finally' judged is determined by the law of the Member State in which the judgment was delivered. Consequently, if a Member State does not definitively bar further prosecution at national level in respect of certain acts, then there is no procedural obstacle to the possible opening or continuation of criminal proceedings in respect of the same acts in another Member State of the European Union.[59] Meaning also, that the executing judicial authority cannot as a general rule refuse to execute EAW in such cases.

In 2013, the same year of the *Melloni* judgement, the Court dealt with a similar problem in the *Radu*[60] case. Several governments intervened in the proceedings highlighting that in their view, the execution of an EAW could exceptionally be refused if there are serious reasons to believe that the execution would lead to infringements of the requested person's fundamental rights.[61] The Court however only focused on the same outcome as in *Melloni*, that the Framework Decision must be interpreted as the executing judicial authorities cannot refuse to execute EAWs issued for the purposes of conducting a criminal prosecution on the ground that the requested person was not heard (in case of *Melloni;* sentenced *in absentia* -without making appearance in court-) in the issuing Member State before that arrest warrant was issued. It held that the obligation of the suspect to be heard would 'inevitably lead to the failure of the very system of surrender provided for by the EAWFD.[62]'

The quasi-follow-up judgments of *Melloni, Taricco I., II.* raise even more questions than it answers on when a Member State can apply higher standards of rights in criminal proceedings. The Italian CC used the notion of constitutional identity for the first time in its Decision No. 24/2017, when it asked the ECJ to clarify whether its ruling in Taricco actually left national courts with the power to disapply domestic norms, even to the extent that this contrasted with a fundamental principle of the Constitution, namely, the principle of legality in Article 25. he Italian CC asserted in the judgment that the rule inferred from Article 325 TFEU is only applicable if it is compatible with the constitutional identity of the Member State, and it falls to the competent authorities of that State to carry out such an assessment.[63] In *Taricco I* the Court held that the Italian limitation periods for serious VAT fraud cases breached Article 325 of the TFEU (combatting fraud), and according to the Court, the primacy of EU law required the Italian court to disapply the national rules on limitation

[55] Case C105/14 Taricco and Others [EU:C:2015:555] and Case C-42/17 M.A.S and M.B., [EU:C:2017:936]

[56] Case C168/13 Jeremy F. v Premier ministre [EU:C:2013:358]

[57] Joined Cases C404/15 and C659/15 PPU Aranyosi and Robert Căldăraru [EU:C:2016:198]

[58] Case C-261/09 Gaetano Mantello [EU:C:2010:683]

[59] Court of Justice of the European Union PRESS RELEASE No 113/10 Luxembourg, 16 November 2010.

[60] Case C-396/11 Ciprian Vasile Radu **[**EU:C:2013:39]

[61] A. Ghimis, *The European Arrest Warrant: Between mutual recognition and fundamental rights*, European Parliamentary Research Service Blog, 11 September 2013. https://epthinktank.eu/2013/09/11/the-european-arrest-warrant-between-mutual-recognition-and-fundamental-rights/ (1 December 2021).

[62] Case C-396/11 Radu para. 40.

[63] T. Drinóczi, *Constitutional Identity in Europe: The Identity of the Constitution. A regional Approach,* German Law Journal Vol. 21, No. 2, 2020, p. 111.

periods.[64] It is precisely this feature of the Italian legality principle (which applies also to limitation periods) that was accepted in *Taricco II*[65], though without altering the scope of Article 49 of the Charter. The Court thus permitted the Italian courts to apply the national standard of protection (the national legality principle), even if it means higher standards, and even if it comes at the detriment of the effectiveness of EU law; indeed, many criminal proceedings of VAT fraud affecting the EU's financial interests would be time-barred as a consequence.[66]

As we could see from the judgments analyzed above, the CJEU showed strong commitment to widen and strengthen the scope and the binding value of the Charter. Indeed, the Court is fully aware of the importance and sensitiveness of its role in the scrutiny of the criminalization choices of the EU legislator and of the relevant national criminal provisions. It tries to have an independent position from the ECtHR, even in the light of future accession to the ECHR (discussed in the upcoming chapter). However, comparing the material facts in Melloni (application of the European Arrest Warrant) and in Taricco (fight against the offences affecting the EU's financial interests), we could conclude that, when security needs are at stake, the CJEU is more likely to lower the standard of protection for fundamental rights.[67]

More recently on 15 October 2019, the Court published its judgement in *Dorobantu,*[68] a case which concerns the interpretation of Article 4 of the Charter and Council Framework Decision 2002/584/JHA of 2002 on the EAW and the surrender procedures between Member States. Interestingly, the judgment makes no mention 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. [69] Firstly, the Court ruled that Article 1(3) of the Framework Decision, read in conjunction with Article 4 of the Charter, must be interpreted as meaning that when the executing Member State has objective, reliable, specific and properly updated information showing that there are systemic or generalized deficiencies in the conditions of detention in the issuing Member State, it must take account of all relevant physical aspects of the conditions in the prison in which the person concerned is likely to be detained (*e.g.* the personal space available to each detainee, sanitary conditions, freedom of movement within the prison).[70] To that end, the Court specified, that in order to safeguard the efficacy of the EAW system, the executing Member State has to take into account the time limits set by Article 17 of Framework Decision 2002/584/JHA for the adoption of a final decision on the execution of the European Arrest Warrant. Therefore, it should be determined if there is indeed a real risk in the prisons in which the individual might be detained and not a general assessment for all the prisons of the issuing Member State. In order to achieve that in time, the executing Member State

[64] Another point worth highlighting is that, according to the CJEU, by disapplying the statutes of limitations periods, the referring court would not breach the principle of legality, as enshrined in Article 49 of the Charter. This is because the latter covers only substantive criminal provisions: those determining the types of crimes and sanctions, whereas the nature of statutes of limitations periods is procedural in the CJEU's view. See more on this topic: M. Krajewski, *A way out for the ECJ in Taricco II: Constitutional identity or a more careful proportionality analysis?,* European Law Blog, 23 November 2017. https://europeanlawblog.eu/2017/11/23/a-way-out-for-the-ecj-in-taricco-ii-constitutional-identity-or-a-more-careful-proportionality-analysis/ (1 December 2021).

[65] Case C-42/17 M.A.S and M.B [EU:C:2017:936]

[66] C. Peristeridou, *A Bridge over Troubled Water – a Criminal Lawyers' Response to Taricco II*, VerfBlog' 12 December 2017, https://intr2dok.vifa-recht.de//receive/mir_mods_00002969 (1 December 2021).

[67] See V. Scalia, *Protection of Fundamental Rights and Criminal Law The Dialogue between the EU Court of Justice and the National Courts,* Eucrim (The European Criminal Law Associations' Forum), Vol. 10, No. 3, 2015, pp. 100-111.

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

[69] Á. Mohay, *The Dorobantu case and the applicability of the ECHR in the EU legal order,* Pécs Journal of International and European Law, Vol. 11, No. 1, 2020, p. 88.

[70] Council Framework Decision 2002/584/JHA of 13 June 2002, OJ L 190, 18.7.2002, paras. 58 and 62.

must request the issuing Member State to provide (as a matter of urgency) all the necessary information on the conditions in which it is actually intended that the individual will be detained.[71]Interestingly, the Court citing the case of *Melloni,* reminds us one more time that the person detained by virtue of a European Arrest Warrant is subject only to compliance with the minimum standards of detention conditions resulting from Article 4 of the Charter and Article 3 of the ECHR, and not with those resulting from the national law of the executing Member State, otherwise, the principles of mutual trust and recognition will be undermined.[72]

The right to an effective remedy does not have an independent existence. Instead, it complements other fundamental rights. According to the case-law of the ECtHR it cannot be violated in itself, but only if a state action constricting human rights cannot be challenged. [73] Also recently, in its *Gavanozov*[74] judgement the CJEU had the chance to interpret for the first time some provisions of Directive 2014/41/EU and provide some clarification on the level of safeguards that needs to be provided 'in practice.' Although it is a brief judgment that ultimately deals only with the interpretation of the form contained in an Annex to the Directive, the questions it raises touch upon broader and more fundamental issues of transnational enforcement. The CJEU was tasked with deciding is the right to an effective remedy violated by Bulgarian law not providing the right to challenge the issuance of an European Investigation Order (EIO) requesting search of business premises and home and the seizure of items? [75] According to the Directive the EIO is a judicial decision issued or validated by a judicial authority in order to request one or several specific investigative measures carried out in another Member State or to obtain evidence already in possession of the competent authorities of the executing Member State. In many European Investigation Orders that were transmitted through Eurojust, Section J was not filled in.[76] This sometimes prompted executing judicial authorities to send requests for additional information related to the available legal remedies in the issuing Member State. In addition, several national authorities struggled with questions on how to interpret the obligation to fill in this box: some insisted that the use of the present perfect in that section ('remedy … already has been sought …') implied that it was inherently impossible to fill in this box, as at the time of the issuance of the EIO template a legal remedy could not yet have been issued. Others believed that the sentence in brackets seemed to refer only to the availability of legal remedies in the national legislation (either used or not, in the specific case in question).[77] With the *Gavanozov* judgment, this issue has been clarified. The CJEU held that Article 5 (1) EIO DIR must be interpreted as meaning that the judicial authority of a Member State does not, when issuing an EIO, have to include in Section J a description of the legal remedies, if any, that are provided for in its Member State against the issuing of such an order.

To conclude, the application of the EIO with its double check by the issuing as well as by the executing State on the principle of legality, proportionality, on the grounds for refusal, risks to put in crisis the principle of mutual recognition which is based on mutual trust. According to Eurojust[78], in

[71] Ibid. para. 67.

[72] Ibid. para. 79.

[73] European Court of Human Rights: Guide on Article 13 of the European Convention on Human Rights. 2020. p. 8.

[74] Case C-324/17 Ivan Gavanozov [EU:C:2019:892]

[75] See I. Szijártó, *The implications of the European Investigation Order for the protection of fundamental rights in Europe and the role of the CJEU,* Pécs Journal of International and European Law Vol. 13, No. 1, 2021, p 66.

[76] See Eurojust and EJN, Joint Note of Eurojust and the European Judicial Network on the practical application of the European Investigation Order, Council doc. 11168/1/19 https://www.eurojust.europa.eu/hu/joint-note-eurojust-and-ejn-practical-application-european-investigation-order (31 October 2021).

[77] Report on Eurojust's casework in the field of the European Investigation Order, November 2020, https://www.eurojust.europa.eu/sites/default/files/2020-11/2020-11_EIO-Casework-Report_CORR_.pdf (1 December 2021), pp. 25-26.

[78] European Union Agency for Criminal Justice Cooperation (2020). Challenges and best practices from

practice, in some States, the control is more pervasive than it should be: without reinforcing mutual trust among States there is a risk that cooperation might become ineffective, with consequences on the field of the fight against organised crimes that have a transnational dimension.[79]

7. The question of final competence and constitutional conflict

As we will see, the problem of final competence remains an important question, as the CJEU and the national constitutional courts often consider themselves to be the final judge.[80] In Luxemburg's view, EU law (including all acts of secondary law) enjoys unconditional supremacy over national law (including constitutions), whilst national constitutional courts view the national constitution to be supreme law of the Member State. In particular, they have underlined the need to uphold the protection of fundamental rights, as granted at national level, which should not be lowered, as well as preserving national constitutional identity.

According to Article 52 of the Charter, any limitation to fundamental rights must be provided for by law, respect the essence of those rights and freedoms, and respect the principle of proportionality, failing which EU legislation is also to be held void. The CJEU has touched up upon these principles in judgments through the last decades, since the entry into force of the Lisbon Treaty. In the *Schecke* case[81], whilst recognising that, in a democratic society, tax-payers have the right to be kept informed of the use made of public funds, the Court considered nonetheless that it was necessary to strike a proper balance between the right to transparency, on the one hand, and the right to protection of personal data of natural persons, on the other. However, due to the absence in EU law of criteria minimising interference with personal data (such as the definition of the periods during which those persons received such aid, the frequency of such aid or the nature and amount thereof), the Court considered that the Council and the Commission exceeded the limits of proportionality.

In the *Test-Achats* cases[82] the CJEU partially annulled an EU measure dealing with insurance services on account of discrimination between women and men, in violation of Articles 21 and 23 of the Charter. These provisions stipulate that any discrimination based on gender is prohibited and that equality between men and women must be ensured in all areas. The issue was that Directive 2004/113 in principle promoted equal treatment, but at the same time, recognised an unlimited transitional period for the Member States in its Article 5(2). Accordingly, the Court considered there was a risk that EU law may permit a derogation from the equal treatment of men and women to persist indefinitely. Such a provision, enabling the Member States to maintain, without temporal limitation, an exemption from the rule of unisex premiums and benefits, was considered contrary to the achievement of the objective of equal treatment between men and women, and incompatible with Articles 21 and 23 of the Charter.[83]

Eurojust's casework in the area of cybercrime. Overview Report. https://www.eurojust.europa.eu/sites/default/files/2020-11/2020-11_Cybercrime-Report.pdf (1 December 2021).

[79] S. Cacciatore, *European Investigation Order as Instrument for the Fight Against Organised Crime*, Vilnius University Open Series, 2021, pp. 34-38.

[80] G. Beck, *The Problem of Kompetenz-Kompetenz: A Conflict between Right and Right in Which There Is No Praetor*, European Law Review, Vol. 30, No. 1, 2005, p. 42.

[81] Joined Cases C-92/09 and C-93/09, Schecke [EU:C:2010:662]: The CJEU annulled certain EU rules providing for the annual *ex-post* publication of the names of beneficiaries of the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD), and of the amounts received by each beneficiary under each of those Funds.

[82] Case C-236/09 Test-Achat [EU:C:2011:100]

[83] Ferraro & Carmona 2015, pp. 19-21.

In the *Digital Rights Ireland case* [84], the CJEU annulled the Data Retention Directive on account of a violation of the principle of proportionality when limiting fundamental rights to privacy and data protection (Articles 7 and 8 of the Charter).[85] The Court was of the opinion that, by adopting the Data Retention Directive, the EU legislature exceeded the limits imposed by compliance with the principle of proportionality. In that context, the Court observed that, in view of the important role of protection of personal data in the light of the fundamental right to respect for private life, and the extent and seriousness of the interference with that right caused by the Directive, the discretion afforded the EU legislature is reduced, with the result that, discretion should be reviewed strictly. Although the retention of data required by the Directive may be considered appropriate to attain the objective it pursues, the wide-ranging and particularly serious interference of the Directive with the fundamental rights at issue was not sufficiently circumscribed to ensure that that interference was limited to strict necessity.[86]

In *Kadi I*[87]*,* and *Kadi II*[88]the CJEU and the General Court have struck down a range of EU laws imposing sanctions, including both 'autonomous' EU measures as well as UN-mandated measures, for violating a range of rights, most notably due process (rights of defence) and the right to property.[89] Cases have been brought to challenge a wide range of EU legislative measures, including the Biotechnology Directive[90], the Family Reunification Directive[91], the Framework Decision on an Arrest Warrant[92], the Money-Laundering Directive[93], the Audio-visual Media Services Directive[94], and the Biometric Passport Regulation[95]. In each of these cases, however, the Court, having considered

whether the alleged restriction was disproportionate, upheld the EU legislation.[96]

It is also important to add that the Treaty of Lisbon has preserved the use of general principles of

[84] Joined Cases C-293/12 and C-594/12 Digital Rights Ireland [EU:C:2014:238]

[85] The main objective of the Data Retention Directive was to harmonise Member States' provisions concerning the retention of certain data, generated or processed by providers of publicly available electronic communications services or of public communications networks. Its aim was to ensure that data were available where required for the prevention, investigation, detection and prosecution of serious crime, such as, in particular, organised crime and terrorism. Thus, the Directive provided that the above-mentioned providers must retain traffic and location data, as well as related data necessary to identify the subscriber or user. In contrast, it did not permit retention of the content of the communication or of information consulted. The Court took the view that, by requiring the retention of this data, and by allowing the competent national authorities to access the data, the Directive was interfering in a particularly serious manner with the fundamental rights to respect for private life and protection of personal data. Furthermore, the fact that data were retained and subsequently used without informing the subscriber or registered user, is likely to generate a feeling in the persons concerned that their private lives are the subject of constant surveillance.

[86] Ferraro & Carmona 2015, p. 21.

[87] Joined Cases C-402 and 415/05 Kadi I [EU:C:2008:461]

[88] Joined Cases C-584/10, C-593/10 and C-595/10 Kadi II [EU:C:2013:518]

[89] Craig & de Búrca 2015, p. 402.

[90] Case C-377/98 Netherlands v Council and Parliament [EU:C:2001:523] (challenging the Biotechnology Directive for violation of human dignity).

[91] Case C-540/03 European Parliament v Council of the European Union [EU:C:2006:429] (challenging the directive for violation of the right to respect for family life).

[92] Case C-399/11 Stefano Melloni v Ministerio Fiscal [EU:C:2013:10] (violation of the right to an effective judicial remedy and a fair trial).

[93] Case C-305/05 Ordre des barreaux francophones et germanophone and Others v Conseil des ministers [EU:C:2006:788] (violation of the right to a fair trial and the professional secrecy of lawyers).

[94] Case C-283/11 Sky **Österreich** GmbH v **Österreichischer** Rundfunk [EU:C:2013:28] **(**violation of the right to intellectual property and freedom to conduct a business).

[95] Case C-291/12 Michael Schwarz v Stadt Bochum [EU:C:2013:670] (violation of the right to private life).

[96] Craig & de Búrca 2015, p. 401.

EU law for the protection of fundamental rights, which would eventually allow the CJEU, if need be, to integrate new rights which are not written in the Charter but which would correspond to changes in society and would be established in the Member States. In other words, the Court has still the possibility to intervene in the development of fundamental rights even though these rights are set out in a legally binding document.

Another issue at hand is that the national courts can invoke their constitutional interpretations of fundamental rights and apply their higher national standards of protection, only in areas of law where the actions of the Member States are not fully dictated by EU law. This leaves them with a secondary role in the discussion for fundamental rights in the European legal order, especially if we consider that as the scope of EU law is expanding, the legal field where national courts can apply their national standards becomes narrower. This is not in line with the ideas of pluralism and judicial dialogue, and clearly shows that the main priority of the CJEU is to safeguard the primacy of EU law.[97]

On the same date of the *Melloni* decision, the CJEU issued the judgment in the previously mentioned *Åkerberg Fransson* case as well, containing the same doctrine: where an EU legal act harmonises the law between the Member States, national constitutions cannot provide higher levels of protection. According to disputes that followed the judgements, these decisions had the effect of shifting the power away of national constitutional courts to determine the meaning of their state constitutions in cases where the law has been fully harmonised by EU law.[98]

A few months after the *Melloni* decision, the French Constitutional Council ('FCC') also had to face similar issues, when looking for a balance between the efficiency of mutual recognition and the protection of human rights in the *Jeremy F* case. The FCC had to clear whether the French law of criminal procedure was, or was not, infringing the right to an effective judicial remedy and the principle of equality before the courts. It also had to take into consideration if the Framework Decision were to be followed, it would lead to give precedence to EU law (and the decision would be in accordance with the case-law of the CJEU set out in the *Melloni* judgement) and not to recognise a possible right of action resulting from the principles of constitutional rank in France.

Therefore, for the first time in its existence—just like the Spanish Constitutional Court—the FCC decided to refer a question to the Court of Justice for a preliminary ruling. The CJEU came to the conclusion that EU law does not prevent Member States from providing for an appeal suspending execution of a decision extending the effects of a European Arrest Warrant. EU law does, however, require that, in the case where the Member States choose to provide for such an appeal, the decision to extend should be taken within the time-limits provided for by EU law in cases concerning the European Arrest Warrant.[99]

In the joined cases of *Aranyosi/Căldăraru* the CJEU answered the question whether Article 1(3) of the Framework Decision on the European Arrest Warrant must be interpreted as meaning that when there are strong indications that detention conditions in the issuing Member State infringe Article 4 of the Charter, the executing judicial authority must refuse surrender of the person against whom the EAW is issued. The CJEU ruled that if, after a two-stage assessment, the executing judicial authority finds that there is a real risk of an Article 4 violation for the requested person once

[97] C. Zachariadis, *The role of Article 53 of the Charter in the EU legal order*, Thesis paper, 2016, https://lup.lub.lu.se/student-papers/search/publication/8879784 (1 December 2021), pp. 13-14.

[98] M. García, *Cautious Openness: the Spanish Constitutional Court's approach to EU law in recent national case law,* European Law Blog, June 2017, http://europeanlawblog.eu/2017/06/07/cautious-openness-the-spanish-constitutional-courts-approach-to-eu-law-in-recent-national-case-law/ (1 December 2021).

[99] Court of Justice of the European Union PRESS RELEASE No.69/13 Luxembourg, 30 May 2013.

surrendered, the execution of the arrest warrant must initially be deferred and, where such a risk cannot be discounted, the executing judicial authority must decide whether or not to terminate the surrender procedure.[100] This conclusion shakes the system of mutual trust upon which the principle of mutual recognition is built and also questions the previous case-law the CJEU has been building up in this matters.

8. The Relationship between the CJEU and the ECtHR-and the EU's accession to the ECHR

The relationship between the CJEU and the ECtHR is another important issue in EU law and human rights law which needs to be put under scope. While the CJEU rules on European Union law, the ECtHR rules on the European Convention on Human Rights, which covers the 47 Member States of the Council of Europe. The common features between the two jurisdictions can be determined as well; both courts are supranational or international and compulsory jurisdictions. Moreover, both courts have been set up to ensure respect for the law of the treaties establishing them.

Cases cannot be brought at the ECtHR against the European Union, but the Court has ruled that states cannot escape their human rights obligations by saying that they were implementing EU law. The Strasbourg Court, in accordance with Article 53 of the Convention, aims at establishing a minimum level of human rights protection throughout all 47 Member States, the Convention does not aspire to harmonise the various systems of fundamental rights developed at national level, but at securing a common basis.[101] Meanwhile, the EU judiciary's aim is not to ensure a minimum protection of fundamental rights in Europe but the uniformity of EU law, based on the principle of equality of Member States.

After the Charter became legally binding on the European Union with the entry into force of the Treaty of Lisbon in December 2009, another milestone that has to be mentioned is the delivery of Opinion 2/13 in December 2014 by the CJEU[102] which held that the accession of the EU to the ECHR on the basis of the draft agreement negotiated by the Council of Europe and the EU would be incompatible with Article 6(2) and Protocol No. 8 of the TEU.[103] As the Union endowed itself with its own catalogue of fundamental rights and since most of them correspond to rights also guaranteed by the ECHR, it was necessary to formally clarify the terms of interaction between the Strasbourg and the Luxembourg regime.[104]Serving as an interpretative bridge of the two regimes, Article 52(3) of the Charter has to be mentioned, which states that, without prejudice to a more extensive protection, the meaning and scope of those rights shall be the same as those laid down by the ECHR.

On the other hand, in the wake of the Treaty of Lisbon, a tendency of the CJEU to use the Charter as its principal point of reference can be identified in its case law. This trend was clearly made explicit

[100] K. Bovens'eerdt, *The Joined Cases Aranyosi and Căldăraru: A New Limit to the Mutual Trust Presumption in the Area of Freedom, Security, and Justice?,* Utrecht Journal of International and European Law, Vol. 32, No. 83, 2016, https://utrechtjournal.org/articles/10.5334/ujiel.337/ (1 December 2021).

[101] D. Spielmann, *The Judicial Dialogue between the European Court of Justice and the European Court of Human Rights or how to remain good neighbours after the Opinion 2/13*, Conference Paper, Brussels, 27 March 2017, pp. 3-5.

[102] Opinion 2/13 of the Court of Justice of the EU [EU:C:2014:2454] (hereinafter: Opinion 2/13)

[103] Consolidated version of the Treaty on the Functioning of the European Union, Protocol (No 8) relating to Article 6(2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms, OJ C 326, 26.10.2012.

[104] Spielmann 2017, p. 10.

in 2010[105] in a case on access to legal aid referred by a German court with reference to the general principle of effective judicial protection but resolved by the Court with reference to Article 47 of the Charter. In a similar matter, in a case which concerned the right of effective judicial protection in asylum procedures, the Court did not make any reference to the ECHR or the case law of the ECtHR.[106] On its part, the ECtHR started to refer to the CJEU's case law more frequently when the Charter became binding. For the CJEU, it is a matter of legitimation of its status and of the autonomy of EU law towards national jurisdictions while for the ECtHR, referring to EU law offered a basis to show contemporary consensus and modernise the interpretation of the Convention. In conclusion, with the entry into force of the Charter, EU law became more relevant to the ECtHR.[107]

The Lisbon Treaty increased the likely extent of the CJEU's case law on fundamental rights issues in three ways: by repealing the constraints under the former Article 68 of the EC Treaty as regards the making of preliminary references by national courts in the area of freedom, security and justice, by including the acts of EU agencies such as FRONTEX and the Asylum Support Office within the scrutiny powers of the Court, and by strengthening the application of the accelerated procedure and the urgent preliminary ruling procedure for cases where a person is in custody.[108] The growth of the CJEU's role as a human rights adjudicator[109] is not just a function of the coming into force of the Charter with a binding set of EU human rights commitments for the Court to enforce, but also a consequence of the continued expansion of the scope of EU law and policy.[110] A significant part of the EU's legislative corpus now covers areas such as immigration and asylum, security and privacy, alongside many of the more traditional fields of EU policy including competition and market regulation.[111]

According to de Búrca, the combination of these various features—the binding force of the Charter, the ever-expanding scope of EU powers and competences, and the extension of the Court's jurisdiction by the Lisbon Treaty—heralds a growing role for the Court as a human rights tribunal.[112] By comparison with the ECtHR, which is the regional European court charged with interpreting and enforcing a European Bill of Rights, the Court of Justice has little experience of adjudicating human rights issues in any depth, despite now being tasked with applying the EU Charter of Rights across the whole range of EU powers.[113]

The planned accession of the European Union to the European Convention on Human Rights has gone from a theoretical opportunity to a formally drafted accession agreement, which was demolished by Opinion 2/13 of the CJEU in December 2014. As the opinion was binding on the EU, the solution which seemed to be manageable for the EU was to draw up a new accession agreement.[114]

[105] Case C-279/09 DEB Deutsche Energiehandels und Beratungsgesellschaft mbH v Bundesrepublik Deutschland, [EU:C:2010:489]

[106] Case C-69/10 Brahim Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration. [EU:C:2011:524]

[107] Spielmann 2017, pp. 11-12.

[108] S. Carrera & M. De Somer & B. Petkova, *The Court of Justice of the European Union as a Fundamental Rights Tribunal: Challenges for the Effective Delivery of Fundamental Rights in the Area of Freedom, Security and Justice,* in CEPS, Justice and Home Affairs, Liberty and Security in Europe Papers, No. 49, 2012.

[109] G. de Búrca, *After the EU Charter of Fundamental Rights: The Court of Justice as a human rights adjudicator?,* Maastricht Journal of European and Comparative Law, Vol. 20, No. 2, 2013, pp. 168-184.

[110] Ibid. 169-170.

[111] P. Ferk, *Public services as fundamental rights of European citizens in the time of crises*, Acta Universitatis Wratislaviensis, No. 3744, 2016, p. 106.

[112] de Búrca 2013, p. 170.

[113] de Búrca 2013, pp. 170-171.

[114] See Á. Mohay, *Once more unto the breach? The resumption of negotiations on the EU's accession to the ECHR,* Pécs Journal of International and European Law, Vol. 13, No. 1, 2021, pp. 6-8.

The Commission and the Council of Europe have both restated that the intention to make the EU's accession to the ECHR possible was unchanged. Following an informal meeting in June 2020[115] - where the European Commission clarified that it intends to realize the accession by 'modulations' to the Accession Agreement - accession negotiations were formally resumed in September 2020. It was agreed that these modulations should preserve the EU's special characteristics while meeting the requirements set out in Opinion 2/13. This means that the Draft Accession Agreement lays the foundation for the upcoming meetings and provides the parties with a frame to work in.

The negotiation meetings kept going through November 2020, where discussions were held on the EU specific mechanisms of the procedure before the ECtHR, inter-party applications under Article 33 ECHR and references for an advisory opinion under Protocol No.16. The next meeting was scheduled for February 2021, where the issues of mutual trust and Common Foreign and Security Policy (CFSP) was examined. One of the most lamented elements of Opinion 2/13 is the issue of jurisdiction over the CFSP. As is known, the CJEU has very limited competence in CFSP matter, as it may only monitor compliance with Article 40 TEU and review the legality of certain decisions as provided for by Article 275(2) TFEU. This means that most acts adopted in the context of the CFSP fall outside the scope of judicial review by the CJEU.[116]

At its 92nd meeting (November 2019), the Steering Committee for Human Rights (CDDH) proposed a series of arrangements for continuation of the negotiations within an ad hoc group composed of representatives of the 47 Member States of the Council of Europe and a representative of the European Union ("47+1"). The latest (11th negotiation) meeting took place on October 2021, where the Group discussed proposals related to the EU's specific mechanism of the procedure before the ECtHR, the operation of inter-party applications (Article 33 of the Convention), the principle of mutual trust between EU member states and other provisions of the draft Accession Agreements (notably Articles 6-8).[117]

Ultimately it can be seen, that while the negotiations are in progress, it is already apparent that they will take time. Several of the CJEU's objections in Opinion 2/13 concern issues that are extremely delicate. From the perspective of the non-EU Member States of the Council of Europe, the negotiations are now essentially being reopened to deal with mostly internal affairs between the EU and its Member States. This is a recurrent theme in EU external relations: the externalization of issues that should be dealt with internally. Against this background, the future negotiations will likely be quite difficult. Hopefully, however, the obstacles can nevertheless be overcome without undermining the ECHR system. If not, there is only one way forward: amending EU primary law to neutralize the effects of Opinion 2/13.

9. The future of fundamental rights protection in the EU

[115] Virtual Informal Meeting of the CDDH ad hoc Negotiation Group ("47+1") on the Accession of the European Union to the European Convention on Human Rights – Meeting Report, 22 June 2020 [47+1(2020)rinf]

[116] Mohay 2021, p. 6. See also T. Verellen, *In the Name of the Rule of Law? CJEU Further Extends Jurisdiction in CFSP (Bank Refah Kargaran)*, European Papers, Vol. 6, No. 1, 2021, pp. 17-24.

[117] See the report of the meeting: https://rm.coe.int/cddh-47-1-2021-r11-en/1680a42134 (1 December 2021). The Group is scheduled to hold its next meeting in December 2021.

To provide assistance and expertise relating to fundamental rights to EU institutions, bodies, offices, agencies, and also to EU countries when they implement EU law, the EU Agency for Fundamental Rights (FRA) was established in 2007. Its main task is to collect and publish relevant, objective and comparable information and data on the situation of fundamental rights throughout the Member States, within the scope of EU law. The agency covers all EU countries, potential EU countries, and it plans its research on the bases of multiannual programming documents and within the thematic areas listed in its multiannual frameworks. FRA identifies and analyses major trends in the fields of fundamental rights protection, in 2012 the EU also appointed its first ever EU Special Representative for Human Rights[118], whose role is to make EU policy on human rights in non-EU countries more effective and to bring it to public attention.

Moreover, in October 2010, the Commission adopted a strategy to ensure that the Charter is effectively implemented. It developed a 'Fundamental Rights Check List' to reinforce the evaluation of impacts on fundamental rights of its legislative proposals. The Commission is also working with the relevant authorities at national, regional and local, as well as at EU level to better inform people about their fundamental rights and where to go for help if they feel their rights have been infringed. The Commission now provides practical information on enforcing one's rights via the European e-Justice portal[119] and has set up a dialogue on handling fundamental rights complaints with ombudsmen, equality bodies and human rights institutions.

The profound human rights and democracy dimensions to the ongoing global health crisis have become increasingly evident. The COVID-19 pandemic has perpetuated and aggravated existing inequalities and vulnerabilities worldwide. In 2020, in line with its commitment to contribute to the global response to the pandemic, the EU has promoted a human rights-based approach, stressing that human rights are universal, interdependent and indivisible and must be fully respected in the response to the pandemic. All the EU's work and achievements in the advancement of human rights through its external action are detailed in the report on human rights and democracy, which is adopted by the Council once a year.[120] Furthermore, in November 2020, the Foreign Affairs Council adopted the EU Action Plan on Human Rights and Democracy (2020-2024), which sets out the EU's ambitions and priorities for action in external relations for the next five years. The EU annual report on human rights and democracy monitors the implementation of the new EU Action Plan by presenting the progress achieved to date.

In December 2020, the Council also adopted a landmark decision and a regulation[121] establishing the first-ever EU global human rights sanctions regime, which is a milestone achievement. For the first time, the EU is equipping itself with a framework that will allow it to target individuals, entities and bodies—including state and non-state actors—responsible for, involved in or associated with serious human rights violations and abuses worldwide, no matter where they occurred.

10. Summary and concluding remarks

[118] Following Mr. Stavos Lambrinidis (first EUSR for Human Rights), since 1 March 2019, Mr. Eamon Gilmore holds this position. In February 2021 his mandate was extended for two years, until 28 February 2023.

[119] https://e-justice.europa.eu/home.do?action=home&plang=en (1 December 2021).

[120] See the annual report on human rights and democracy in the world for 2020 https://reliefweb.int/sites/reliefweb.int/files/resources/eeas_annual_report_humanity_2021_web.pdf (1 December 2021).

[121] Council Regulation (EU) 2020/1998 of 7 December 2020, concerning restrictive measures against serious human rights violations and abuses, OJ L 410I 7.12.2020.

The European Union, like its Member States, must comply with the principle of rule of law and respect fundamental rights when fulfilling its tasks foreseen by the Treaties. These legal obligations were framed by the case law of the CJEU. The Court filled gaps in the original Treaties, ensuring the autonomy and consistency of the EU legal order and its relationship with national constitutional orders. Since the entry into force of the Lisbon Treaty, these principles are also clearly laid down by the Treaties and by the Charter of Fundamental Rights (with the same legal value).

The Charter, as mentioned before, draws on the European Convention on Human Rights, the European Social Charter and other human rights conventions, and the constitutional traditions common to the EU Member States, and the Court's case law. Even if some of its provisions refine, or even develop, existing human-rights instruments, the Charter does not extend EU competence.[122] However, as part of the body of EU constitutional rules and principles, the Charter is binding upon the EU institutions when adopting new measures as well as on the Member States when implementing them.

It is also important to underline the role of the Court of Justice of the EU as the only institution which in an authoritative way can interpret the EU law and impose its respect and implementation and that it was through the jurisprudence of the Court that the supranational legal order of the Union has been consolidated. The protection of fundamental rights developed exponentially in the case-law of the Court of Justice, as it is the Court itself which introduced this notion in the EU legal order, which finally led to the adoption of the Charter. In Europe today, the question is perhaps less about whether certain fundamental rights are enforceable before a supranational court (provided of course that relevant requirements are met), and more about before which judicial the enforcement can take place. Recent cases continue to highlight the relevance of the interplay between European human rights systems and the need for a consistent interpretation and a well-defined relationship between the European standards of human rights protection.[123]

The Treaty of Lisbon brought two novelties in the field of fundamental rights: the incorporation of the Charter in EU primary law and a provision allowing the accession of the EU to the European Convention. The Charter became the reference text and the starting point when the CJEU deals with a matter relating to fundamental rights. The CJEU is very concerned with the consistency of its judgements with the case-law of the Strasbourg Court. The text of the Charter itself ensures the coherence between the rights it guarantees and those contained in the European Convention. This could suggest that the accession of the EU to the Convention can be seen as a 'translation' of the existing dialogue between the two Courts before and after the entry into force of the Treaty of Lisbon. 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.[124] However it is also interesting to note that 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.[125] And yet in the *Dorobantu* judgement it has relied 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.[126]Although a great deal of discussion surrounds the relationship of the two courts, the accession of the EU to the ECHR should not be seen or realized as a form of subordination of one

[122] Ferraro & Carmona 2015, p. 3.

[123] Mohay 2021, p. 8.

[124] 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.

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

[126] Mohay 2021, p. 90.

court to another: the CJEU and the ECtHR as judicial forums are crucial pillars of the European legal space which always have had - and in all probability will continue to have - regard to each other's case law following the eventual accession.[127]

We can agree that twelve years after it became legally binding, the EU Charter of Fundamental Rights is not used to its full potential. Research shows that people do not know enough about their Charter rights but would like more information.[128] In the future the Commission intends to present a strategy to improve use and awareness of the Charter in the EU so that it becomes a reality for all. All in all, the judicial activism of the CJEU, by increasing the number of cases referring to fundamental rights protection, and maintaining the final say in competence matters, while also placing the EU's primacy in the frontline, has served as a basis for establishment of EU system for human rights protection. There are certain visible benefits of the adoption of the EU Charter, but the analysis of its practical application also shows that reaching more efficient implementation of the EU Charter is one of the challenges that still remain for the European Union.

[127] T. Lock, *The European Court of Justice and International Courts,* Oxford University Press, Oxford 2015. pp. 167-218. and p. 244.

[128] See for example: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Strategy to strengthen the application of the Charter of Fundamental Rights in the EU [2020.12.2. COM (2020) 711].

Haitians in limbo – Legal responses for migration induced by the 2010 Haitian earthquake on the American continent

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The way and the extent to which environmental degradation contributes to the most recent migration trends and refugee crises has so far been under researched. It is precisely the multidimensional quality of human security that is not reflected adequately by most immigration laws, which prescribe oversimplifying legal categories for the complex circumstantial situations that life on earth produces. Although the Cartagena Declaration on Refugees of 1984 calls for the signatories to add—among other legal grounds—„other circumstances which have seriously disturbed public order", none of contracting states actually enacted any relevant legislation. This paper collects and reflects on the legal responses to the influx of Haitian migrants following the earthquake in Port-au-Prince, Haiti in January 2010 provided by countries on the American continent.

Keywords: environmental migration, disaster management, immigration, asylum

1. Introduction

On 12 January 2010 Haiti was shaken by the single most severe earthquake ever recorded in the island's history. The earthquake occurred 25 kilometres from Port-au-Prince and for another week, more aftershocks shook the western part of the island, which were felt even in Cuba and Venezuela.[1] The capital and its surrounding areas lie right at the confluence of two rock plates and is a swampy area, crossed by rivers running into nearby estuaries.[2] The rate of annual deforestation in the region is 3%, which can be traced back to historical and political reasons as well as current local energy needs. Due to its natural resources, the sudden opening of markets and outdated agricultural practices, Haiti is one of the most insecure countries in terms of food security, just ahead of the Democratic Republic of the Congo and Eritrea. Although the country is regularly affected by natural disaster—such as floods, droughts, earthquakes, extreme storms—due to its turbulent colonial past and subsequent civil wars, the country's resilience and disaster protection are virtually non-existent. This particular natural disaster affected around three million people, in a country which is the poorest in the Western Hemisphere. It is estimated that a quarter of a million people lost their lives, three hundred thousand were injured and one and a half million were forced to seek refuge in camps set up for those displaced.[3] Consequently, a cholera epidemic also broke out in

[1] This day: Massive earthquake strikes Haiti https://www.history.com/this-day-in-history/massive-earthquake-strikes-haiti (7 December 2020).

[2] Overview of the Haiti Earthquake https://escweb.wr.usgs.gov/share/mooney/142.pdf (20 December 2020).

[3] World Vision: 2010 Haiti earthquake: Facts, FAQs and how to help https://www.worldvision.org/disaster-re-

Haiti in October 2010.[4]

The way and the extent to which environmental degradation contributes to the most recent migration trends and refugee crises is currently under research. Considering the case of Haiti, according to Audebert, it can be established that the demographic pressures on scarce land resources in rural areas as well as the extension of erosion aggravate the living conditions among agricultural workers which is then coupled with rudimentary agricultural practices. These eventually lead to the contraction of arable land and the reduction of agricultural resources. This directly causes the impoverishment of masses, which, if not met with adequate political will to resolve the situation, may cause social tension and even violent conflicts. Moreover, climate change causes extreme weather conditions which makes certain areas in the world such as Haiti extraordinarily vulnerable to environmental disasters. Additionally, taking into account the colonial exploitation, the military dictatorship and the overall political and economic instability throughout the past decades, Audebert claims that all of these insecurities create a „multidimensional vulnerability" for people living in places such as Haiti.[5] Consequently, immigration authorities face quite a challenge when trying to legally distinguish asylum-seekers from economic migrants.

In this article I will not focus on the causes but on the consequences: the wave of human mobility experienced after the earthquake and the legal responses to accommodate the influx of Haitians given by the countries of destination. It is estimated that there were as many as 700,000 displaced in Port-au-Prince alone. Almost 600,000 are thought to have had to relocate to areas outside the capital. Displaced populations and migration was a challenging issue both within Haiti (with more than 1.2 million people displaced) and internationally, as people were leaving Port-au-Prince for unaffected rural areas, as well as the Dominican Republic, North America as well as South America.[6] Additionally, I will also mention some trends in secondary movements of Haitians relocated in Central and South American countries, to display the spill over effect of displacement caused by natural disasters.

It is precisely the abovementioned multidimensional quality of human security that is not reflected adequately by most domestic immigration laws, which prescribe oversimplifying legal categories for the complex circumstantial situations that life on Earth produces. Throughout the 20th century with the introduction of the paradigm of human rights protection by the signature of the UN Charter, when domestic laws failed to provide protection to the affected communities, the international community stepped up and showed solidarity. When dealing with displacement in Latin-America and the Caribbean, one must assess the possible application of the following international conventions: the 1951 Convention relating to the Status of Refugees, and its 1967 Protocol relating to the Status of Refugees, the 1969 American Convention on Human rights. In addition, possible international customary law may be evidenced by the 1984 Cartagena Declaration on Refugees, although this document lacks legally binding effect. Although the Cartagena Declaration calls for the signatories to add—among other legal grounds—„other circumstances which have seriously disturbed public order"[7], which could include environmental factors, none of the regional contract-

lief-news-stories/2010-haiti-earthquake-facts (7 December 2020).

[4] Planting Now: Agricultural challenges and opportunities for Haiti's reconstruction, Oxfam Briefing Paper, October 2010 https://oi-files-d8-prod.s3.eu-west-2.amazonaws.com/s3fs-public/file_attachments/bp140-planting-now-agriculture-haiti-051010-en_0_4.pdf (7 December 2020).

[5] C. Audebert, *The recent geodynamics of Haitian migration in the Americas: refugees or economic migrants?*, Revista Brasileira de Estudos de População, Vol. 34, No. 1, 2017.

[6] R. Margesson, & M. Taft-Morales, *Haiti Earthquake: Crisis and Response, Congressional Research Service*, CRS Report R41023, 8 March 2010 p. 25.

[7] http://www.unhcr.org/about-us/background/45dc19084/cartagena-declaration-refugees-adopted-colloquium-international-protection.html (1 May 2021).

ing states actually enacted any relevant legislation. This eventually means that although a political declaration has been made by the countries of the American continent, it has not been backed up by state practice, therefore the assessment of the Cartagena Declaration is not a relevant source for this article.

In order to assess whether there is a need for an international convention on the protection of those displaced by natural disasters and environmental degradation, I will assess domestic immigration policies from the following two aspects: a) how prepared was the country to receive the displaced in terms of already available legal status and therefore protection, and b) how flexible were their legal regimes in order to accommodate a sudden influx of people, either temporarily or permanently.

Although this article assesses the migratory experiences of a decade old natural disaster, the relevance of the potential lessons learned is as topical as ever. Haiti remains in political turmoil with the assassination of President Jovenel Moise on 7 July 2021[8], and as mentioned above, Haiti continues to experience frequent natural disasters, the latest being a 7.2-magnitude earthquake in mid-August 2021[9]. Despite the fact that this year's earthquake was much less catastrophic than that of 2011[10], since Haitians still face severe human insecurities, the migration implications discussed in this paper will once again prove relevant.

2. Country assessments

In the following, I will collect the legal responses of a number of countries on the American continent to the influx of Haitian migrants following the earthquake in Port-au-Prince, Haiti in January 2010. The countries that I will study and assess are the main economies of the continent. Traditional countries of destination in America include the United States of America, Canada, Mexico and Venezuela. The emergence of Brazil as a regional power, and the labour market opportunities for Haitians makes Brazil a new but significant country of destination.[11] The aim of the country assessments are to uncover any inconsistencies in terms of the migration management of ad-hoc and large influxes of people.

2.1. The Dominican Republic

I start my analysis with the only country with which Haiti shares a land border with. Today the island is divided between and shared by the Dominican Republic and Haiti. Historically, this division is a legacy of colonial times, therefore the relationship between the two—culturally very different—countries has been gruesome since their independence. This bloody rivalry is exactly why the Dominican Republic enacted no national special measures for Haiti nationals, even though thousands of Haiti nationals sought refuge just over the border. Although the UNHCR issued the Guiding Principles on Internal Displacement in 1999, also covering victims of natural disasters, not just violent conflicts, these do not apply to persons displaced cross-border. The Dominican Republic

[8] https://www.bbc.com/news/world-latin-america-57762246 (10 August 2021).

[9] https://reliefweb.int/report/haiti/haiti-earthquake-flash-update-no-1-15-august-2021 (15 August 2021)

[10] According to the UN Office for the Coordination of Humanitarian Affairs 2,200 people have died, over 12,000 people were injured, over 53,000 homes were destroyed and 77,000 have sustained damage, meaning that over 1.4 million locals were severely affected. https://reliefweb.int/report/haiti/haiti-flash-appeal-earthquake-august-2021 (31 October 2021)

[11] Audebert 2017, p. 2.

only participated in Assisted Voluntary Return programs led by the International Organisation for Migration (IOM) through which more than 1000 Haitian nationals were returned in 2011 already.[12]

2.2. Canada

Natural disasters hit immigration systems in various ways. Since the Embassy of Canada in Port-au-Prince was damaged in the earthquake, the Citizenship and Immigration Commission of Canada (CIC) had to establish an interim office, the Ottawa Haiti Processing Office (OHPO), while the Embassy of Canada in Santo Domingo, Dominican Republic took over and processed temporary resident visa applications from applicants from the Dominican Republic and Haiti.[13]

Asylum-seekers and immigrants entering Canada are entitled to various legal statuses based on the Immigration and Refugee Protection Act of 2001.[14] However, since this did not provide adequate protection to those Haitians coming to Canada, on 16 January 2010, the CIC announced the Haiti Special Measures (HSM) providing „special priority processing measures for persons who self-identified as being directly and significantly affected" by the earthquake in Haiti. At the end of the procedure, the CIC provided the applicant with the appropriate document, which was either a) a temporary resident visa; b) a temporary resident permit; c) a permanent resident visa; or a negative decision. Cases not covered under HSM, were to lose priority and were to be processed at a later date. The special measures ended on 31 August 2010 but Haitian applications were still processed as quickly as possible. Moreover, by 2014, Haitians who were legally present in Canada prior to 13 January 2011 but made an application for a work permit after 13 January 2011, benefitted from exemptions based on the HSM.[15] Although on August 4 2016, the HSM finally expired, HSM-holders were invited to apply for permanent residence status on humanitarian and compassionate grounds.[16]

Along with the HSM, a temporary suspension of removals (TSR) was also introduced. Those who were eligible to be removed, could apply for permanent residence on „Humanitarian and Compassionate grounds" on or before 1 June 2015 to remain in Canada. However, due to improved conditions in Haiti—alleged by the Canadian Government—, on 1 December 2014, the Government of Canada lifted the TSR. Thus, if a person was found ineligible to make a refugee claim, was inadmissible on criminal or security grounds, or who had been excluded from refugee protection by the Immigration and Refugee Board based on the exclusion clauses of the Refugee Convention, or who faced an outstanding criminal warrant, could be removed from Canada once again.[17]

Additionally, the autonomous Province of Quebec also introduced new regulatory measures to facilitate sponsorship of people who were seriously and personally affected by the earthquake in Haiti. The 'Parrainage Humanitaire' program allowed (Haitian) Quebec residents to sponsor appli-

[12] B. Wooding, *L'évolution des relations entre Haïti et la République dominicaine après le séisme de 2010*, Outre-terre, Vol. 1-2, No. 35-36, 2013, p. 256.

[13] https://www.canada.ca/en/immigration-refugees-citizenship/news/notices/visa-immigration-services-offered-santo-domingo-port-spain.html (1 May 2021).

[14] Audebert 2017, p. 2.

[15] http://ccrweb.ca/sites/ccrweb.ca/files/haiti-zimbabwe-special-measures-jan-2015-presentation.pdf (1 May 2021), p. 4.

[16] https://www.canada.ca/en/immigration-refugees-citizenship/news/notices/notice-update-additional-time-given-people-haiti-zimbabwe-affected-lifting-temporary-suspension-removals-apply-permanent-residence-canada.html (31 October 2021).

[17] https://www.canada.ca/en/immigration-refugees-citizenship/news/notices/reminder-people-haiti-zimbabwe-affected-lifting-temporary-suspension-removals.html (1 May 2021).

cations for a permanent resident visa for also siblings and non-dependent children over the age of 22 and their accompanying family members.[18]

Due to these special measures introduced by the Canadian governments, the number of Haitian asylum-seekers tripled after the earthquake between 2010 and 2014, and Canada became the world's second largest host of Haitians refugees (8,400 in total) in 2014.[19] To date, however, apart from generous offers of local humanitarian aid for the victims of the 2021 earthquake in Haiti, Canada has not announced any special measures for Haitian asylum-seekers.

2.3. United States of America

The United States of America remained the number 1 host of Haitian refugees in the world during and after the 2010 Haiti earthquake.[20]

The immigration of Haitians into the USA has always been balancing on the verge of legal and illegal, which is why as a predecessor of the Temporary Protected Status, the USA introduced a „hybrid legal category" to regulate these migrants, called the 'Cuban Haitian Entrant Status'. As suggested by its name, in 1980, the United States hoped to regularize the status of those massive numbers of Cubans and Haitians, who entered the US irregularly usually through the Florida shores by boat.[21] Since 2000, the people on a temporary status could receive a permanent residence permit based on the 1998 Haiti Refugee Immigration Fairness Act.[22] Building on the decade long experiences of immigration, within days of the earthquake, the Department of Homeland Security (DHS) was quick to react to the potential influx of Haitian people due to the natural disaster by pledging to grant Temporary Protected Status (TPS) to Haitians in the United States.

The TPS was more or less a blanket form of ad-hoc humanitarian relief, providing protection and legal status to those, who otherwise would not fit the legal definition of refugee but are nonetheless fleeing—or reluctant to return to—potentially dangerous situations. The TPS was instated by the 1990 Immigration Act, which specifies that the secretary of the DHS, in consultation with other government agencies (i.e. the Department of State), may designate a country for TPS under one or more of the following conditions: (a) ongoing armed conflict in a foreign state that poses a serious threat to personal safety; (b) a foreign state request for TPS because it temporarily cannot handle the return of nationals due to environmental disaster; or (c) extraordinary and temporary conditions in a foreign state that prevent migrants from safely returning. [23] It was the Secretary of DHS who could issue TPS for periods of 6 to 18 months and these could be extended if conditions do not change in the designated country. [24] Initially, the TPS for Haitians was valid for 18 months[25] but after the earthquake, the term of the granted TPS was extended multiple times. [26] In November

[18] https://www.canada.ca/en/immigration-refugees-citizenship/news/notices/update-haiti-immigration-figures-december-31-2010.html (1 May 2021).

[19] Audebert 2017, p. 2.

[20] Audebert 2017, p. 3.

[21] Audebert 2017, p. 2.; J. H. Wilson, *Temporary Protected Status: Overview and Current Issues*, Congressional Research Service, RS20844, 17 January 2018, p. 32. https://fas.org/sgp/crs/homesec/RS20844.pdf (31 October 2021).

[22] Audebert 2017, p. 3.

[23] A state may not be designated for TPS if the Secretary of DHS finds that allowing its migrants to temporarily stay in the United States is against the U.S. national interest. Wilson p. 2.

[24] Ibid. p. 2.

[25] Ibid. p. 31.

[26] Ibid. p. 32.

2017, under the Trump administration's guidelines, the DHS announced its decision to terminate the TPS regarding Haiti, with an 18-month transition period and thus Haiti's designation ended on 22 July 2019.[27]

It must be pointed out that TPS-holders were not considered to be permanently residing in the United States, they may have been deemed ineligible for public assistance by a state, and may have travelled abroad only with the prior consent of the DHS Secretary.[28] The TPS recipients were also eligible for federal benefits and cash assistance much like refugees. The newly arriving Haitians however were barred from the major federal benefits and cash assistance for the first five years after entry.[29] TPS did not provide a path to lawful permanent residence or citizenship, unlike the above-mentioned statuses, however TPS recipients were not barred from adjusting to non-immigrant or immigrant status, if they had met the requirements.[30]

It is worth noting that on 3 August 2021, Haiti was once again designated as a country of origin for TPS. The TPS will last 18 months again, until 3 February 2023. Additionally, the termination of the 2011 TPS by the DHS has also been contested in court where preliminary injunctions order by the courts disallowed the DHS to enforce these terminations, thereby extending the designation of the 2011 TPS for the time being.[31] This means that not only can new arrivals from Haiti stay in the US but also those people who have arrived back in 2011.

In addition to the TPS, there was another form of blanket relief from removal known as deferred enforced departure (DED), which was a temporary, discretionary, administrative stay of removal granted to aliens from designated countries. The DED is usually granted through an executive order or presidential memorandum, with no statutory basis, at the President's discretion, usually in response to war, civil unrest, or natural disasters. In 2010, the DHS also halted temporarily the deportation of Haitians from the US.[32] In contrast to recipients of TPS, migrants who benefit from DED were not required to register for the status, unless they wanted a work permit. Instead, DED was triggered when a protected migrant had been identified for deportation.[33] In 2011 though, „removals on a limited basis of Haitians with final orders of removal and convicted of a serious crime, or who posed a national security threat" resumed. In 2016, the Obama administration issued a DED with immediate effect, and thus the DHS resumed, consistent with law, „the removal of convicted felons, individuals convicted of significant or multiple misdemeanours, and individuals apprehended at or between ports of entry while attempting to unlawfully enter the United States". The deportations did not affect the TPS holders, especially if they continually resided in the US. Those who expressed a fear of return to Haiti were screened by a U.S. Citizenship and Immigration Services (USCIS) asylum officer to determine whether they possess a credible fear of persecution or torture. Those determined to have a credible fear were referred to immigration court for removal proceedings where they could apply for asylum or other forms of relief. [34] With the withdrawal of the DED for Haitians and the termination of the 2011 TPS, around 1,000 Haitians were deported back to Haiti in September 2021. As a result thousands have fled their camps at the US-Mexican;

[27] Wilson p. 7.

[28] Wilson p. 3.

[29] Ibid. p. 32.

[30] Ibid. p. 13.

[31] https://www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-haiti (31 October 2021).

[32] Ibid. p. 31.

[33] Ibid. p. 3.

[34] https://www.dhs.gov/news/2016/09/22/statement-secretary-johnson-concerning-his-directive-resume-regular-removals-haiti (1 May 2021).

Texas Governor Greg Abbott estimated that out of the 14,000 encamped in Del Rio International Bridge only 8,600 remained. In order to flee deportations from the USA to Haiti, they are now trying to irregularly enter Mexico.[35]

It must also be mentioned that both the governments of Canada and the USA gave priority and granted entrance on humanitarian grounds (humanitarian parole) to Haitian children who were legally confirmed as orphans eligible for intercountry adoption by the government of Haiti and who were in the process of being adopted by U.S. or Canadian residents, respectively, prior to the earthquakes.[36]

2.4. Mexico

According to the Jesuit Refugee Service in Latin-America and the Caribbean, although the Mexican government was quick to express solidarity on a political level, president Calderón failed to keep his promise of any special legal assistance to Haitian asylum-seekers.[37] Haitian nationals in the aftermath of the earthquake could apply for a „regular" temporary visa on humanitarian grounds for up to 1 year, subject to renewal.[38]

Most of the Haitians registered at the southern borders of Mexico, in particular in Tapachula, Chiapas, according to the National Institute of Migration and stayed at refugee camps (Estación Migratoria) provided by the government.[39] Since initially, Mexico was a country of transit for Haitian migrants moving to the USA or Canada, the undersecretary for Population, Migration and Religious Affairs of the Federal Ministry of Interior at the time stated that although under normal circumstances an irregular migrant would have 20 days to leave the country, Mexico will not deport Haitians until they receive their legal documents to enter the United States.[40] However, after the abovementioned withdrawal of the temporary protected status in the USA, more than 4000 applications seeking asylum or humanitarian protection were submitted in Baja California in February 2016 alone.[41]

As Mexico experienced a large influx of irregular migrants in 2015, which led to a crisis similar to the EU's refugee crisis, Haitian nationals received no special treatment moving forward. Currently, Mexico is facing a potential crisis situation again. According to Andres Ramirez, the current head of the Mexican Commission for Refugee Assistance (COMAR), thousands of Haitians entered Mexico irregularly from its Norther neighbour due to the announced deportations, and thousands of Haitians resettled in Brazil or Chile have entered Mexico irregularly from the South unhappy with deteriorating economic conditions of their adopted countries. Refugee applications now take 6 to 7

[35] https://www.voanews.com/a/us-ramps-up-haitian-deportation-flights-but-lets-other-migrants-stay-in-us/6241286.html (31 October 2021).

[36] https://www.canada.ca/en/immigration-refugees-citizenship/news/notices/update-haiti-immigration-figures-december-31-2010.html (1 May 2021). Wilson p. 31.

[37] https://www.entreculturas.org/files/documentos/estudios_e_informes/Flujos%20haitianos%20haciaAL.pdf (10 August 2021), p. 4.

[38] https://www.gob.mx/inm/documentos/preguntas-frecuentes-para-solicitar-el-cambio-a-visitante-por-razones-humanitarias (1 May 2021).

[39] https://www.gob.mx/cms/uploads/attachment/file/281220/Informe_Caso_Haitianos_y_Africanos.pdf (1 May 2021), p. 1.

[40] https://expansion.mx/nacional/2016/10/10/la-tragedia-que-persigue-a-los-haitianos-hasta-mexico (1 May 2021).

[41] https://www.gob.mx/inm/documentos/preguntas-frecuentes-para-solicitar-el-cambio-a-visitante-por-razones-humanitarias (1 May 2021).

months to process and are difficult to finish as many applicants are no longer around as they have moved North, closer to the US border. Change in federal Mexican legislation would be essential, as humanitarian visas, granting a the right to stay and a work permit for its holders for a period of one year, may only be granted to those who have applied to COMAR for refugee status.[42]

2.5. French Guiana

French Guiana is a traditional destination in terms of Haitian emigration, since its francophone and an overseas department of the Republic of France. However, in the 2000s, Guiana has virtually closed its borders to immigrants, and, in 2010, President Sárközy asked neighbouring Suriname to do the same. Consequently both countries started issuing transit visas, as well as temporary residence visas to asylum-seekers, and as a result French Guiana (and Suriname) became a tranzit country on the way to Brazil. [43]

Between 2010 and 2015 only 4,5% of the applicants were finally granted asylum in France. However, over half of the applicants for refugee status received subsidiary protection from France.[44] Under the so-called Qualification Directive of the EU, subsidiary protection may be granted to a person, who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to their country of origin would face a real risk of suffering serious harm, and is unable or, owing to such risk, unwilling to avail themselves of the protection of that country.[45] The devastation caused by a natural disaster may be considered such a serious harm, however EU member states have implemented and applied this Directive rather conservatively under normal circumstances.

2.6. Brazil

Although as mentioned above, Brazil had not been a traditional country of destination for Haitian migrants before 2010, it became the top country of destination by 2016.[46] Most Haitian nationals arriving after the earthquake applied for refugee status. At first, in 2010, they received a temporary, asylum-seeking status until a final decision as Haitians entering Brazil in the aftermath of the earthquake did not specifically meet the requirements of the Geneva Convention on Refugees. The government thus provided Haitian applicants with a work permit and fiscal credentials necessary under Brazilian law to legally stay in Brazil as an immigrant. However, this practice was suspended in February 2011.[47]

Those who did not get a legal status, remained in the country though and so the National Immigration Council recommended to the Ministry of Employment in March 2011, to provide Haitians with a residence permit on humanitarian grounds. In January 2012, the National Immigration Council

[42] https://www.reuters.com/world/americas/their-prospects-dim-haitian-migrants-strain-mexicos-asylum-system-2021-10-05/ (31 October 2021).

[43] J. Handerson, *The Haitian migratory system in the Guianas: beyond borders*, Diálogos, Maringá-PR Brasil, Vol. 24, No. 2, pp. 207-209.

[44] Audebert 2017, p. 6.

[45] https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_search/subsidiary-protection_en (10 August 2021).

[46] https://robuenosaires.iom.int/sites/default/files/publicaciones/Diagnostico_Regional.pdf (1 May 2021), p. 48.

[47] https://www.entreculturas.org/files/documentos/estudios_e_informes/Flujos%20haitianos%20haciaAL.pdf (10 August 2021), p. 2.

created a permanent visa for humanitarian reasons by Normative Resolution No. 97/2012 for five years. The annual quota was 1,200 visas (100 per month), which did not include applications for visas on the grounds of family reunification.[48] Initially, the resolution should have been in force for only two years, but the program has been extended annually from 2012 to 2016. Altogether throughout the years 48,000 applications were successful, a refugee crisis unfolded at the Brazilian borders due to the various forms of illegal facilitation of migration.[49] One of the key requirements of the applicants that were put in place was that such a visa application could only be filed in person to the Brazilian consulate in Port-au-Prince. The Brazilian consulate was overloaded by work, which slowed down the whole process, and a waiting list had to be drawn up. For those that were already in the country, the granting of humanitarian visas were to remain for „special cases" but were mostly left without a case in the eye of the authorities.[50] To ease the crisis, by April 2013, the Brazilian government decided to issue Normative Resolution No. 102/2013, which (i) revoked the limit of a 100 visas per month; (ii) stroke the requirement that humanitarian visas must be submitted to the consulate in Port-au-Prince and thus these could also be processed in Ecuador, Bolivia, and the Dominican Republic, among others.[51] To finally resolve the crisis, under Normative Resolution No. 27/1998, 50 000 undocumented Haitians were granted permanent residence in Brazil.[52] By 2020, the Haitian population grew to around 143,000 in Brazil. However, due to economic downturn and a right turn in governance with the election of President Bolsonaro, many decided to leave Haiti, first to Chile and then farther North.[53] In September 2021, IOM has formally requested the Brazilian government to receive Haitians who moved to the USA or Mexico from Brazil, or who have a Brazilian child.[54] The Brazilian government is yet to decide what to do about secondary movements and have not enacted any special measures concerning potential new arrivals after the August earthquake.

2.7. The gateway to Central America: Chile, Ecuador, Colombia, Panama

Chile and Ecuador are the gates of the Caribbean in terms of South-to-South migration trajectories, therefore these usually serve as transit countries for immigrants. According to IOM, no special measures were enacted regarding the Haitian environmental migrants.[55] However due to existing liberal, employment oriented immigration regulations, in the first three months of 2011, the number of Haitians entering Chile and Ecuador was equal to the number of Haitians entering in 2009 in total.[56]

In Chile, a very favourable alien law in force was enacted in 1975 under Pinochet (Presidential Decree Act No. 1094). Initially, the law linked the only available visa for employment to a single employer, who also had to commit to pay to transfer the immigrant from their country of origin to Chile. In case of the termination of employment, the immigrant had to leave the country within 30

[48] Wilson p. 64.

[49] Audebert 2017, p. 3.

[50] Wilson pp. 64-65.

[51] Ibid. p. 66.

[52] Audebert 2017, p. 4.

[53] https://www.migrationpolicy.org/article/haitian-migration-through-americas (31 October 2021).

[54] https://www.reuters.com/world/americas/exclusive-un-migration-body-asks-brazil-receive-haitians-us-mexico-border-2021-09-24/ (31 October 2021).

[55] https://robuenosaires.iom.int/sites/default/files/publicaciones/Diagnostico_Regional.pdf (1 May 2021), p. 48.

[56] https://www.entreculturas.org/files/documentos/estudios_e_informes/Flujos%20haitianos%20haciaAL.pdf (10 August 2021), p. 2.

days. In April 2015, a new temporary visa for employment was enacted, which allowed immigrants to enter the country with an already executed employment contract or even a job offer for a duration of one year, with the possibility that if the employment was not executed or was terminated, the immigrant may look for a new job within the duration of their work visa.[57] Haitians, in particular, could enter Chile visa-free until 2018. In 2015, more than 12,000 Haitians arrived in Chile, and more than 103,000 in 2017. After the enactment of new visa requirements, in 2018, still some 27,000 Haitians entered Chile. However, moving forward the number of Haitians leaving Chile has started exceeding the number of Haitians entering, the latter dropping below the 2010 level by 2019.[58]

Ecuador enacted a visa waiver for nationals of Latin-American and Caribbean countries already in 2008, which meant that Haitians could enter with a 90-day tourist visa any time to look for work, even before the earthquake. As a response to the aftermath of the natural disaster, in February 2010, Executive Decree No. 248 declared the regularisation of irregular immigrants, such as Haitians displaced by the earthquake, as well as their spouses and their children.[59]

Haitians did not begin to arrive consistently in Panama until 2016, when almost 17,000 people entered. According to the Migration Policy Institute, this was at least in part prompted by Hurricane Matthew and due to changing socioeconomic and political dynamics in Brazil. With the surge in Haitians (and Cubans) transiting through the region, Central American countries have struggled to receive them. Nicaragua notably closed its border in late 2015, leaving many Haitians and Cubans stuck for months in Costa Rica. As a result, a large number of Haitians began travelling through Central America around 2016, who were then trapped in limbo during transit. Since 2016, the numbers of Haitians transiting through Panama and the rest of Central America have fluctuated. However, 2021 is yet another record year for Haitians transiting through Central America. Colombian officials estimated in July that around 1,500 Haitians crossed the border from Ecuador each day. In August 2021, regardless of the recently struck earthquake in Haiti, Colombia, Panama and Costa Rica agreed to cooperate in the controlled flow policy and to limit the number of Haitians crossing into - for example - Panama.[60]

2.8. Argentina

Just like in Chile or Ecuador, under normal circumstances, Haitians enjoy visa free entry to Argentina, however at the border control entrants may be asked to present documents proving their purpose of „tourism" and may be rejected if such documents are not produced.[61] Any alien in Argentina may apply for the following three temporary regular status: work visa, student visa, and visa for humanitarian reasons[62]. Residence for humanitarian reasons is granted by the National Migration Directorate, who decide whether the applicants are entitled to such special treatment. According to the National Migration Directorate, Haitian applicants were to be granted such status as subsidiary means, meaning that applicants are granted temporary residence on humanitarian grounds, unless they are entitled to refugee status based on their asylum claims. Much like the EU's subsidiary protection status under the above mentioned Qualifications Directive. According to the National

[57] Wilson p. 92.

[58] https://www.migrationpolicy.org/article/haitian-migration-through-americas (31 October 2021).

[59] Audebert 2017, p. 6.

[60] https://www.migrationpolicy.org/article/haitian-migration-through-americas (31 October 2021).

[61] Such documents are: hotel reservation, or invitation letter from a specific person in Argentina, and in some cases an amount of approximately 1000 USD that can cover the stay in Argentina. Wilson p. 117.

[62] According to Art. 23 of Act No. 25.871 and Regulatory Decree No. 616/2010.

Migration Directorate 1482 Haitian nationals applied for temporary residence and 408 for permanent residence between 2010 and 2016.[63] After three years of continuous residence in the country, temporary residence holders could apply for permanent residence. [64]

The National Migration Directorate also approved a—duty-free—special mechanism to facilitate the regularization of migration for humanitarian reasons for Haitian nationals. This special regime allows for Haitian nationals to be granted a temporary residence for 2 years, who hold ordinary passports, who entered Argentina as tourists before 1 March 2017 and are not entitled to any other grounds for immigration. The special mechanism was enacted for a temporary period of 6 months from 15 March 2017. According to the Ministry of Interior, this special mechanism was enacted explicitly to assist the survivors of the 2010 earthquake.[65]

It must also be noted that up until today, due to the lack of necessity, no special measures have been enacted concerning the victims of the 2021 earthquake.

3. Conclusions

The analysis of the domestic legal responses of the receiving countries in the region to the influx of Haitian nationals displaced by the 2010 earthquake is summed up in the following table:

Receiving country	Refugee status	Special legal status	Special procedural measures	Ordinary legal status on humanitarian grounds	In-kind provisions
Canada	No	No	Yes	Yes	n/a
USA	No	Yes	No	No	Yes
Mexico	No	No	No	Yes	n/a
French Guiana	No	No	No	Yes	n/a
Brazil	No	Yes	No	Yes	n/a
Chile	No	No	No	No	n/a
Ecuador	No	No	No	No	n/a
Argentina	No	Yes	No	Yes	n/a
Dominican Republic	No	No	No	No	Yes

Table 1.

Legal responses for migration induced by the 2010 Haitian earthquake on the American continent

In order to establish whether there is a need for an international convention on the protection of those displaced by natural disasters and environmental degradation, I have assessed domestic immigration policies from two aspects: a) how prepared was the country to receive the displaced in terms of already available legal status and therefore protection, and b) how flexible were their legal regimes in order to accommodate a sudden influx of people, either temporarily or permanently.

[63] Wilson p. 109.

[64] Ibid. p. 116.

[65] http://www.migraciones.gov.ar/accesible/indexA.php?mostrar_novedad=3427 (1 May 2021).

Consequently, I have drawn the following conclusions.

Firstly, in terms of country of destination, it may be established that those displaced by the earthquake or circumstances of its aftermath headed for traditional countries of destination, with the exception of Brazil, which has emerged as a regional economic power during the aftermath of the natural disaster. Therefore, it is virtually impossible to distinguish an economic migrant from an environmentally displaced person, due to the fact that once a person is compelled to move away from their home, they will go somewhere where their livelihood is best ensured.

Secondly, in terms of dealing with a sudden influx of displaced persons, the host countries implemented ad hoc measures to swiftly deal with the influx: some countries opted for a temporary legal status aiming to help for a limited time period at their own discretion, not granting permanent residence, while some other countries recognized the economic benefits of a potential work force and provided an avenue to permanent residence, while a very few receiving states almost pushed people over their borders to other countries with transit visas in order to avoid even the temporary settlement of those displaced. In addition, most of the assessed domestic immigration standards do not adequately reflect the diverse means and motivations of international mobility, i.e. the consequences of the above-mentioned multidimensional quality of human insecurity in places such as Haiti. Therefore, current immigration regimes either prescribe oversimplifying standard legal categories such as the refugee status, or apply a blanket form of relief for the complex man-made or naturally occurring circumstances inducing human mobility, such as the humanitarian visa.

Penultimately, referencing the Geneva Convention on Refugees, no country has provided refugee status to Haitian nationals, and while that may be correct under the strict application of international law, some form of subsidiary protection is necessary for persons who are unable to return to their homes due to the serious harm that they face at home. As mentioned above, although the Cartagena Declaration would allow a signatory to include natural disasters as a ground for granting asylum to an applicant, up until today no signatory state has enacted domestic laws to implement this provision, and this also explains why none of the receiving states has provided refugee status to those displaced due to the Haiti earthquake. In fact, although the IOM acknowledges the term „environmental migrant”[66], and the UNHCR also references „environmentally displaced persons” in their Guiding Principles on Internal Displacement [67], these working definitions haven't been implemented—neither in domestic legal systems, nor in international conventions with a legally binding effect.

Finally, it is evident from the spill over effect of displacement in the Central American region that ad hoc immigration measures bear ad hoc secondary movements and shift responsibilities. Multilateral international cooperation therefore is inevitable as bilateral or limited regional coordination are necessitated by circumstances any ways, such as in the case of Panama and its neighbours. It is also evident that environmental displacement is not an individual case but subsequent secondary movements necessitate long-term planning and permanent structural immigration solutions, internationally.

[66] Environmental migrants are persons or groups of persons who, predominantly for reasons of sudden or progressive changes in the environment that adversely affect their lives or living conditions, are obliged to leave their habitual homes, or choose to do so, either temporarily or permanently, and who move within their country or abroad. https://environmentalmigration.iom.int/environmental-migration (1 May 2021).

[67] Persons who are displaced within their country of habitual residence or who have crossed an international border and for whom environmental degradation, deterioration or destruction is a major cause of their displacement, although not necessarily the sole one. This term is used as a less controversial alternative to environmental refugee or climate refugee that have no legal basis or raison d'être in international law, to refer to a category of environmental migrants whose movement is of a clearly forced nature. https://environmentalmigration.iom.int/environmental-migration (1 May 2021).

Although ten years on, the environmental crisis seems to have been resolved effectively, with the lingering secondary movements, the onset of climate change and the increased frequency and intensity of prospective natural disasters, in the region and around the world, a more long-term vision and standard legal regime should be implemented by the international community as a whole for the future. In order to avoid situations where displaced persons are left in limbo and without protection, international coordination should be enhanced with international conventions regulating the legal status and the protection to be enjoyed by those who are displaced due to environmental degradation. This need is already reflected in the United Nations' Global Compact for Safe, Orderly and Regular Migration[68], therefore negotiations on a regional level, within the Framework of the Organisation of American States should commence to encourage the implementation or the improvement of the Cartagena Declaration.

[68] https://undocs.org/A/RES/73/195 (1 May 2021).

EU Private International Law in Family and Succession Matters: The Hungarian Judicial Practice

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This article is based on the Hungarian strand of the multiyear CEPIL project ("Cross-Border Litigation in Central-Europe: EU Private International Law before National Courts") carried out with the generous support of the European Commission Directorate General Justice and Consumers. One of the leading considerations behind the CEPIL project was that the value of private international law (PIL) unification can be preserved only if EU private international law (EU PIL) instruments are applied correctly and uniformly, hence, the European endeavors in the field should not and cannot stop at statutory unification but need to embrace the judicial practice and make sure that besides the vertical communication between the CJEU and national courts, there is also a horizontal communication between national courts, authorities and the legal community in general. The purpose of this publication is to contribute to this horizontal communication between Member State courts by providing an analytical insight into the Hungarian case-law on EU PIL instruments in family and succession matters.

Keywords: Brussels II Regulation, Brussels IIa Regulation, EU Private International Law, Maintenance Regulation, International Family Law, International Succession Law, Matrimonial Property Regulation, Regulation on the Property Consequences of Registered Partnerships, Rome III Regulation, Succession Regulation

1. Introduction

This article is based on the Hungarian strand of the multiyear CEPIL project ("Cross-Border Litigation in Central-Europe: EU Private International Law before National Courts") carried out with the generous support of the European Commission Directorate General Justice and Consumers.[1] One of the leading considerations behind the CEPIL project was that the value of private international law (PIL) unification can be preserved only if EU private international law (EU PIL) instruments are applied correctly and uniformly, hence, the European endeavors in the field should not and cannot stop at statutory unification but need to embrace the judicial practice and make sure that besides the vertical communication between the CJEU and national courts, there is also a horizontal communication between national courts, authorities and the legal community in general. The purpose of this publication is to contribute to this horizontal communication between Member State courts by providing an analytical insight into the Hungarian case-law on EU PIL instruments in

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family and succession matters.[2]

2. Judicial practice in family law matters having a cross-border element

The survey produced 55 Hungarian cases where a reference was made to the Brussels IIa Regulation[3] and 14 cases where the Maintenance Regulation[4] was applied. 2 cases were found concerning the Rome III Regulation,[5] however, no substantive issue emerged in these.[6] Hungary does not take part in the enhanced cooperation concerning the Matrimonial Property Regulation[7] and the Regulation on the Property Consequences of Registered Partnerships.[8]

2.1. Jurisdiction and recognition and enforcement in matters concerning the dissolution of the marital bond and parental responsibility: application of the Brussels IIa Regulation

The survey produced 55 Hungarian cases where a reference was made to the Brussels IIa Regulation. In two thirds of these cases (37 matters) no substantive issue of interpretation emerged.

2.1.1. Scope of application

Under Hungarian law, a significant part of family law issues related to children, such as certain issues related to the exercise of access rights, are handled by the Guardianship and Child Protection Office ("gyámhivatal").

In Case *Pfv.II.20.622/2009*,[9] the Supreme Court established that as the competences concerning access rights are split between the court and the Guardianship and Child Protection Office, the latter has to be regarded as a "court" from the perspective of the Brussels IIa Regulation.

In Case *Kfv.II.39.412/2007/12*,[10] the plaintiff claimed compensation for the travel costs incurred when exercising his visitation rights in the time-frame set out by the court, because the other parent failed to inform him that she moved with the child to Germany and, hence, they could no longer be reached at the earlier address. The Supreme Court held that the claim of reimbursement for the failed visitation came under the scope of the Brussels IIa Regulation. The Court, referring to Articles 1(1)(b) and 2(a) of Brussels IIa Regulation, pointed out that the Regulation also applied to the exercise of the right of access and the claim of reimbursement for the failed visitation was part of the exercise of the plaintiff's rights of access.

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[2] In this article, Brussels I Regulation refers both to the 2001 Brussels I Regulation (Council Regulation 44/2001, *OJ* 2001 L 12/1.) and the 2012 Brussels II Regulation (Regulation 1215/2012, OJ 2012 L 351/1.) jointly and, if not specified otherwise, article numbers refer to the 2012 Brussels I Regulation.

[3] Council Regulation 2201/2003, OJ 2003 L 338/1.

[4] Regulation 4/2009, OJ 2009 L 7/1.

[5] Council Regulation 1259/2010, OJ 2010 L 343/10.

[6] Case Pf.634936/2019/12 (Budapest-Capital Regional Court), appealed from Case P.101627/2017/112 (Central District Court of Pest); Case Pfv.21582/2019/4 (Supreme Court), appealed from Case Pf.21234/2018/20 (Szolnok Regional Court), appealed from Case P.20663/2017/5 (Jászberény Local Court).

[7] Council Regulation 2016/1103, OJ 2016 L 183/1.

[8] Council Regulation 2016/1104, OJ 2016 L 183/30.

[9] Reported as BH 2009.10.298 and EH 2009.1961.

[10] Appealed from Case K.21134/2007/8 (Nyíregyháza Regional Court).

Hungarian courts have been reluctant to apply the Brussels IIa Regulation to matters having a significant non-EU element.

In Case *Pfv.II.21.847/2014*,[11] the Supreme Court had to decide whether the Brussels IIa Regulation applied to a matter with a significant non-EU element. The plaintiff was a Hungarian and the defendant a French citizen. The plaintiff requested the court to dissolve their marriage concluded in Paris, to place their child born in Tokyo to her (a French-Hungarian dual citizen) and to award maintenance. Before the opening of the Hungarian procedure, the defendant launched divorce proceedings in Bora Bora (French Polynesia), where the parties allegedly lived at the time the procedure was launched. While the case centered around the consequences of the Polynesian proceedings in terms of *lis pendens*, the Supreme Court also examined the applicability of the Brussels IIa Regulation's jurisdictional rules and established, in a summary manner, that they did not apply, since French Polynesia did not come under the Regulation's scope of application. Unfortunately, the Supreme Court supported its stance with no detailed analysis, although this construction seems to go counter to Article 6 of the Brussels IIa Regulation. This provides that a spouse who is habitually resident or a national of a Member State can be sued only in accordance with the Regulation's jurisdictional rules ("may be sued in another Member State only in accordance with Articles 3, 4 and 5").

As noted above, the reluctance to apply an EU PIL instrument to a matter with a significant non-EU element is not novel in the Hungarian case law. In Case *G.20348/2013/83*, the Győr Regional Court indicated that the Rome I Regulation did not apply in a case where one of the contracting parties was Austrian but the other one was from the Cayman Islands, although Article 2 of the Rome I Regulation provides for universal application.

2.1.2. Jurisdictional and related procedural issues

In the Hungarian judicial practice, habitual residence, as one of the central concepts of the Brussels IIa Regulation's jurisdictional rules, is treated as a fact-intensive issue and is analyzed on a case-by-case basis. Courts interpret this concept uniformly in the various legal instruments (Brussels IIa Regulation, Hague conventions and domestic law). As to the child's habitual residence, courts do not attribute primary relevance to the length of the stay but, instead, take into consideration the parents' decision and common will.[12]

In Case *Pfv.II.20.123/2015*,[13] the Supreme Court established that if the parties move with the child to another country for a long period of time, though without the intention to settle, and sell their movables in Hungary and rent out their real estate for an indefinite duration, the child's habitual residence changes.

In Case *Pfv.II.20.910/2011*,[14] the Supreme Court held that the child's place of habitual residence does not shift to Hungary, if the parents consider their employment here as provisional and maintain their habitual residence in the other country.

In Case *Pfv.II.21.710/2013*,[15] the Supreme Court examined the requirements against a choice-of-court agreement as set out in Article 12(3) of the Brussels IIa Regulation. It noted that during the

[11] Reported as BH+ 2016.1.26.

[12] See Case reported as BH 2014/180.

[13] Reported as BH+ 2015.11.465.

[14] Reported as EH 2011.2318.

[15] Reported as BH+ 2014.8.352.

first instance procedure (where the court rejected the parties' motion) the child's interests would have been best served, if the first instance court had tried the case and decided on the placement of the child, since at that time all interested parties were staying in Hungary. The court of first instance, misinterpreting Article 12(3) of the Brussels IIa Regulation, erred when it declined jurisdiction and terminated the procedure. However, due to the change of circumstances, this flawed decision could not be rectified.

In Case *Pfv.II.20.622/2009*,[16] the Supreme Court interpreted Article 9(1) of the Brussels IIa Regulation in an idiosyncratic manner. Article 9(1) provides that if the child moves lawfully to another Member State, the courts of the previous habitual residence retain jurisdiction "during a three-month period *following the move* for the purpose of modifying a judgment on access rights issued in that Member State before the child moved,"[17] provided the holder of access rights remains in this country. While the statutory language of Article 9(1) suggests that the starting date of the three-month period is the day of the actual move, as *obiter dicta*, the Supreme Court indicated, in a case where the Hungarian court authorized the child's move from Hungary to Italy (i.e. the change of the habitual residence), that the three-month period starts running from the date of the judgment authorizing the move.

Article 11(2) of the Brussels IIa Regulation requires the court to ensure "that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate having regard to his or her age or degree of maturity." The Supreme Court has consistently held that the court does not have to hear the child via a psychologist but may hear him directly and assesses whether the child's declarations should be taken into consideration having regard to his age and degree of maturity.[18]

In Case *Pfv.II.20.769/2013*,[19] the Supreme Court rejected the plaintiff's allegation of jurisdiction based on appearance, because the defendant objected to the jurisdiction of Hungarian courts right in his first submission after the delivery of the statement of claim and at numerous occasions thereafter.

In Case *Pfv.II.22.073/2009*,[20] the Supreme Court established that the defendant implicitly accepted the jurisdiction of Hungarian courts when he made submissions as to the merits of the case and beforehand requested the transfer of the case to another Hungarian court (from the court of the child's habitual residence to the court of his last Hungarian place of living). With his objection to the venue of the court and indication of another court, the defendant accepted, tacitly but unequivocally, the jurisdiction of Hungarian courts, since the question of venue emerges only if Hungarian courts have jurisdiction at all. The defendant accepted the jurisdiction of Hungarian courts also when he declared that he was willing to enter into a settlement in accordance with the psychologist's opinion, provided it was not obviously flawed or abusive. The Supreme Court considered that the foregoing two declarations implied that the defendant accepted the jurisdiction of Hungarian courts and this also served the best interests of the child.

In Case *Pfv. II. 20.936/2019*,[21] the Supreme Court interpreted Article 15 of the Brussels IIa Regulation, which authorizes the court to transfer the case to a court of another Member State, if the

[16] Reported as BH 2009.10.298 and EH 2009.1961.

[17] Emphasis added.

[18] Case *Pfv.21601/2009/5* (Supreme Court), reported as BH 2010.5.123; Case *Pfv.II.20.461/2013* (Supreme Court), reported as BH 2014.3.80; Case *Pfv.II.20.461/2013* (Supreme Court), reported as BH 2014.3.80.

[19] Reported as BH 2013.12.344.

[20] Reported as EH 2010.2141.

[21] Reported as BH 2020.2.43.

latter is better placed to hear the case. According to the Supreme Court, Article 15 sets out three conjunctive conditions: the paramount interests of the child, a close link to the other Member State and that the other court be better placed to entertain the case.[22] The close link to the other Member State is defined by Article 15(3) of the Regulation in a detailed manner, however, the other two considerations come under the court's discretion and have to be assessed in light of the purposes of the Regulation.[23] A court is better placed if the transfer of the cases could have a real and specific added value. The rules of procedure of the other court may be taken into account but not its substantive law.[24] The Supreme Court affirmed the lower court's decision that in this case the transfer of the case to the courts of the child's habitual residence was justified, as the German court was better placed to explore the circumstances of the child, such as the place of living, school, out-of-school activities, and had better access the pertinent evidence (witnesses, deeds).[25] The Supreme Court also stressed that the assessment is based exclusively on the interests of the child and the interests of the parents play no role here.[26]

Hungarian courts have consistently held that the Brussels IIa Regulation narrowed the possibility to refuse to return the child. According to Article 11(4) of the Regulation, "[a] court cannot refuse to return a child on the basis of Article 13b of the 1980 Hague Convention if it is established that adequate arrangements have been made to secure the protection of the child after his or her return." The 1980 Hague Convention establishes a presumption that the child's interests are best served, if he is forthwith returned to the place of habitual residence. This presumption is reinforced by the Brussels IIa Regulation and can be rebutted only in exceptional cases, if justified by the individual circumstances. The burden of proof rests on the plaintiff. This was confirmed by the Supreme Court in Case *Pfv.II.22.039/2016/7*,[27] in Case *Pfv.II.20.703/2018/3*[28] and Case *Pfv.II.21.124/2018/10*[29].

2.1.3. Recognition and enforcement

In Case *Pfv.II.21.380/2010*,[30] the Supreme Court established that the recognition and enforcement of a judgment rendered in another Member State as to parental responsibility cannot be rejected merely because the enforcement of a Hungarian judgment concerning the child's abduction is pending.

In Case *Pfv.II.21.068/2013*,[31] the Supreme Court held that the recognition and enforcement of a judgment rendered in another Member State cannot be rejected, if the possibility to hear the child was ensured, although this did not work out, because the party concerned obstructed it. In this case the Belgian court established: while the date of the hearing was carefully selected, the party did not ensure the child's appearance before the court and tried to justify this with a doctor's certifi-

[22] Ibid. para. 20.

[23] Ibid. paras. 21 and 26.

[24] Ibid. para. 28.

[25] Ibid. paras. 29-35.

[26] Ibid. para. 36.

[27] Ibid. para. 27. Appealed from Case 50.Pkf.635.636/2016/2 (Budapest-Capital Regional Court), appealed from Case 2.Pk.500.132/2016/11 (Pest Central District Court).

[28] Appealed from Case 50.Pkf.630.055/2018/2 (Budapest-Capital Regional Court), appealed from Case 28.Pk.500.270/2017/27 (Pest Central District Court).

[29] Ibid. para. 56. Appealed from Case 50.Pkf.631.543/2018/4 (Budapest-Capital Regional Court), appealed from Case 26.Pk.500.277/2017/12 (Pest Central District Court).

[30] Reported as BH 2011.6.167.

[31] Reported as BH 2014.8.248.

cate two weeks thereafter. The Supreme Court held that it was at the Belgian court's discretion to decide whether to accept the certificate and establish a new date or reject this, if it considered this appropriate to obviate the protraction of the procedure and to serve the best interests of the child. The Belgian court chose the second option.

In this case, the Supreme Court also interpreted the concept of public policy as a ground of refusal of recognition and enforcement. It established that it is obviously not contrary to Hungarian public policy if the foreign procedure is based on rules different from the Hungarian ones. Public policy is to be construed narrowly and used exceptionally. Recognition and enforcement can be rejected only if the foreign judgment would obviously go counter to Hungarian public policy, that is, if the decision entailed domestic legal consequences that would intolerably infringe the domestic sense of justice. It is not sufficient that the foreign procedure and decision is irreconcilable with domestic mandatory rules.

In Case *Pfv.II.21.594/2014*,[32] the defendant requested the Hungarian court to reject the recognition and enforcement of an Italian judgment because he could not present his case. However, the Supreme Court established that he had the possibility to take part in the procedure, hence, there was no reason to apply Article 23(c) of the Brussels IIa Regulation, which provides that recognition and enforcement of the judgment has to be rejected "where it was given in default of appearance if the person in default was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable that person to arrange for his or her defense unless it is determined that such person has accepted the judgment unequivocally." The Court held that the requirement that the document instituting the procedure has to be served in sufficient time and in an appropriate way implies that the defendant has to have a real chance to appear in person and to hire a local attorney, that is, to defend himself. Accordingly, the primary purpose of the requirement of sufficient time is not to ensure that the defendant learns the date of the trial in time but to make sure that the defendant has sufficient time to defend himself until the decision ending the procedure is adopted. The requirement of appropriate way implies that during this time the defendant has the possibility to defend himself in the procedure, either personally or through an attorney, and eventually to request a new date for the trial and a personal hearing. The refusal of recognition and enforcement is an exceptional rule, which can be used only if the defendant is not afforded sufficient time between the service of the document instituting the procedure and the decision ending it to take the necessary measures (*e.g.* to hire an attorney or to submit a defense as to the merits). In this case, this time was seven months. The Supreme Court noted that the defendant did not take the Italian procedure seriously, it ignored the call concerning mandatory legal representation and hired no legal representative, thus excluding himself from the possibility to protect his legal interests.

2.1.4. Conclusions

Hungarian courts have been coping well with the application of the Brussels IIa Regulation both as to jurisdiction and recognition and enforcement.

A point that may merit emphasis is the treatment of cases with a significant non-EU element. In Case *Pfv.II.21.847/2014*,[33] the Supreme Court refused to apply the Brussels IIa Regulation to a matter partially connected to French Polynesia (where the parties allegedly lived at the time the procedure was launched). This approach appears to go counter to Article 6 of the Brussels IIa Reg-

[32] Reported as BH+ 2015.5.211.

[33] Reported as BH+ 2016.1.26.

ulation, which provides that a spouse who is habitually resident or a national of a Member State can be sued only in accordance with the Regulation's jurisdictional rules.

2.2. Jurisdiction, recognition and enforcement and applicable law in maintenance matters: application of the Maintenance Regulation

The reported cases on the application of the Maintenance Regulation are very rare. The survey produced 14 cases, however, most of these (11 cases) contained no substantive analysis.

2.2.1 Jurisdictional and related procedural issues

In Case *Pfv.II.21.658/2018/16*,[34] the Supreme Court established jurisdiction, under Article 5 of the Maintenance Regulation, on account of the defendant's appearance before the Hungarian court. The defendant appeared before the court and, thus, tacitly accepted its jurisdiction, when, in his response to the statement of claim, requested the court to reject the plaintiff's claim and made submissions to the merits without objecting to the court's jurisdiction.

2.2.2. Applicable law

In Case *Pfv.22223/2017/4*,[35] the Supreme Court established that the 2007 Hague Protocol, which determines the law applicable to maintenance due to the Maintenance Regulation, encapsulates a "moving connecting factor." Article 3 of the 2007 Hague Protocol subjects maintenance obligations to the law of the habitual residence of the creditor, which may change over time, leading to the application of another law "from the moment when the change occurs." In this case, the plaintiff, after the spouses got separated, became habitually resident in Hungary, hence, Hungarian law applied to the claim for maintenance.

2.2.3. Recognition and enforcement

Hungarian law's provision that limits the payment of maintenance to arrears of six months raised questions of interpretation in the context of recognition and enforcement under the Maintenance Regulation. According to Hungarian law, the maintenance creditor may claim maintenance retrospectively for the period exceeding six months only if the claim's late submission is justifiable; claims for maintenance for the period preceding three years are not legally enforceable.[36]

In Case *Pfv.I.21.308/2017/3*,[37] the maintenance judgment was issued by a French court and underFrench law the limitation period was five years.[38] However, in Hungary, the first and second instance courts held that enforcement was governed by local law and, as enforcement was sought in Hungary, the above six-month limitation period applied. The Supreme Court confirmed that, in case of enforcement in Hungary, the limitation period is determined by Hungarian law. However,

[34] Reported as BH 2020.4.108.

[35] Appealed from Case Pf.630704/2017/12 (Budapest-Capital Regional Court), appealed from Case P.22943/2013/73 (Budapest District Court for the Districts of IV and XV).

[36] Section 4:208 of the Hungarian Civil Code.

[37] Reported as BH 2018.4.120.

[38] Article 2224 of the Code Civil.

the Court remanded the case because the lower-level courts established the time of the request of enforcement erroneously. While the first and second instance courts considered the request for enforcement submitted to the Hungarian court as relevant, the Supreme Court held that the creditor may claim maintenance as from the time he submitted his request to the French central authority and for the preceding six-months period.

Unfortunately, the Supreme Court's decision seems to be at odds with Article 21 of the Maintenance Regulation. Although Article 21(1) provides that while refusal and suspension of enforcement are governed by the law of the Member State where enforcement is sought, Article 21(2) makes clear that enforcement cannot be refused if the claim is not time-barred either under the law of the country of origin or the country of enforcement. Enforcement may be refused "if the right to enforce the decision of the court of origin is extinguished by the effect of prescription or the limitation of action, either under the law of the Member State of origin or under the law of the Member State of enforcement, whichever provides for the longer limitation period." In the above case, the limitation period set by French law (country of origin) was five years, while under Hungarian law it was six months (with an objective term of three years). Given that French law provided for a longer limitation period, it should have been applied.

3. Judicial practice in succession matters having a cross-border element

The survey produced 2 court cases where reference was made to the Succession Regulation.[39] In one of them the Regulation was not applicable *ratione temporis*.[40]

In Case *Pfv.I.20.164/2019*,[41] the Succession Regulation was found inapplicable *ratione materiae*. Here, the plaintiff and the deceased (whose legal successor was the defendant, as the deceased's heir) allegedly agreed that the plaintiff would provide care and support for the deceased and, in exchange for this service, the deceased would bequeath his entire property to the plaintiff. However, in his testament, the deceased bequeathed all his property to the defendant. The plaintiff sued the defendant for compensation for the services provided and referred to the alleged verbal agreement with the deceased. The Supreme Court established that this claim was contractual and not succession law. Hence, it did not come under the Succession Regulation but under the Brussels I Regulation. The Supreme Court carried out an autonomous interpretation of the term "succession" and, on the basis of the definition embedded in Article 3(1) of the Succession Regulation, stressed that it involves legal succession *mortis causa*. In this case, however, the plaintiff did not claim to be the deceased's legal successor but submitted a contractual claim as the deceased's creditor.

4. Conclusions

EU PIL instruments have been applied in numerous family and succession cases by Hungarian courts and raised no major conceptual issues. Because of the lack of conceptual difficulties, the overwhelming majority of the cases raised no substantive issues of interpretation. This demonstrates the contribution EU PIL rules are making to the effective settlement of cross-border cases and the creation of a European area of justice. The importance and role of EU PIL is also showcased by the exponentially growing number of cases where these instruments are applied by the courts.

Very interestingly, the number of succession matters has been saliently low, in reality, the research has found only a negligible number of court matters where the Succession Regulation was applied. This does not imply that there are no succession matters involving an international element or the

[39] Regulation 650/2012, OJ 2012 L 201/107.

[40] Case *Pfv.I.20.369/2017/7* (Supreme Court), reported as BH 2018.6.174.

[41] Reported as BH 2020.3.78.

international element is comparatively more often overlooked in these cases. It simply means that succession matters usually do not reach the court. The very low number of court cases in succession matters is highly counter-intuitive, given Central Europe, including Hungary, has emitted a huge number of migrant workers targeting Western Europe.[42] This migration is in stark contrast with the number of matters applying the Succession Regulation. It is also difficult to reconcile with the number of matters where other EU PIL instruments are applied: while this migration has generated a good deal of family law disputes, it has resulted only in a negligible number of succession matters.

It has to be noted that in Hungary succession matters are, in the first place, settled in a probate procedure carried out by a notary. This is not a court procedure and the notary normally does not adjudicate succession law disputes and his or her decisions are not published. This probate procedure filters the cases and apparently results in a situation where the parties have recourse to the court only in a few matters.

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ANNEX: Table of national case-law

Brussels IIa Regulation

Case Pfv.II.21.129/2011 (Supreme Court), reported as BH 2013.1.19

Case Pfv.II.21.677/2011 (Supreme Court), reported as BH 2012.6.154

Case Pfv.II.21.339/2011 (Supreme Court), reported as BH 2012.9.224 and EH 2011.2411

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[42] See *e.g.* Central Statistical Office (Poland), "Informacja o rozmiarach i kierunkach emigracji z Polski w latach 2004–2012" (October 2013) https://stat.gov.pl/cps/rde/xbcr/gus/L_Szacunek_emigracji_z_Polski_lata_2004-2012_XI_2012.pdf (30 November 2021). OECD, "Recent trends in emigration from Romania", in Talent Abroad: A Review of Romanian Emigrants", OECD Publishing, Paris, 2019.

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Case Pkf.635281/2009/4 (Budapest-Capital Regional Court), appealed from Case Pk.500014/2009/9 (Pest Central District Court)

Case Pfv.21582/2019/4 (Supreme Court), appealed from Case Pf.21234/2018/20 (Szolnok Regional Court), appealed from Case P.20663/2017/5 (Jászberény Local Court)

Case Pfv.20463/2019/8 (Supreme Court), appealed from Case Pf.632769/2018/28 (Budapest-Capital Regional Court), appealed from Case P.30770/2015/147 (Buda Central District Court)

Case Pfv. II. 21.588/2008/5 (Supreme Court), appealed from Case 2.Pkf.21.036/2008/2 (Nyíregyháza Regional Court), appealed from Case 29.P.20.528/2008 (Nyíregyháza Local Court)

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Case Pfv.II.21.051/2014/7 (Supreme Court), appealed from Case 50.Pkf.634.732/2014/4 (Budapest-Capital Regional Court), appealed from Case 9.Pk.500.024/2004/14 (Pest Central District Court)

Case Pfv.II.20.150/2015/4 (Supreme Court), appealed from Case 50.Pkf.640.185/2014/3 (Budapest-Capital Regional Court), appealed from Case 30.Pk.500.163/2014 (Pest Central District Court)

Case Pfv.II.20.823/2015/6 (Supreme Court), appealed from Case 50.Pkf.632.726/2015/3 (Budapest-Capital Regional Court), appealed from Case 2.Pk.500.269/2014 (Pest Central District Court)

Case Pfv.II.21.442/2015/4 (Supreme Court), appealed from Case 50.Pkf.633.040/2015/4 (Budapest-Capital Regional Court), appealed from Case 15.Pk.500.288/2014 (Pest Central District Court)

Case Pfv.II.20.001/2016/6 (Supreme Court), appealed from Case 50.Pkf.638.547/2015/4 (Budapest-Capital Regional Court), appealed from Case 15.Pk.500.238/2015 (Pest Central District Court)

Case Pfv. II. 21.366/2016/11 (Supreme Court), appealed from Case Pkf.I.25.119/2016/2 (High Court of Appeal of Győr), appealed from Case Pkf.20.965/2015/4 (Szombathely Regional Court)

Case Pfv. II. 21.826/2016/6 (Supreme Court), appealed from Case 50.Pkf.631.460/2016/9 (Budapest-Capital Regional Court), appealed from Case 2.Pk.500.188/2015/23 (Pest Central District

Court)

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Case Pfv. II. 21.910/2017/4 (Supreme Court), appealed from Case 50.Pkf.632.602/2017/2 (Budapest-Capital Regional Court), appealed from Case 20.Pk.500.043/2017/6 (Pest Central District Court)

Case Pfv.II.21.261/2019/15 (Supreme Court), appealed from Case 4.Pkf.20.258/2019/7 (Szeged Regional Court), appealed from Case 2.P.20.183/2018/22 (Hódmezővásárhely Local Court)

Case Pfv.II.21.543/2019/7 (Supreme Court), appealed from 4.Pkf.20.593/2019/2 (Szeged Regional Court), appealed from Case 9.P.20.447/2019/4 (Szeged Local Court)

Case Pfv.II.21.458/2019/7 (Supreme Court), appealed from Case 4.Pkf.20.864/2019/3 (Szeged Regional Court), appealed from Case 19.P.22.643/2018/23 (Szeged Local Court)

Case Pfv.II.20.263/2020/5 (Supreme Court), appealed from Case 50.Pkf.638.756/2019/3 (Budapest-Capital Regional Court), appealed from Case 8.Pk.500.304/2019/19 (Pest Central District Court)

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Case *Pfv.21601/2009/5* (Supreme Court), reported as BH 2010.5.123.

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Case *Pfv.II.20.703/2018/3* (Supreme Court), appealed from Case 50.Pkf.630.055/2018/2 (Buda-

pest-Capital Regional Court), appealed from Case 28.Pk.500.270/2017/27 (Pest Central District Court).

Case *Pfv.II.21.124/2018/10* (Supreme Court), appealed from Case 50.Pkf.631.543/2018/4 (Budapest-Capital Regional Court), appealed from Case 26.Pk.500.277/2017/12 (Pest Central District Court).

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Case Pfv.20402/2018/5 (Supreme Court), appealed from Case Pf.21658/2017/7 (Miskolc Regional Court), appealed from Case P.20090/2017/23 (Miskolc Local Court)

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Case Pfv.II.20.020/2017/33 (Supreme Court), appealed from Case 2.Pkf.21.238/2016/2 (Nyíregyháza Regional Court), appealed from Case 29.P.20.295/2016/19 (Nyíregyháza Local Court)

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Book review

Peter H. Koehn: Transnational Mobility and Global Health. Traversing Borders and Boundaries

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The monograph "Transnational Mobility and Global Health. Traversing Borders and Boundaries"[1] by Peter H. Koehn is a part of the Routledge Studies in Development, Mobilities and Migration books series, which is dedicated to the field of mobilities and migration, the importance of which is undeniable great – and constantly growing. The fact that the importance of migration has increased enormously in the 21st century is undeniable, but there have not been many synthesizing works that address both migration and its health implications. Koehn's monographs sets out to do just that.

The author is a Professor of Political Science, Director of the Global Public Health Program and his aim in this book is to give a detailed overview of transnational mobility, global health and their various interfaces. At the beginning of the book, the author states that "[t]he book explores the interacting political, economic, social, cultural and climatic drivers of health and migration, proposing innovative ways to enhance global health and care provision in an era of transnational mobility. As health security continues to rise up the agenda in international politics, the book also analyses the political determinants of health and migration." It is already apparent from this opening statement that the author assumes an enormous task. Both areas are diverse and vast individually, and their correlation is just as rich a topic.

Besides the introduction, the book consists of eight substantive chapters. The chapters contain many small text boxes that help the reader to gain a deeper understanding through real examples or, where appropriate, to lighten up the analysis of a larger set of data.

In the introduction, the reader gets an elaborated theoretical basis as regards both transnational migration and global health issues – and later the interconnection between them. It is beneficial to have a system in which we can see the topics of the book already at the beginning. We can learn about the framework of the analysis: the book is focused on field analysis, practice, and insights. This method of analysis one of the book's strengths. There are lots of works where the focus is solely on theoretical approaches, but here we can experience the opposite. The author uses data and field experiences well and adds his own views to these.

The first chapter ("Transnational travel as health insurance") provides an appropriate introduction to the correct interpretation of the other chapters. We can learn about the concept of "transnational care", and we can find information about which diseases occur most frequently in which groups. For example, travelers who are visiting friends and family tend to be at higher risk because they are more likely to stay longer, visit remote areas and consume local food and water, and less likely

[1] Peter H. Koehn, *Transnational Mobility and Global Health. Traversing Borders and Boundaries*, Routledge, Oxon, 2020. 280 p.

to take precautions. Medical tourism is a unique part of this chapter, and the author approaches the institution from several important aspects. He highlights the differences between the North and the South and raises awareness of an important question, namely, biosecurity as the spread of diseases via international travel presents a growing challenge.

The second chapter, entitle "Health challenges for refuges and conflict-included migrants" focuses on Southern conflicts and conflict-included migrants. It is a fact – highlighted by the author too – that the rise of terrorist groups further aggravates the living conditions for vulnerable populations. Despite the Geneva Conventions of 1949, the protection of non-combatants is not always guaranteed, they can be easily affected in incidental or direct ways, and these are highly harmful to their health status both physically and mentally. The chapter includes a nuanced part about how many people suffered what injuries in which conflict, but as I see it, the transition to the next minor topic – which concerns the challenges of access to health-care – is not as smooth as it could have been – or maybe the previous section was not closed off sufficiently. However, the end of this chapter is very interesting, where the author writes about health as a bridge to peace: it contains fascinating elements, for instance the engagement of medical personnel in peacemaking and conflict resolution.

The third chapter, called "Health challenges for other survival migrants on the move North" is one of the most informative parts of the book. By mentioning the category of "survival migrants" the author gave a great start to this chapter. This concept, as Koehn writes, can be linked to complex-humanitarian crises, and with that in mind, he provides a well-structured description of the related emerging issues. The author mentions the category of irregular migrants as well, though it is not entirely clear whether – in his opinion – this category and the survival migrant concept overlap, in whole or in part, or whether they should be treated entirely separately. If these two are separate categories, then in my view it would have been preferable to differentiate between them more clearly. The author's description of the International Detention Coalition is a welcome addition, as not a lot of literature deals with their work.

Chapter four ("Migrant health in Northern reception countries") addresses the impact of unequal mobility. Northern countries have a variety of immigrants with different statuses, and this has a powerful influence on the issue of health access. The author introduces the differences through the lens of migrant workers and irregular migrants with regards to their mental health as well. He describes the "healthy immigrants' paradox", the importance of education and its deficiencies, and the skills that a well-prepared medical worker should possess. In this section, all information about the necessary skills is elaborated, but Koehn at the same time keeps the text quite interesting, so the reader does not get lost among all the information.

The "Migration, health and sustainable development linkages" chapter examines health and migration conditions in the complicated context of sustainable development challenges in developing countries. The first part of the chapter focuses on poverty and its immediate consequences for the South, but as we move on, the the focus also shifts to examination of how states can achieve sustainable development and improve their health systems simultaneously. The so called "brain-drain" effect in the field of health expertise is an interesting part of the chapter, unfortunately, the author did not pay sufficient attention to this topic. Following some thoughts about circular migration and its potential benefits for the health and development challenges, the author closes out this chapter by substantiated arguments and conclusions.

"Pathogens without borders", the sixth chapter provides some lessons in connection with the ongoing pandemic too. It is interesting to see global leaders' lack of preparedness for COVID-19, despite the precedent of earlier large-scale cross-border epidemics. The author explores the impacts

of Northern pandemic fears and vulnerabilities, public-health services in impoverished areas, and related migration impulses. He provides a definition of Emerging and Re-emerging Infectious Diseases (ERID), which is necessary as this chapter is strongly based on this concept. Koehn provides many interesting pieces of information, for example, that 61% of emerging infectious diseases are caused by zoonoses, and three-fourth of these involve transmissions from wildlife to human populations. It is noted that people on the move can introduce new, previously undetected diseases to destination places. He highlights the importance of local and transnational health perspectives and immediate contact tracing, talks about the strict measures of quarantine and isolation, which inevitably involve human rights challenges. Based on this chapter, it can be stated that the most effective response to an ERID is prevention and rapid treatment.

The seventh chapter is about "Climate change, health and migration", namely extreme climatic events and slow-onset changes in climate and environmental conditions as well as consequent ecological, economic and social disruptions related to population mobility and unequal global health outcomes. The author uses China's national and subnational policies as examples related to the responses to air pollution, sea-level rise and rising temperature. Naturally, these kinds of events are the root causes of growing population displacement and migration. With regards to these, there is an important term to use, which is climate migration. The author interprets the concept well, the chapter is accurately built and coherent.

The closing chapter is aptly titled "Where should we "move" from here?". This ultimate section of the book provides the necessary concluding discussion to round out the foregoing analysis. This is also more of a thought-provoking part that focuses on the future more than any other chapter of the book. The author talks about the relevance of health-care education, mostly as regards transnational competences, and the need for a partnership between the North and the South on several levels because the collaboration is beneficial for them both, for instance, it can be a great way for the development of institutional and individual capacities at multiple institutions. The author highlights the importance of innovation, mentioning artificial intelligence too, which is a very hot topic nowadays in almost every field of research. The issues of volunteerism and voluntourism are also on the table – in my view, this is perhaps the most interesting part of this concluding chapter. Finally, the author devotes a section to the Global Health and Migration Corps proposal – this exposé is well detailed and contains very useful information about the relevant recommendation of the US Institute of Medicine.

Overall, many exciting topics are discussed by the author in this topical and important monograph, although in some instances, only a few sentences are devoted to some very interesting issues (such as pre-arrival health checks, for instance) that are only mentioned in a quasi-introductory way at the beginning of the chapter, although it could help to understand this complex subject better if the author explained them in a more detailed way. The style of the monograph is scientific and professional, but at the same time, it could be understandable to people who do not know the subject deeply. Overall, the book is essentially a gap-filling work that will prove very useful for those who are researching the health aspects of migration, be they political scientists, lawyers, or even health professionals or policymakers.

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